



Interconnection and Interoperability Emergency General Determination 2021

Public Consultation

Consultation Document

Matter: 20211129

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Responses Due: 15 December 2021

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INTRODUCTION

1. This consultation document seeks public comment on the Regulatory Authority (Interconnection and Interoperability) Emergency General Determination 2021 (**EGD**) issued by the Regulatory Authority (RA) on 15 November 2021.
2. The RA has issued the EGD creating obligations for interconnection and interoperability which specifically applies to Communications Operating Licence (**COL**) and Integrated Communications Operating Licence (**ICOL**) holders.
3. The RA invites interested parties to comment on the EGD, as well as any other matters raised by this consultation document.

CONSULTATION PROCEDURE

4. 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 (**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.
5. Written comments should be submitted before 11:59 PM (Bermuda time) on Wednesday, 15 December 2021.
6. The RA invites comments from members of the public, electronic communications sectoral participants and sectoral providers, and other interested parties. The RA requests that commenting parties, in their responses, reference the numbers of the relevant questions, as set forth in this Consultation Document, to which they are responding. A complete list of questions presented by this Consultation Document appears in Section V.
7. 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.
8. 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 and follow this link:
9. Submit a Response page for Public Consultations: <https://ra.bm/submit-a-response-form/>.



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10. All comments should be clearly marked "Interconnection and Interoperability Emergency General Determination 2021 Public Consultation" and should otherwise comply with Rules 18 and 30 of the RA's Interim Administrative Rules.
11. The RA intends to make responses to this Consultation Document 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.
12. Individuals making personal submissions may request that personally sensitive information (eg, 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.
13. 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 Consultation Document, 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:
 - a. a written description of the issues discussed, and positions espoused; and
 - b. a copy of any written materials provided.
14. The principal point of contact at the RA for interested persons for this Consultation Document is Richard Ambrosio, who may be contacted by email, referencing "Interconnection and Interoperability Emergency General Determination 2021 Public Consultation" at consultation@ra.bm or by mail at:

Richard Ambrosio
Regulatory Authority
1st Floor, Craig Appin House
8 Wesley Street
Hamilton, Bermuda
15. The RA tentatively plans to issue a final order in this matter by March or April 2022. This timeline will ultimately depend on several factors beyond the RA's control, such as the nature of

any public comments submitted. However, reasonable efforts will be made to attempt to adhere to this.

16. In this Consultation Document, 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.
17. This Consultation Document is not a binding legal document and does not contain legal, commercial, financial, technical or other advice. The RA is not bound by this Consultation Document, 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 Consultation Document 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.

LEGISLATIVE CONTEXT

18. Section 62(1) of the RAA provides that the RA may make general determinations to carry out the provisions and purposes of this Act, sectoral legislation, or any regulations.
19. Section 62(1)(a) of the RAA requires all general determinations to be made following a public consultation, except for when the RA enacts an emergency general determination under section 66 of the RAA, which, insofar as is relevant, provides as follows:
- (2) The Authority may make a general determination on an emergency basis without complying with the public consultation procedures specified in this Act whenever the Authority concludes that the urgency of a particular case requires that it do so.*
- (3) The Authority shall promptly publish on its official website any general determination made pursuant to subsection (2).*
- (4) Any general determination made pursuant to subsection (2) shall be effective, as applied to a specific sectoral participant, at the earlier of the date on which—*
- (a) the sectoral participant has actual notice of the general determination; or*
- (b) the general determination is published in two newspapers of general circulation in Bermuda, one of which shall be the Gazette.*
- (5) In any case in which the Authority makes a general determination pursuant to subsection (2), the Authority shall—*
- (a) file the emergency general determination with the Cabinet Secretary for publication in the Gazette as promptly as possible; and*
- (b) within 14 days after the day on which the Authority makes the emergency general determination, or any longer period approved by the Minister responsible for the regulated industry sector, commence a public consultation.*
- (6) Any general determination adopted on an interim or emergency basis pursuant to this section shall remain in effect for no more than six months, unless the Authority, with the approval of the Minister, causes a notice to be published in the Gazette extending the effective period for up to an additional six months.*
20. “Interconnection” and “interoperability” are defined in section 2(1) of the ECA—
- “interconnection” means the physical and logical linking of public electronic communications networks and any other networks specified by the [RA] that are used by the same or a different communications provider in order to allow the users of one communications provider to communicate with users of the same or another communications provider, or to access services provided by another communications provider within the meaning of section 24(8);*
- “interoperability” means the technical features or functional capability of a group of interconnected systems, including equipment owned and operated by the customer that*

is attached to a public electronic communications network, which ensure end-to-end provision of a given service in a consistent and predictable manner;

21. Section 9(2)(x) of the ECA includes as one of the RA's functions the making of administrative determinations to provide for the control and conduct of public electronic communications, including the establishment and enforcement of procedures and technical standards for interconnection.

22. In the context of sectoral providers with significant market power, section 24(2) of the ECA provides as follows—

(2) The [RA] shall specify, in a general determination, the categories of communications providers that are eligible to obtain interconnection, access or associated facilities and services in accordance with subsection (1), which shall at a minimum include all ICOL holders.

23. Finally, section 33(3) of the ECA provides as follows—

(3) The [RA], by administrative determination, may require providers of public electronic communications networks to ensure, as necessary—

(a) the interoperability of public electronic communications throughout Bermuda; and

(b) access on the part of end-users to any-to-any communications by means of direct or indirect interconnection among communications providers.

BACKGROUND AND PROPOSALS

24. Interconnection is a key policy area that promotes competition in industries, such as the electronic communications sector (**EC Sector**), where new entrants face significant barriers to entry. The purpose of liberalisation of the EC Sector is to provide competition in the provision of services leading to greater choice for customers of suppliers, services, price and quality. Liberalisation should promote competition in all parts of the value chain.
25. Opening markets by itself is not enough. Incumbent sectoral providers are likely to have many advantages over new operators. Their operations are vertically integrated, they are ubiquitous, they likely have access to substantial capital, and their brands are ‘well known’ to customers. Various measures are needed to ensure that new operators can compete on an even playing field. Key policies include obligations on interconnection – ie, to ensure that incumbent sectoral providers allow new operators access to services at fair prices – and interoperability – ie, to ensure that interconnection is technically feasible.
26. Historically, interconnection and interoperability of networks was a fundamental feature of newly liberalized electronic communications markets, ensuring that all users could connect with each other regardless of network operator. Interconnection between competing networks was therefore essential and, because of the imbalance of power between incumbents and new entrants, commercial negotiation could not produce fair, reasonable, and procompetitive outcomes in a timely manner.
27. The principle of regulated interconnection was extended to include wholesale access to any technically or commercially feasible component of an incumbent or SMP operator’s network. The purpose of such regulatory intervention was to create a “level playing field” in which new entrants could choose, without prejudice, between building their own infrastructure and renting from the incumbent, through either access or interconnection.
28. Interconnection and interoperability came to Bermuda by way of amendments in 1997 to the Telecommunications Act 1986 (**TA 1986**). Those amendments specifically sought to foster competition in Bermuda’s telecommunications market. Section 21 of TA 1986 set out various duties of carriers, which included “to furnish telecommunication service upon any reasonable request therefor and on reasonable terms and conditions” and “to establish physical connections with other Carriers on reasonable terms and conditions”, among others.
29. When the Electronic Communications Act 2011 (**ECA**) was enacted, specific language reflecting section 21 of TA 1986 was not included as the new legislative framework would allow for obligations to be imposed on sectoral providers deemed to have significant market power (**SMP**) would be sufficient to ensure interconnection and interoperability. Instead, the power to enact such standards was delegated by the ECA to the RA, to be given effect by way of administrative determination.
30. The original ICOL Licences issued in 2013 under the ECA did include obligations that essentially mirrored section 21 of TA 1986, however these obligations were set to fall away if the ICOL holder was not found to have Significant Market Power.

31. In a number of Market Reviews carried out since 2011, the majority of ICOL holders were not found to have Significant Market Power and were therefore by default released from the interconnection obligations set forth in their respective licences. Those ICOL holders that were found to have Significant Market Power (currently One Communications and Digicel) still had these obligations.
32. In taking any action with respect to the Electronic Communications sector, 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.
33. In 2020, the RA concluded a consultation which led to the moratorium on the number of ICOLs providing in electronic communications services in Bermuda, entitled "Grant of New Integrated Communications Operating Licences and Other Types of Communications Operating Licences".
34. 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.

35. 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.

36. 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.

37. The RA continues to adopt these positions which are relevant to its assessment as to whether act in the manner that it has with the Emergency General Determinations. 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.
38. The granting of new communications licences, as noted above, is a necessary but not sufficient condition for new entrants to compete effectively. Further action required is for new entrants to not face barriers that impede entry into the market.
39. The RA has proceeded on an emergency basis because of the urgent need to act. Two new licences were issued in Sept 2020. Interconnection requests were made to incumbent sectoral providers. While these requests ultimately resulted in agreed upon commercial arrangements, significant time did elapse, and the RA must guard against any attempts to delay good faith efforts to negotiate in the near term which might have the effect of impairing competition within the EC Sector.
40. The EGD is modelled almost entirely on the language of section 21 of TA 1986. This language was chosen as it is a recent legislative model with which the EC Sector will already be familiar and they contain obligations to which all sectoral providers were subject to a few years ago. The decision was taken to avoid legislative innovation in the EGD, reserving any significant changes to result from this public consultation.
41. Furthermore, the obligations of section 21 of TA 1986 and which are contained in the EGD are directed at all sectoral providers within the EC Sector and not just the sectoral providers deemed to possess SMP. The RA believes that these obligations should be of universal applicability. While it is likely that new entrants will be the ones most likely to seek interconnection and interoperability pursuant to the EGD, as existing providers seek to develop

networks based on Fifth Generation technology, they could find themselves in a position where other sectoral providers may seek to benefit from interconnection with their networks.

42. The EGD takes the form of a series of obligations on all operators of a public electronic communications network, the principal ones being:
 - a. to establish, upon reasonable terms and conditions, interconnection and interoperability, at any technically feasible point within its network, with other COL holders;
 - b. to provide, on reasonable terms and conditions, for physical collocation of interconnection and interoperability at its premises;
 - c. to establish and provide facilities for operating, through routes, on reasonable terms and conditions;
 - d. to provide to other COL holders, upon reasonable terms and conditions, access to support structures including telephone poles, underground conduits, and communication towers; and
 - e. to maintain existing services unless permitted by the Authority to discontinue such services.
43. All sectoral providers subject to these obligations must comply within thirty days of the effective date of this Emergency General Determination.
44. The EGD envisages commercial negotiations as the first obligation, leaving primary responsibility for compliance with its terms to the aggrieved party. Only when it can establish a failure to comply with the obligations contained in the EGD can an aggrieved party bring a complaint to the RA under the sectoral provider dispute resolution provisions of section 58 of the RAA.
45. The EGD contains supplementary provisions, the most important of which is the obligation to submit to the RA copies of all agreements in respect of interconnection, interoperability, and access to support structures between COL holders. This includes any amendments to any existing agreements between COL holders. The agreement should be submitted either prior to execution, or not later than ten days after, and in such form as the RA may specify.

CONSULTATION QUESTIONS

46. Please respond to any or all of the following questions, referencing them by number:
- a. What are your views in general on interconnection and interoperability and on the EGD? Do you agree with the RA's rationale to act as it has?
 - b. Do you agree with the RA that new interconnection and interoperability obligations should apply to all sectoral providers in the EC Sector?
 - c. What are your detailed views on the specific provisions within the EGD, a copy of which is contained in Annex A?
 - d. Are there other obligations which you feel should be included in any final general determination which may result from this consultation? If so, please provide detailed commentary.

ANNEX A - Regulatory Authority (Interconnection and Interoperability) Emergency General Determination 2021



BERMUDA

REGULATORY AUTHORITY (INTERCONNECTION AND INTEROPERABILITY) EMERGENCY GENERAL DETERMINATION 2021

BR 154 / 2021

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The Regulatory Authority, in exercise of the power conferred by sections 62 and 66 of the Regulatory Authority Act 2011 and sections 9(2)(c)(x), 24(2) and 33(3) of the Electronic Communications Act 2011, makes the following Emergency General Determination:

Citation

1 This Emergency General Determination may be cited as the Regulatory Authority (Interconnection and Interoperability) Emergency General Determination 2021.

Interpretation

2 In this Emergency General Determination, unless the context indicates otherwise, terms shall have the meaning given in the Regulatory Authority Act 2011, and the Electronic Communications Act 2011.

REGULATORY AUTHORITY (INTERCONNECTION AND INTEROPERABILITY)
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Purpose

3 This Emergency General Determination, which the Authority determines to be in the public interest and consistent with the purposes of the Electronic Communications Act 2011, creates obligations for interconnection and interoperability that apply to COL holders that operate public electronic communications networks.

Obligations of operators of public electronic communications networks

4 (1) Subject to subparagraphs (2) and (3), a COL holder that operates a public electronic communications network must—

- (a) establish, upon reasonable terms and conditions, interconnection and interoperability, at any technically feasible point within its network, with other COL holders; and such interconnection and interoperability shall be at least equal in quality to that provided to itself, a subsidiary, affiliate or any other COL holder, to which it provides interconnection and interoperability;
- (b) provide, on reasonable terms and conditions, for physical collocation of interconnection and interoperability at its premises;
- (c) establish and provide facilities for operating, through routes, on reasonable terms and conditions;
- (d) provide to other COL holders, upon reasonable terms and conditions, access to support structures including telephone poles, underground conduits, and communication towers; and
- (e) maintain existing services unless permitted by the Authority to discontinue such services.

(2) A COL holder shall comply with the obligations set out under subparagraph (1) within thirty days of the effective date of this Emergency General Determination, and is not relieved of those obligations by reason only of the COL holder's inability to comply within the time specified.

(3) Notwithstanding subparagraph (2), a COL holder may comply with the obligations under subparagraph (1) within such longer period as the Authority may allow.

Supplementary matters: General

5 (1) A COL holder must—

- (a) maintain the confidentiality of any information provided by a customer or another COL holder;
- (b) refrain from any act or practice which is intended, or is likely, to have the effect of lessening competition; and
- (c) refrain from marketing practices or advertisements which are false or misleading in a material respect.

(2) The obligation set out under subparagraph (1)(a) does not apply—

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- (a) where one COL holder wishes to transfer certain classes of services to another COL holder;
 - (b) in respect of public electronic communication services which are directly connected with the delivery of emergency services; or
 - (c) where in the special circumstances of a particular case the Authority determines that it is in the public interest that such confidentiality should not apply.
- (3) Where a COL holder has established to the satisfaction of the Authority that an obligation under paragraph 4(1)(a), (b) or (c) applies to an existing service that is unprofitable or loss-making, the Authority shall not refuse permission to discontinue that service unless—
- (a) the Authority considers that it is in the public interest to refuse permission, having regard to the utility of the service, the availability of suitable substitutes, and the degree of reliance on the service by the public or segments of the public; and
 - (b) the Authority is satisfied that the COL holder will be adequately compensated for the loss involved in continuing the service by the rates and charges it charges for other services it provides.
- (4) No COL holder may disconnect another COL holder without the consent in writing of that COL holder or the Authority.
- (5) A COL holder may only seek the permission of the Authority to disconnect another COL holder if—
- (a) that COL holder fails to settle its accounts due—
 - (i) within a period of thirty days after receipt of a written warning notice; or
 - (ii) within a further period of thirty days after receipt of a written notice of intention to seek permission for disconnection;
 - (b) that COL holder fails to comply with any term of the contract or agreement for the provision of the service;
 - (c) that COL holder fails to conform to the agreed technical specification for the provision and operation of the service; or
 - (d) there are other just and reasonable cause for disconnection.
- (6) A COL holder which seeks the Authority's permission to disconnect another COL holder shall give notice to the Authority in writing not less than thirty days before the date of the proposed disconnection, informing the Authority of the reasons for the proposed disconnection; and the Authority shall forthwith refer the matter to the Board of Commissioners for enquiry and report.
- (7) Upon referral of a matter to the Authority under subparagraph (5), the Authority shall conclude its enquiry as expeditiously as possible and render a decision on

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a proposed disconnection of one COL holder by another within thirty days of receipt by the Authority of the notice by the COL holder under subparagraph (6).

Supplementary matters: Agreements

6 (1) A COL holder must submit to the Authority either prior to execution, or not later than ten days after, and in such form as the Authority may specify, copies of all agreements in respect of interconnection, interoperability, and access to support structures between that COL holder and another COL holder, including any amendments to any existing agreements between COL holders.

(2) For the purpose of subparagraph (1), any COL holder that is party to an agreement may furnish a copy of the agreement to the Authority on behalf of all the COL holders that are party to the agreement.

(3) Upon receipt of a copy of an agreement under subparagraph (1) the Authority shall within ten days either indicate its approval of such agreement or its intention to enquire into the agreement.

(4) Where the Authority approves an agreement and informs the COL holder in writing of such approval, the agreement shall either be executed within seven business days by all parties or remain in force as the case may be.

(5) If the Authority decides to enquire into any aspect of an agreement, the Authority shall conclude its enquiries as expeditiously as possible, and in no case in more than thirty days or such longer period as the Authority may require, and the Authority shall give a direction—

- (a) approving the agreement;
- (b) approving the agreement on a provisional basis;
- (c) changing the agreement in whole or in part; or
- (d) suspending the agreement or postponing the date upon which the agreement is intended to be executed, to such other date as may be specified, and the COL holders shall comply therewith.

Dispute Resolution

7 A person who is aggrieved by the failure of a COL holder to discharge an obligation under this Emergency General Determination may make a complaint to the Authority in accordance with section 58 of the Regulatory Authority Act 2011.

Effective date and expiration

8 This Emergency General Determination comes into effect on the day it is published in the Gazette, and expires six months from the day it takes effect.

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Signed this 15th day of November 2021

Chairman
Regulatory Authority

[Operative Date: 16 November 2021]