

TELECOMMUNICATIONS REGULATORY COMMISSION
VIRGIN ISLANDS

REPORT ON THE CONSULTATION ON PART II OF THE
BROADBAND MARKET ANALYSIS: REGULATORY REMEDIES

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Report on Consultation of Broadband Market Analysis and Regulatory Remedies

Overview of Consultation

The Commission has undertaken an extensive review of the fixed broadband market in the British Virgin Islands over the course of 2015-2016. This review, known as a market consultation process, was planned under the Commission's 2010 Market Review, which sets out priority markets for review in the territory.

The Commission has already reviewed and set regulations in place in the call termination and international connectivity markets. However, the fixed broadband market has been of particular importance to the Commission given the level of public discontent with the fixed broadband service experienced across the territory.

The challenge the Commission has faced is how to improve the quality of service in the fixed broadband market and allow for the possibility of competition without damaging incentives to invest or leading to further detrimental price increases. A key issue faced is to encourage investment to roll out the network as far and wide as possible whilst delivering a better quality of service to all customers, in a topographically challenging environment such as the British Virgin Islands.

This review has been undertaken in two stages:

- 1) Market Consultation on the Broadband Market ("Broadband Market Analysis I")
- 2) Part II Report on the Consultation of the Broadband Market Analysis and Part II Broadband Market Analysis, Regulatory Remedies ("Broadband Market Analysis II")

Broadband Analysis I defined separate markets for fixed and mobile broadband services and proposed to focus the remainder of the consultation on the fixed broadband market. On 17 December 2015¹, the Commission declared Flow dominant in the provision of

- "Fixed retail broadband services"
- "Wholesale broadband access"

Broadband Market Analysis II sets out options for regulation following Section 26 (4) of the Telecommunications Act (the "Act") in order to address perceived problems in the provision of broadband internet service.

¹ Determination of Dominance

http://www.trc.vg/images/attachments/Determination_of_Dominance/determination%20of%20dominance_bb_gazette_trc%20-%20december%2017%202015.pdf

The Commission noted that there is a competitive problem with the provision of fixed broadband service as customers do not have sufficient choice of supplier for broadband products. The Commission explained that this lack of choice is damaging to consumer welfare as consumers suffer repeated price increases of over 10%. The Commission has received complaints whereby customers are not receiving the speed they have paid for and many customers experience long waiting times, either to receive the initial connection to the broadband network or to repair a fault. With one dominant supplier, consumers have no choice but to put up with poor service.

Through the Broadband Market Analysis II, the Commission set out a number of proposed regulatory remedies for consultation. The Commission looked into price regulation options given the concern that Flow had sustained two price increases, over 10%, during the previous five years and has since carried out a new price benchmarking exercise shown below in Figure 1, which confirms the previous concerns set out in Broadband Market Analysis II.

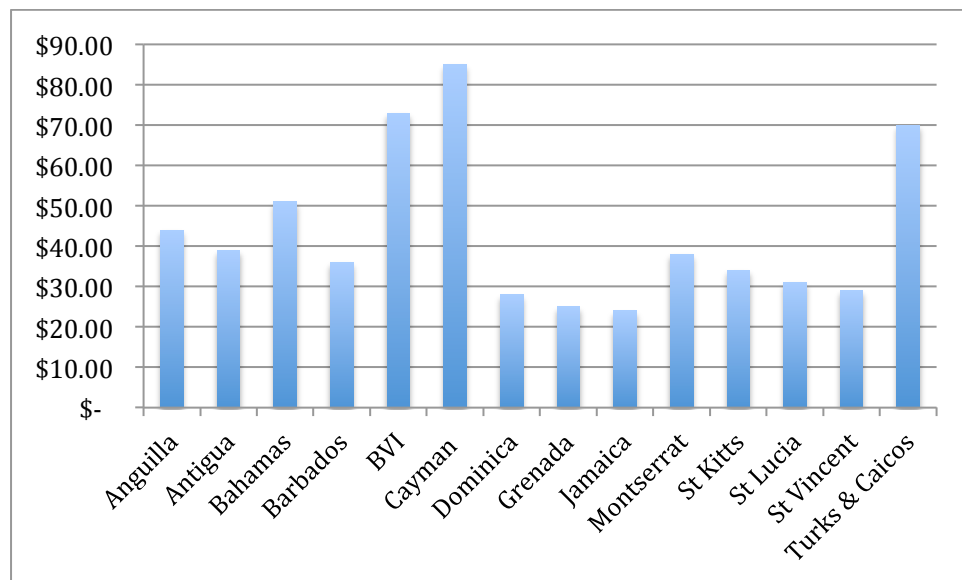


Figure 1: Average monthly revenue per line, Flow markets, February 2016. Source: Flow

Figure 1 shows that the BVI is one of the markets in the Caribbean with the highest fixed broadband line charges along with Cayman and Turks & Caicos. This is a major cause for concern for the Commission.

The Commission looked into retail quality regulation and assessed ways in which it might be either able to incentivize or force Flow to improve its quality of service through the imposition of fines for non-performance.

The following remedies were set out for discussion:

Retail Price Regulation Options:

- Require further price increases to be subject to Commission approval
- Require LIME to reduce prices to levels prior to 1 November 2015 increase
- Benchmark retail prices against LIME's comparable pricing in the region
- Benchmark retail prices against international broadband pricing (eg price per Mbp/s download speed) for selected countries
- Restrict price increases to a level below inflation (eg RPI-X)

Retail Quality Regulation

- Incentive regulation to enforce the delivery of sold connection speeds through required reporting and refund system
- Ability for consumers to terminate contracts if connection speeds do not meet sold standards
- Commission monitoring of connection speeds and fines for not meeting advertised connection speeds
- Commission monitoring of time to receive a new connection and fines for exceeding a certain delay
- Commission monitoring of fault repair and fines for delay

The Commission set out these options for retail price regulation and options for retail quality of regulation and invited the public to respond by January 22 2016. The Commission received responses from Flow and Digicel. In the course of receiving responses from Flow and Digicel, the Commission has maintained dialogue with both parties to receive further information and feedback. Aligned with the principles set out in Section 18.1 of their Licence for the Operation of a Telecommunication Network Providing Telecommunications Services in the British Virgin Islands (the "*Licence*"), prior to amending a licence to introduce a new Regulation, the Commission has entered into a period of negotiation with Flow, the designated dominant supplier, over the form of possible Licence Amendment. This negotiation has taken an extended form in order to deal with the complexity of the problem and to work towards designing an effective solution which will result in a better broadband service for all BVI consumers.

Wholesale broadband access

During the course of the Broadband Market Analysis I, the Commission did not receive any requests for wholesale broadband regulation. The Commission sought further input on this area in Broadband Market Analysis II and remained open to ideas.

Following Broadband Market Analysis II, Digicel responded by asking the Commission to look into options for wholesale duct access.² Subsequent to separate discussions between the Commission and Digicel and the Commission and Flow, it has been agreed that Digicel may seek duct access from Flow and if access is not forthcoming or is problematic then either operator is at liberty to request the Commission's assistance to resolve the matter. Such resolution at this point may be sought through Section 17 of the Telecommunications Code (Part 6) (Interconnection and Access to Facilities) Requirements, 2011. If the matter cannot be resolved in such a way, the Commission is able, on the basis of the Determination of Dominance, to work with the operators concerned to bring an appropriate wholesale broadband access regulation into place, which will enable the development of greater competition in the retail broadband market.

Further Consultation following Broadband Market Analysis II

Flow responded to our questions on the need for and design of appropriate regulation. Flow argued that it was not necessary to introduce regulatory controls for Flow's prices, terms of service or quality of service. Flow argued that the market for broadband services was competitive and undergoing a period of transformation whereby the introduction of any form of regulation could be damaging. Flow proposed that a proportionate response would be to monitor the market and the performance of the operators, as entry and investment took place, over the following 12 month period.

In conjunction with Flow's formal written response³ to the Commission's consultation, Flow agreed to begin a dialogue with the Commission to discuss the best way to proceed as a result of the determination of dominance so that the Commission's next steps would be fully informed by developments on Flow's network and in the service delivered to customers.

Flow presented a proposed broadband improvement plan to the Commission on 3 March 2016. During this meeting, Flow presented on its quality of service improvement plan with targets achievable through to Q4 2016. As a result of the meeting the Commission agreed to send a list of a revised set of quality of service indicators to Flow. Each operator must report on quality of service every quarter. Following the Commission's review of the Broadband quality of service indicators, it was agreed that the set of indicators set out in Schedule 3 of the Telecommunications Code (Part 3) (Quality of Service) Requirements, 2010 was insufficient to capture all elements of the broadband service demanded by customers and provided by Flow.

Over the following months, the Commission and Flow conversed on an expanded set of quality of service indicators, developing forms of each metric, targets and dates by which the target would be met. Given the Commission's concern that Flow may not meet the targets without any enforcement mechanism in place, the Commission also set out a proposed enforcement mechanism which would

² The Commission's summary of Digicel's response is set out in Annex 1

³ The Commission's summary of Flow's response is set out in Annex 2

impose fines on Flow for not attaining targets by an agreed date. Flow rejected the proposal of such an enforcement mechanism, arguing that it would be detrimental to investment as in the event of non-attainment of targets the company would be seriously financially penalized. The Commission expressed concern over Flow's lack of commitment to the targets and emphasised that an enforcement mechanism would only come into play when the agreed targets were not met. Following further discussion, Flow and the Commission agreed to explore an alternative framework which would specifically address the problems experienced by consumers without the formality of regulation.

The new framework covers the following areas:

1. Customer reimbursement in the event of a fault
2. Customer engagement
3. Publication of Quality of service indicators and targets

The Commission and Flow have agreed to a set of Broadband Service Commitments contained within a Customer Charter on Fixed Broadband Service (the "Charter") which set out Flow's commitment to provide better service in the BVI by rolling out its superfast broadband network more extensively and by addressing faults on the old network within a shorter timeframe. The Charter sets out the compensation that Flow will offer in the event of a fault or if the speed experienced at the customers premises falls below that sold by Flow, with the fault being due to the Flow network. The Charter also sets out guidance to customers to explain what customers can do on the home base side to improve the quality of their internet connection, for example by moving devices which may interfere with wifi transmission away from the router or the receiving device. This advice is set out on the Commission's website, on Flow's website and in Annex 2 of the Charter.

The Commission strongly urge the public to read the Customer Charter on Fixed Broadband Service to be fully informed of what compensatory measures will be offered. The Commission has placed special emphasis on putting measures in place to enable customers to improve the access line speed that they experience. In the event of a speed fault, whereby a customer finds that they are receiving broadband speed less than that sold to them, the customer is advised to contact Flow to investigate the issue and may be entitled to compensation if a satisfactory solution cannot be found. The details of this are set out in the Charter. The Commission's formal Decision on the current appropriate regulatory response to the problems resulting from Flow's dominance in the retail market for fixed broadband service is set out in the **Decision by the Telecommunications Regulatory Commission of the Virgin Islands With Respect to the Declaration of Dominance of FLOW BVI in relation to Fixed Retail Broadband Services** which is published on our website.

Monitoring over 2017

The Commission will monitor Flow's network performance through the quality of service indicators and targets set out in the Charter. The Commission will

assist with consumer complaints and monitor public feedback on the improvements expected in Flow's network performance. The Commission will also continue to monitor Flow's pricing very carefully. In the event of pricing complaints, pricing anomalies or price increases, the Commission may reconsider its ability to introduce formal retail price regulation. The Commission will publish Flow's record of performance each quarter to keep the public fully informed. Following the close of Q4 2017, the Commission will produce a report on Flow's performance and achievement of targets throughout the year. The report will assess the effectiveness of the Charter in incentivizing Flow to deliver a better fixed broadband service to its customers and will assess the need for the introduction of formal regulation.

Annex 1

Digicel's response to the Broadband Market Consultation⁴

Digicel did not object to the designation of Flow as dominant in the provision of fixed broadband services. Digicel had already announced plans to roll out a fibre network across the territory and therefore couched their response in the terms of a new entrant.

Digicel proposed the requirement for further price increases by Flow be subject to the Commission's approval as the most appropriate form of price regulation. Digicel argued that this method would allow the Commission to assess the justification for a price increase, on a case by case basis, and to judge if a proposed price increase is in the best interest of the market at a particular time.

Digicel argued that the direct control of pricing in the fixed retail market "is not an appropriate or sustainable structural intervention in the market." Digicel argued that with the potential entry of another competitor in the fixed line market, direct retail price regulation could distort the competitive environment. Digicel requested that the Commission forbear from direct retail price regulation and allow the possibility of price competition developing as a result of new entry.

Digicel suggested a "prohibition on geographic or portfolio price de-averaging by Flow in the retail market" to prevent Flow from targeting selective price reductions and promotions in areas where Digicel initially rolls out "while leveraging its dominance to find these using revenues from those areas or products where it faces no competition." The Commission advises that there is a General Prohibition against cross-subsidies under 10.1(c) of the Licence and therefore any such activity should be refrained from or reported in the case of suspected detection.

Digicel also suggested that the Commission mandate wholesale access at cost oriented prices in the upstream infrastructure market. Digicel argued that Flow should be forced to provide wholesale infrastructure access on a cost oriented basis "to avoid Flow simply sheltering margin in a market where it faces no competition." Digicel suggested that the Commission put in place a wholesale duct access regulation. Digicel suggested that the Commission should take the opportunity to take the obligations currently framed in the Telecommunications Code (part 6) (Interconnection and Access to Facilities) Requirements 2011 (the "Interconnection Requirements") and further specify the obligation to provide access on a cost oriented basis with regulated wholesale price of access.

In terms of the options for quality of service regulation put forward by the Commission, Digicel argued that the current quality of service Requirements under the Telecommunications Code, Part 3, if properly enforced, were sufficient to regulate quality of service standards and there would be no need to introduce further regulation.

⁴ Digicel's response is available on www.trc.vg

Given that Digicel had specifically requested the regulation of wholesale duct access, the Commission requested further clarification and information from Digicel on this proposal. Digicel responded by explaining that in its view, the Interconnection Requirements were fairly limited in their scope as it relates to the regulation of access to facilities. Digicel suggested that the Interconnection Requirements simply require access on a non-discriminatory and equitable basis without further guidance on the exact terms and with limited room for intervention by the Commission. Digicel proposed access, non-discrimination and pricing remedies.

In terms of access, Digicel argued that there “needs to be more than a general obligation to provide access when requested.” Digicel requested a specific obligation to provide access to ducts on defined and standard terms with the offering to be in place within a defined and short timeframe. Digicel suggested that a regulation needs to mandate access in the event of duct congestion. The aim of this regulation would be to ensure that Digicel can access all of Flow’s ducts or dark fibre equivalent on the same basis as Flow. In the application of non-discriminatory remedies, Digicel also argued for the right to engage independent contractors to perform services in accordance with proposed Service Level Agreements.

Finally Digicel proposed price regulation of duct and pole access with a provision for Commission intervention in the event of a dispute relating to any aspect of access to the physical infrastructure. Digicel provided pricing benchmarks for duct and pole access and for dark fibre.

Based on Digicel’s response, the Commission has explored the possibility of a wholesale duct access regulation further but is awaiting further input from Digicel or any other operator on the immediate requirement for a wholesale broadband access regulation.

Annex 2

Flow response⁵

Flow disagreed with the Commission's Determinations of Dominance and set out the following comments explaining why, in Flow's view, it was not dominant with the provision of fixed broadband service.

Flow argued that it disagreed with the Commission's conclusion that fixed wireless and mobile technologies are not complete substitutes to fixed solutions. Flow disagreed with the Commission's assessment of substitutes arguing that an alternative service only needs to serve a "comparable function" to the service in question to be a substitute. As such Flow argues for a broader market definition. Flow argued that differences in the quality of service are "often a fundamental aspect of how companies compete." The Commission had noted the potential for CCT's Go Fast LTE product to compete at lower levels of speed but had concluded that the trend towards demand for higher speed products provided via a reliable fixed line rendered the substitutability incomplete.

Flow argued that most customers were requesting the lower speed services which in their view were substitutable with other products on the market, but the market analysis is a forward looking analysis which takes account of both the today and the tomorrow and in the view of the Commission, demands for higher speed broadband means that fixed line technologies are most likely to provide higher speed connectivity and are therefore not completely substitutable with wireless and fixed wireless technologies.

The Commission also noted that CCT's Go Fast LTE product has an element of portability whereby a customer can transport the device from one location to another depending upon network availability. Flow's fixed network does not have this feature. Flow argued that the portability element enhances CCT's ability to compete. The Commission does not view the portability in this respect. The Commission sees that Flow's fixed broadband network is available over most of the territory, but not all of it, and is available in places where CCT's LTE coverage does not reach therefore it is not possible for all BVI consumers to view Flow's network and CCT's coverage as substitutes.

Flow does not refer to the Commission's small but significant non-transitory increase in price tests ("SSNIP tests") and nor does it refer to the historical prices increases exceeding 10% which in the Commission's view provide proof of Flow's dominant position in the market. **To be clear, the fact that Flow can introduce and sustain price increases of 10% on all of its broadband products on both the new network and the old network demonstrates Flow's dominance in the market.**

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the market for broadband services was competitive and also undergoing a period of transformation whereby the introduction of any form of regulation could be damaging. Flow proposed that a proportionate response would be to monitor the market and the performance of the operators, as entry and investment took place, over the following 12 month period.

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