



# **Wave Bermuda Ltd. trading as Horizon Communications, Change of Control**

## **Public Consultation**

### **Preliminary Report and Decision**

Matter: 20210205

Date: 23 March 2021

Responses Due: 6 April 2021

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## I. INTRODUCTION

1. The purpose of this Preliminary Report and Proposed Decision (“Preliminary Report”) is for the Regulatory Authority of Bermuda (the “RA”) to seek public input regarding the Change of Control request (“the Proposed Transaction”) submitted by Wave Bermuda Ltd, trading as Horizon (“Horizon”).
2. Horizon is the holder of an Integrated Communications Operating Licence (“ICOL”), # ICOL202023Rev1-772, issued on 1 September 2020.
3. The RA has received a notification from Wave requesting its authorisation of a change in control of Horizon to Fortress Bermuda H Investor LLC (“FBH”) through the subscription by FBH for newly issued shares such that FBH would obtain a controlling interest in Horizon. This is part of a financing arrangement whereby the proceeds of FBH’s investment would be utilized by Wave to fund the implementation of its business plan and budget.
4. At the conclusion of the consultation process, the RA will issue a Final Decision.

## II. CONSULTATION PROCEDURE

5. This consultation is being undertaken in accordance with sections 49 and 87 of the Regulatory Authority Act 2011 (“RAA”) and section 18 of the Electronic Communications Act 2011 (the “ECA”). The procedure and accompanying timelines (as set out in section 70 of the RAA), under which this consultation is taking place has been set out below.
6. The RA initiated the consultation by publishing a Consultation Document on 5 February 2021 that invited responses from members of the public, including electronic communications and electricity sectoral participants and sectoral providers, as well as other interested parties. The purpose of the RA’s Consultation Document was to provide initial details on the Proposed Transaction and to solicit further comment on it.
7. Written comments should be submitted before **11:59 PM (Bermuda time) on Tuesday, 6 April 2021**.
8. The Consultation Document invited comments on whether the Proposed Transaction is likely to:
  - (a) Have an effect(s) on the residents of Bermuda with particular interest in, but not limited to, the provision of electronic communication services in Bermuda?
  - (b) Have an effect on innovation within Bermuda’s electronic communications sector?
9. Responses to the Consultation Document were solicited from the public electronically through the RA’s website at [www.ra.bm](http://www.ra.bm) as well as through the consultation e-mail address at [consultations@ra.bm](mailto:consultations@ra.bm).
10. The response period commenced on 5 February 2021 and concluded on 16 February 2021. The submissions received are summarized below.
11. The RA again invites comments from members of the public, electronic communications sectoral participants and sectoral providers, and other interested parties.
12. All submissions will require a ‘declaration of interest’. Any submission must include the name, address and occupation of the commenting party. It must be signed by the individual, in the case of a personal submission, or by an authorised representative of any business. Personal submissions must declare any relevant link to a licensed or government body, whether commercial or personal (i.e. family, etc). Where a business is not a licensed carrier, any business’s submission must declare commercial relationships to any licensed operator. Failure to declare an interest that is subsequently identified will lead to the rejection of the submission.

13. Responses to this Consultation should be filed electronically in MS Word or Adobe Acrobat format. Parties wishing to file comments should go to the RA's website [www.ra.bm](http://www.ra.bm) and follow this link: <https://ra.bm/submit-a-response-form/>.

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14. All comments should be clearly marked "Comments on Horizon Change of Control Preliminary Report" and should otherwise comply with Rules 18 and 30 of the RA's Interim Administrative Rules.
15. The RA intends to make responses to this Preliminary Report available on its website. If a commenting party's response contains any information that is confidential in nature, a clearly marked "Non-Confidential Version", redacted to delete the confidential information, should be provided together with a complete version that is clearly marked as the "Confidential Version." Redactions should be strictly limited to "confidential information," meaning a trade secret, information whose commercial value would be diminished or destroyed by public disclosure, information whose disclosure would have an adverse effect on the commercial interests of the commenting party, or information that is legally subject to confidential treatment. The "Confidential Version" should highlight the information that has been redacted. Any person claiming confidentiality in respect of the information submitted must provide a full justification for the claim. Requests for confidentiality will be treated in the manner provided for in Rule 30 of the RA's Interim Administrative Rules.
16. Individuals making personal submissions may request that personally sensitive information (e.g. their name, address) is redacted from the publication of their statements. Any individual claiming that other information submitted is confidential must provide a full justification for the claim. Requests for confidentiality will be treated in the manner provided for in Rule 30 of the RA's Interim Administrative Rules.
17. In accordance with section 73 of the RAA, any interested person may make an ex parte communication during this consultation process, subject to the requirements set forth in this paragraph 13. An ex parte communication is defined as any communication to a Commissioner or

member of staff of the RA regarding the matter being consulted on in this Preliminary Report, other than a written submission made pursuant to this Section 2. Within two business days after making an ex parte communication, the person who made the ex parte communication shall submit the following to the RA:

- (i) a written description of the issues discussed, and positions espoused; and
- (ii) a copy of any written materials provided.

18. The principal point of contact at the RA for interested persons for this Preliminary Report is Richard Ambrosio, who may be contacted by email, referencing “Comments on Horizon Change of Control Preliminary Report” at [consultation@ra.bm](mailto:consultation@ra.bm)” or by mail at:

Richard Ambrosio  
Regulatory Authority  
1st Floor, Craig Appin House  
8 Wesley Street  
Hamilton, Bermuda

19. In this Preliminary Report, except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them by the EA, the RAA and the Interpretation Act 1951.
20. This Preliminary Report is not a binding legal document and does not contain legal, commercial, financial, technical or other advice. The RA is not bound by this Preliminary Report, nor does it necessarily set out the RA's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this Preliminary Report and the due exercise by the RA of its functions and powers, and the carrying out of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the RA.

### III. LEGISLATIVE CONTEXT

21. Any sectoral participant who holds an Integrated Communications Operating Licence ("ICOL") is prohibited from completing any proposed change in control of the ICOL Holder without first obtaining the prior written authorization of the RA, acting with the written consent of the Minister, in accordance with sections 18(6) of the ECA and condition 20 of the relevant ICOL.
22. "Control" for the purposes of the Proposed Transaction, according to section 18(7) of the ECA—
  - (a) means the power, whether held directly or indirectly, to exercise decisive influence over an ICOL holder, including by directing its management and policies, whether through ownership of shares, stocks or other securities or voting rights, or through an agreement or arrangement of any type, or otherwise; and
  - (b) shall, in any event, be deemed to exist in any case involving the ownership of 25 per cent or more of the shares, stocks or other securities or voting rights, including through an agreement or arrangement of any type.
23. Section 49(2) of the RAA that where an application is filed in connection with, *inter alia*, the transfer of control of an ICOL, the RA must—
  - (a) conduct a public consultation;
  - (b) if requested by the applicant, conduct an investigative hearing; and
  - (c) issue a decision and order.
24. As Horizon is not a specified sectoral provider in accordance with section 87(2) of the RAA,<sup>1</sup> the RA is not required to consider whether the Proposed Transaction constitutes a concentration pursuant to that Act.

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<sup>1</sup> See GN0838/2019, "Notification of Specified Sectoral Providers," <https://www.gov.bm/theofficialgazette/notices/gn08382019>

#### IV. DESCRIPTION OF PROPOSED TRANSACTION

25. Upon approval of the Proposed Transaction, FBH would obtain a controlling interest in Horizon. This is part of a financing arrangement whereby the proceeds of FBH's investment would be utilized by Wave to fund the implementation of its business plan and budget.
26. FBH is entirely owned by an investment funded by Fortress Investment Group, LLC, via Fortress Holding Bermuda Limited – a company licensed on 21 December 2016 to carry on business as a local company in Bermuda in accordance with section 114B of the Companies Act 1981. The entire group is collectively referred to as "Fortress".
27. Details of the Proposed Transaction were previously disclosed to the RA as part of the Consultation, "Grant of New Integrated Communications Operating Licences and Other Types of Communications Operating Licences".<sup>2</sup> A redacted copy of Horizon's Master Application Form for an ICOL can also be found online.<sup>3</sup>
28. In providing a summary description of its financial plan for the first three years, Horizon stated in its Master Application Form as follows:

*"Horizon and the Bermuda Infrastructure Fund will act quickly upon receipt of the ICOL to deliver the plan outlined above.*

*This operational plan is supported by Fortress who have signed a term sheet with Horizon for up to [REDACTED] which underpins the financial plan summarized below. The funding required for this project is significant, it recognizes that fulfillment of the services of the ICOL will take time in addition to investment and Fortress is prepared to support that delivery over a five-year + timescale to ensure that Horizon provides a first-class service for the people of Bermuda." (Page 17)*
29. A Redacted Organizational Chart and copy of the term sheet agreed between Horizon and Fortress Investment Group respectively are located on pages 39 and 40.
30. The RA has already conducted due diligence with respect to the Proposed Transaction insofar as it relates to whether Horizon meets the prescribed Basic Eligibility Requirements for the award of an ICOL and the requirements of the Regulatory Authority (Master Communications Operating Licence Application Process) General Determination 2019 (BR 90/2019). Having determined that it did meet the Requirements, the RA issued an Order dated 21 August 2020 granting an ICOL to Horizon.

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<sup>2</sup> Regulatory Authority. *Grant of New Integrated Communications Operating Licences and Other Types of Communications Operating Licences: Final Report & Final Decisions and Orders*. 21 August 2020, <https://www.ra.bm/documents/final-report-decision-and-order-grant-of-new-integrated-communications-operating-licences-and-other-types-of-communications-operating-licences/?wpdmdl=15139&refresh=6015974b667591612027723>.

<sup>3</sup> *Communications Operating Licence: Master Application Form Wave Bermuda Ltd. trading as Horizon Communications*. 19 June 2020, <https://www.ra.bm/documents/non-confidential-icol-application-horizon/?wpdmdl=14803&refresh=6015974b6985b1612027723>.



## V. SUMMARY AND DISCUSSION OF RESPONSES TO INITIAL CONSULTATION DOCUMENT

31. The Consultation Document invited the public to submit responses commenting on the Proposed Transaction and to respond to the consultation questions. Responses to the Consultation Document were received from 3 individuals and 1 Sectoral Provider:
- (a) Linda Chavis;
  - (b) Kent Stewart;
  - (c) Debbie Brown; and
  - (d) Digicel Group (“Digicel”).
32. The RA thanks everyone for their participation in the consultation and for having made submissions. The comments can be broadly summarized under three main areas of concern, which will be addressed in turn below:
- (a) The amount of time provided for the initial consultation;
  - (b) The role to be played by FBH in the Proposed Transaction; and
  - (c) Whether the Proposed Transaction can be approved within a period of three years from the date on which the ICOL was issued.
33. One submission which refers to the health of Bermudians with nothing more is non-responsive to the original consultation. Absent any further details, the RA is unable to consider this response further at this stage. However, we welcome the opportunity for further development of the point as part of the second stage of consultation.

### V.A. Amount of time provided for the initial consultation

34. This point was principally advanced by Digicel as part of its submission, which was situated in a broader concern about favouritism. Digicel noted that the response time of one week for the initial consultation was “extremely short” compared to other ICOL holder’s or sectoral provider’s applications.
35. Digicel compared this to the two weeks which were required following the Consultation Document of the Transact Change of Control,<sup>4</sup> noting that foreshortening the period for Horizon Communications without objective reasoning being given would appear to amount to differential treatment being applied to similarly situated industry participants, which is inconsistent with Section 16 (h) of Regulatory principles of the RAA.

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<sup>4</sup> “Transact Ltd. Change of Control - Public Consultation”, Consultation Document, Matter: 20200923 Date: 12th October 2020, <<https://www.ra.bm/documents/transact-change-of-control/?wpdmdl=15405&refresh=603f98fddd691614780669>>

36. Digicel further notes that, although Horizon Communications’ Master ICOL application was published on the Authority’s website, subject to confidentiality restrictions, during its ICOL application process, the issues on which public was asked to comment were fundamentally different from the current matter. As a result, according to Digicel, the RA could not simply rely on the fact that information on Horizon Communications’ shareholders and Fortress’s involvement was featured in previous ICOL application as a reason for this unusually short consultation period.

### RA Response

37. The RA thanks Digicel for this submission. As noted in the original Public Consultation document, details of the Proposed Transaction were previously disclosed to the RA as part of the Consultation, “Grant of New Integrated Communications Operating Licences and Other Types of Communications Operating Licences” (“the Previous Consultation”).<sup>5</sup> A redacted copy of Horizon’s Master Application Form for an ICOL can also be found online.<sup>6</sup>
38. The RA accepts the fundamental point, enshrined in section 16(h) of the RAA, that it should act without favouritism to any sectoral participant. While it is an axiomatic principle that similarly situated sectoral providers should be treated similarly, the corollary to this is that where sectoral providers are not similarly situated, treating them similarly may be procedurally unfair to at least one of the providers.
39. The RA’s legislative scheme is not prescriptive as to lengths of time for any consultation. However, we will guide ourselves by what is reasonable in the circumstances, making an assessment in the round. We look to, *inter alia*, the regulatory principles which Digicel referred to in considering this question of reasonableness.
40. While Digicel is correct to note that the Previous Consultation dealt with ‘whether there is reason to believe that any of the licence applicants [such as Horizon] fail to meet the Basic Eligibility Requirements’, the fact remains that material details of the Proposed Transaction were made publicly available in August 2020 and have been in the public domain for five clear months before the start of the present consultation. The Consultation Document recapitulated that information for the purposes of the present consultation, with a deadline for initial responses that was set at one week in circumstances considered by the RA to reasonably justify this deadline.
41. The RA regards the Horizon Change of Control to be sufficiently different from the Transact Change of Control to justify a one-week deadline for initial comments instead of the normal two weeks. The material details of the Transact Change of Control were not put into the public domain several months prior to the start of the relevant Change of Control. Furthermore, the Transact

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<sup>5</sup> Regulatory Authority. *Grant of New Integrated Communications Operating Licences and Other Types of Communications Operating Licences: Final Report & Final Decisions and Orders*. 21 August 2020, <https://www.ra.bm/documents/final-report-decision-and-order-grant-of-new-integrated-communications-operating-licences-and-other-types-of-communications-operating-licences/?wpdmdl=15139&refresh=6015974b667591612027723>.

<sup>6</sup> *Communications Operating Licence: Master Application Form Wave Bermuda Ltd. trading as Horizon Communications*. 19 June 2020, <https://www.ra.bm/documents/non-confidential-icol-application-horizon/?wpdmdl=14803&refresh=6015974b6985b1612027723>.

Change of Control concerned two parallel processes: a Change of Control application, pursuant to section 18(6) of the ECA, and a concentration approval, pursuant to section 87(2) of the RAA. As explained above, as Horizon is not a specified sectoral provider in accordance with section 87(2) of the RAA, the RA is not required to consider whether the Proposed Transaction constitutes a concentration pursuant to that Act. Finally, there were additional complexities to it, at least as was apparent from the outset of the application, in comparison to the Horizon Change of Control.

42. Put another way, if the RA had set the initial consultation deadline in the Horizon Change of Control at two weeks to avoid any appearance of favouritism towards Horizon, it would have opened itself up to criticisms of an appearance of favouritism towards Digicel; Horizon would rightly question the RA for treating a much simpler application in a similar manner to a more complex one.
43. Of course, as we stated above, the Horizon application appeared much simpler at the outset. If no substantive comments were made on the Consultation Document, the RA would have felt justified in a similarly shortened period for submitting comments on this Preliminary Report. Indeed, the RA identified at paragraph 16 of the Consultation Document an intention that a final order in this matter be made by early to mid-March 2021. This timeline cannot be met. As a result of a new wrinkle in the Horizon Change of Control, brought to the RA's attention by Digicel, two weeks has been set for this Preliminary Report rather than one week, which we again feel to be reasonable in the circumstances. This added complication is discussed below.

#### **V.B. The role to be played by FBH in the Proposed Transaction**

44. Two of the respondents to the initial consultation document raised concerns about the role to be played by FBH in financing Horizon's business plan and which is conditional upon the approval of the Proposed Transaction by the RA.
45. Debbie Brown alerted to the fact that the Bermuda Government "may or does already hold shares in" Fortress, which might mean that "the Bermuda Govt [sic] will control an electronic communications company and could potentially manipulate the sector."
46. Kent Stewart similarly considered the various effects of the Proposed Transaction. He notes the relationship of Fortress to the Bermuda Infrastructure Fund "BIF", the risk of a new sectoral provider "being intertwined with the taxpayer's money" due to the Government of Bermuda guaranteeing its management fee and what is regarded as an essential fact that "the Bermuda Government now has a direct financial benefit to see the success of Fortress/Horizon/Wave vs others already in the industry."
47. Mr Stewart further states, and it is worth quoting this paragraph at full:

*"I must further comment that spectrum for current players in the market has still not been assigned by the RA after now years of requests. The conclusion that spectrum is not being issued must be reached that it may be reserved for Horizon/Wave. I have brought this perception to the RA before and urge the RA to ensure this is mistaken."*

48. In commenting upon the effect of the Proposed Transaction on the residents of Bermuda, Mr Stewart states that: (1) there could be reduced local employment arising from a drive to maximize profit; (2) that profits could be repatriated to non-Bermudians; (3) management decisions by Bermudian owners would be influenced by the controlling investor; and (4) residents would be unlikely to see any reduction in current rates due to the new entrant of Horizon.
49. In commenting upon the effect of the Proposed Transaction on innovation, Mr Stewart states that: (1) “[t]he current larger industry players already bring innovation and have a long history of doing so” and that “smaller ICOL holders are already filling the gaps, or wish to, but are not able to fill in the gaps, due to the RA’s “moratorium” on spectrum grants”; and (2) “[m]ore entrants do not create innovation per se” and that “market forces in Bermuda dictate innovation (and the observation of innovation occurring in other larger countries) then “filters down” into our needs.” He further reiterates his concern with respect to the Bermuda Government’s guarantee to Fortress.

#### RA Response

50. With respect to Horizon’s eligibility to have been granted an ICOL, the RA noted in its Final Report, as follows:

*[T]he RA is aware of no reason why the participation of the Bermuda Infrastructure Fund as an investor in Horizon would impact that applicant’s eligibility. For the avoidance of doubt, the Government’s potential role in the Fund, as a potential investor in Horizon, has had absolutely no bearing on the RA’s decision whether to grant Horizon’s licence application.<sup>7</sup>*

51. The RA similarly reiterates this view in the context of the Proposed Transaction. Furthermore, the RA again notes that the Government’s potential role in the fund, as a potential investor in Horizon, has had absolutely no bearing on the RA’s decision whether to approve the Proposed Transaction and to authorize the transfer in the change of control over Horizon’s ICOL.
52. Coming from a former Commissioner, Mr Stewart’s submissions are treated with a particular degree of respect and deference; more than most, he would appreciate the challenges the RA has faced and continues to face as an organization. However, with the greatest of respect, the RA categorically rejects any suggestion that wireless spectrum is “being reserved for Horizon/Wave.” No evidence has been advanced as part of this consultation to substantiate this bare assertion.
53. The RA fully understands Mr Stewart’s concern regarding the time taken to open the process of issuing spectrum. This is precisely why the RA has been acting with all due dispatch to advance the current process. The Administrative Determination necessary to enable new spectrum to be issued should have been addressed soon after the RAA became effective. The Regulatory Authority (Grant of Spectrum Licences Permits and Exempted Frequencies) General Determination 2020 was the culmination of this critical legacy item from the RA’s workplan.

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<sup>7</sup> Op. cit., page 8.

54. Other than any normal interest Horizon might have in obtaining Wireless Spectrum as an ICOL holder, there is no link with the RA's approach to spectrum allocation. Various sectoral providers have submitted applications for the grant of spectrum since the 2020 GD was enacted in December 2020. These are presently being considered by the RA with a view to making and communicating allocation decisions shortly. To the extent that any application by Horizon is considered, it will be determined in accordance with the normal principles involved in such an application.
55. In deciding whether to recommend approval of the Proposed Transaction, the RA must have regard to the purposes of the Electronic Communications Act 2011, which are set out in section 5(1):
- (a) ensure that the people of Bermuda are provided with reliable and affordable access to quality electronic communications services;*
  - (b) enhance Bermuda's competitiveness in the area of electronic communications so that Bermuda is well-positioned to compete in the international business and global tourism markets;*
  - (c) encourage the development of an electronic communications sector that is responsive to the requirements of users (both individuals and businesses) and provides them with choice, innovation, efficiency and affordability;*
  - (d) encourage the development and rapid migration of innovative electronic communications technologies to Bermuda;*
  - (e) promote the orderly development of Bermuda's electronic communications sector;*
  - (f) encourage sustainable competition and create an invigorated electronic communications sector that will lay the groundwork for the further development of communications-reliant industries;*
  - (g) encourage the development and maintenance of resilient and fault-tolerant communications infrastructures;*
  - (h) promote investment in the electronic communications sector and in communications-reliant industries, thereby stimulating the economy and employment; and*
  - (i) promote Bermudian ownership and Bermudian employment at all levels of the electronic communications sector.*
56. The RA considers that its approach to the Master ICOL application process following the ending of the moratorium on new COLs and ICOLs is a fair and considered one that ensures the purposes of the ECA are met. Issuing a limited number of new ICOLs enhances Bermuda's competitiveness in the area of electronic communications while ensuring that competition is sustainable.
57. The RA noted in the Final Report the benefits that increased competition will bring to Bermuda over the longer term. The RA further noted at paragraph 36:

*The proposed ICOL grants are a necessary, but not sufficient, condition for the two new entrants to compete effectively in the provision of fixed and mobile networks in Bermuda. Granting the ICOLs at this time will at least commence the process of opening the sector to new entry and introducing increased competition over the longer term.<sup>8</sup>*

58. In the context of a discussion on the COVID-19 pandemic at paragraph 37:

*[T]he ability of the new entrants to gain traction in the market will be an even greater challenge than would otherwise be the case and could prolong their respective start-up periods. The RA therefore sees no reason to delay the grant of the pending licence applications. In fact, it would be contrary to the public interest to delay this first step in the road toward increased competition, which, if allowed to develop over time, is expected to benefit the overall economy of Bermuda in the years to come.<sup>9</sup>*

59. In the context of a discussion on the then pending Market Review consultation:

*The award of communications operating licenses in this proceeding does not automatically create effective or sustainable competition. Other necessary conditions for the development of effective, sustainable competition include the availability and award of spectrum to one or both of the ICOL applicants to support fixed wireless and/or mobile networks and services, as well as the ability of the new entrants to negotiate reasonable interconnect and wholesale access arrangements with existing ICOL holders, including OneComm and Digicel.*

60. The RA continues to adopt these positions which are relevant to its assessment as to whether the public interest is met in approving the Proposed Transaction. It is a fundamental statutory principle that Bermuda consumers will, in general, benefit from increased competition. The duty to promote and preserve competition was entrenched as one of the principal functions of the RA.

61. The granting of new communications licences, as noted above, is a necessary but not sufficient condition for Horizon, as one of the new entrants in the electronic communications market, to compete effectively. Further required is for new entrants to have the opportunity to give effect to the business plans which were submitted to the RA as part of the Master ICOL process. Horizon's business plan calls for a significant amount of outside investment to launch its services and to compete effectively.

62. Horizon has arranged with Fortress Bermuda H Investor LLC to secure financing in exchange for granting control of the company. As noted in Horizon's Communications Operating Licence: Master Application Form, of which a redacted version is publicly available:

*The funding required for this project is significant, it recognizes that fulfillment of the services of the ICOL will take time in addition to investment and Fortress is prepared to support that delivery over a five-year + timescale to ensure that Horizon provides a first-class service for the people of Bermuda.*

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<sup>8</sup> Ibid, page 7.

<sup>9</sup> Ibid, page 7.

*It is important to note that Horizon will not deliver a return in the first year and will still be building out the company and capabilities of the network. Also, to ensure the future longevity of the company, Horizon has allocated a significant amount of yearly capital back into the company for equipment upgrades and network improvements in order to continually improve the service.<sup>10</sup>*

63. Furthermore, Horizon's application form attached the term sheet with Fortress showing that Fortress would close an investment once the ICOL was granted, moving into a controlling shareholder position.
64. To prevent a change of control at this stage would render the objectives of the lifting of the ICOL moratorium and of the issue of new licences nugatory. More fundamentally, not allowing the Change in Control would frustrate Horizon's ability to deliver on the business plan it presented to the RA prior to being issued an ICOL, thereby preventing the possibility of new competition arising. The business cannot be funded by debt and is entirely dependent upon a significant equity investment funding.
65. While the RA notes the objections of Mr Stewart to the Proposed Transaction and his citing of the effects it might have, we cannot accept that these concerns have been made out. No evidence has been offered beyond mere suppositions of possible effects, and accordingly, these concerns are insufficient for rebutting the RA's preliminary view that the Proposed Transaction meets the public interest and would have a positive effect on the residents of Bermuda and on innovation.

#### **V.C. Whether the Proposed Transaction can be approved within a period of three years from the date on which the ICOL was issued**

66. The Regulatory Authority (Master Communications Operating Licence Application Process) General Determination 2019 ("2019 GD") establishes the criteria, conditions, requirements and procedures for the grant of new COLs and the terms and conditions of such COLs. Annex 4 of the 2019 GD inserts into new licences (including the ICOL) the following transitional condition:

***A6 TRANSFER OR ASSIGNMENT OF ICOL; TRANSFER OF OWNERSHIP OR CONTROL***

*Notwithstanding the provisions of Conditions 19 and 20, the Licensee may not, for a period of three years following the date of this Licence, directly or indirectly:*

*sub-license, assign or grant any right, interest or entitlement in the License nor transfer the Licence to any other Person, including an Affiliate of the Licensee; or*

*transfer ownership or control of the Licensee.*

*For purposes of this Transitional Condition A1 [sic], "control" shall have the meaning assigned to it by section 18(7) of the ECA, except that the reference to "25 per cent" shall be replaced by "10 per cent."*

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<sup>10</sup> Op. Cit., page 17.

67. The ICOL was issued without this condition included. Notwithstanding this omission, the ICOL is deemed by operation of the 2019 GD to include new condition A6 which prohibits any change in control of a new ICOL for three years from that date it is issued.

RA Response

68. The RA thanks Digicel for bringing this point to its attention. The RA must acknowledge that the point did not arise from its initial consideration of the Proposed Transaction.

69. Section 51(1) and (2) of the Regulatory Authority Act 2011 (“RAA”) empowers the RA to modify any licence, permit or authorization, where (1) the RA is authorized to do so by sectoral legislation, and (2) it concludes that such modification is in the public interest:

*51 (1) The Authority, when authorized by sectoral legislation, on its own motion or at the request of an authorization holder, may modify or vary any term or condition of a licence, permit or other authorization if the Authority concludes that such modification or variation is necessary in the public interest.*

*(2) Before taking any action pursuant to subsection (1), the Authority shall give the authorization holder reasonable notice and an opportunity to comment, and shall take into account any representations made by or on behalf of the authorization holder.*

70. The relevant sectoral legislation is the Electronic Communications Act 2011 (“ECA”), specifically, section 9(2)(c)(i), which permits the RA to make administrative determinations for, inter alia, the modification of licences for the provision of electronic communication services:

*9 (2) The functions of the Authority shall include—*

*[...]*

*(c) the making of administrative determinations to provide for the control and conduct of public electronic communications, including—*

*(i) the award, renewal, modification, termination or revocation of licences for the provision of electronic communications;*

71. Horizon’s Integrated Communications Licence (“ICOL”) also provides at condition 16:

**16 MODIFICATION OF THE LICENCE**

*The licence may be modified:*

*(a) with the mutual consent of the Licensee and the Authority;*

*(b) by the Authority pursuant to the provisions of Section 51 of the RAA and Section 9(2)(c)(i) of the ECA; and*

*(c) by the Authority following an enforcement proceeding, pursuant to the provisions of Section 93 of the RAA.*

72. The RA notes that the subject matter of new condition A6, namely a prohibition on any change in control of a new ICOL for three years, was not embedded as a direct obligation in the 2019 GD. Rather, the GD creates a new condition of the ICOL (whether deemed or otherwise), which must



be read in the context of the ICOL as a whole, and indeed, the entire legislative framework to which the ICOL is subject.

73. The effect of this is that the ICOL, as amended by the 2019 GD, can be modified in accordance with the RA's ordinary processes. This is not to say that 2019 GD is being amended by this decision and order; this legal result can only be achieved by a different General Determination, in accordance with section 62(2)(d) of the RAA. Rather, this decision and order is simply modifying the ICOL as it applies to Horizon.
74. In any event, the RA notes that the 2019 GD is nonetheless subject to the provisions contained within primary legislation setting out its powers and functions. It is an axiomatic principle that subsidiary legislation, such as a General Determination, cannot purport to narrow the scope of authority directly granted to a public authority by its parent legislation. Ordinary rules of statutory interpretation require that subsidiary legislation should be construed to avoid such a result.
75. The RA adopts and considers its above analysis at paragraphs 55 to 65 and notes that the rationale for approving the Proposed Transaction apply with equal force to the RA's parallel consideration of whether to amend Horizon's ICOL. New condition A6 serves as an impediment to the sort of outside financing which might be critical to a nascent business venture and was considered during the licensing process, subject to an actual application for change of control and the related due diligence. To prevent a change of control at this stage would render the objectives of the lifting of the ICOL moratorium and of the issue of new licences nugatory. More fundamentally, not modifying the ICOL to remove condition A6 would frustrate Horizon's ability to deliver on the business plan it presented to the RA prior to be issuing an ICOL, thereby preventing the possibility of new competition arising.

**VI. FINAL DECISION**

76. The RA proposes to approve the Proposed Transaction, subject to receipt of the Minister's written consent in accordance with sections 18(6) of the ECA and condition 20 of the ICOL.