



Decision Notice 2018-6

**Complaint by Digicel (TCI) Ltd. concerning the
conduct by Cable & Wireless (TCI) Limited
arising from Hurricane Irma**

issued by the

**Turks and Caicos Islands
Telecommunications Commission**

October 26, 2018

Table of Contents

Overview	i
1 Introduction.....	1
2 Background	2
2.1 The Digicel Complaint	2
2.1.1 The Events at Described in the Complaint.....	2
2.1.2 Digicel’s Claimed Impacts of the Outage	3
2.1.3 Allegations of Anti-Competitive Conduct	4
2.1.4 Requests for Relief.....	5
2.2 Flow’s Response.....	5
2.3 Digicel’s Reply	8
2.4 Flow’s Further Response.....	10
2.5 Digicel’s Further Reply	11
3 Matters to be determined by the Commission	12
4 Anti-Competitive Conduct under the Licence	14
5 Anti-Competitive Conduct under the Telecommunications Competition Guidelines..	15
5.1 Market Definition	15
5.2 Market Dominance	16
5.3 Assessment under the Guidelines	17
6 Relief Sought by Digicel for Anti-competitive Conduct	17
7 Breach of the Interconnection Regulations	19
8 Emergency Preparedness in TCI.....	20
9 Conclusions and Next Steps	21

Overview

This Decision addresses matters within the Telecommunications Commission's ("Commission") authority raised in Digicel (TCI) Ltd's ("Digicel") complaint dated October 31, 2017 (the "Complaint") regarding certain alleged conduct by Cable & Wireless (TCI) Limited ("Flow") during the immediate aftermath of Hurricane Irma in September 2017.

In the Complaint, Digicel claimed that the network outage it suffered at the time was deliberately caused by Flow when it disconnected an underground backhaul fiber link that was to be supplied by Flow under a Cooperation Agreement entered into by Digicel and Flow just prior to the arrival of Hurricane Irma. Digicel claimed that Flow's actions in this regard were anti-competitive, in breach of the Interconnection Regulations as well as reckless and undertaken without regard for the welfare of the public. Based on the information provided in the Complaint, Digicel asked the Commission to impose an obligation on Flow to provide access to certain services on terms and conditions subject to Commission approval.

Following the receipt of the Complaint, the Commission asked Flow and Digicel to provide two rounds of responses and replies relating to the matters raised in the Complaint. It also asked Digicel and Flow to provide data on their respective international transmission capacities.

Based on its review of the Complaint and the related submissions, the Commission reached the following conclusions:

- i) The Commission denies Digicel's claim that the network outage it suffered during the immediate aftermath of Hurricane Irma, which was caused by Flow's disconnection of an underground backhaul fiber link, was anti-competitive.*
- ii) The Commission also denies Digicel's claim that the loss of local interconnectivity that resulted from this same action by Flow was a breach of the Interconnection Regulations.*
- iii) Consequently, the Commission denies Digicel's requested relief related to these claims.*

The Commission considers that the network outage suffered by Digicel in the aftermath of Hurricane Irma highlights the need for a more formal and comprehensive emergency preparedness plan in TCI. Therefore, in its Decision, the Commission directs Digicel and Flow to jointly develop an Emergency Preparedness Agreement that encompasses a telecommunications network capacity backup plan, together with implementation measures, that would be in place in times of national emergencies, including those resulting from severe weather events. Submissions in this regard are to be filed within 45 days of this Decision. The Commission will then decide on what further process should occur to finalize an Emergency Preparedness Agreement.

1 Introduction

This Decision addresses matters within the Telecommunications Commission's ("Commission") authority raised in Digicel (TCI) Ltd's ("Digicel") complaint dated October 31, 2017 (the "Complaint") regarding certain alleged conduct by Cable & Wireless (TCI) Limited ("Flow") arising from Hurricane Irma.

The Complaint relates to events that occurred in September 2017 shortly after Hurricane Irma struck the Turks and Caicos Islands ("TCI"). In the Complaint, Digicel claimed that the service outage it suffered during the aftermath of Hurricane Irma was deliberately caused by Flow. As a result, Digicel claimed, among other things, that Flow's actions at the time were:

- i) anti-competitive and had the effect of substantially lessening competition in the retail markets for mobile voice and data services and, therefore, were in breach of sections 13.4 and 13.5 of Flow's Telecommunications and Spectrum Licence ("Licence") and
- ii) were also in breach of section 5(3) of the *Telecommunications (Interconnection and Access to Telecommunications Facilities) Regulations* (the "Interconnection Regulations")

Digicel noted in the Complaint that the Commission has the authority to investigate such matters under section 4(1) of the Telecommunications Ordinance (the "Ordinance"). It added that under section 50 of the Ordinance, the Commission also has the authority to impose remedial measures to address any contraventions of the Ordinance or any condition of licence where found appropriate.

In terms of relief requested, Digicel asked that the Commission make a determination that Flow is dominant in the provision of international connectivity, underground backhaul connectivity and underground ducting infrastructure and also impose an obligation on Flow to provide access to the two latter services on terms and conditions subject to Commission approval. In this respect, Digicel noted that the Commission has the authority to regulate the rates for a service offered by a dominant operator under section 28(2) of the Ordinance.

In response to the Complaint, the Commission established two rounds of responses and reply comments, which were submitted on the following dates:

- Flow's Response dated December 11, 2017
- Digicel's Reply dated January 15, 2018
- Flow's Further Response dated January 23, 2018
- Digicel's Further Reply dated January 29, 2018

In addition, on April 11, 2018, the Commission asked that Digicel and Flow to provide data on their respective international transmission capacities. Digicel provided its response to this request on May 4, 2018 and Flow on May 10, 2018.

In reaching its Decision on the matters raised in the Complaint, the Commission has taken all of the parties' submissions into account. It should be noted at the outset, that the Commission

Decision deals strictly with matters that fall under its authority as set out in the Ordinance, the Licence, as well as in related regulations such as the Interconnection Regulations.

In what follows, Section 2 provides a summary of the statement of claims in the Complaint as well as parties' responses and reply comments regarding the Complaint. Section 3 sets out a list of the matters raised in the Complaint to be determined in this Decision. Sections 4 to 7 address and provide the Commission's conclusions on with each of those matters. Lastly, Section 8 addresses the issue of Emergency Preparedness in TCI that arises from the Complaint. Section 9 provides conclusions and next steps.

2 Background

2.1 The Digicel Complaint

2.1.1 The Events at Described in the Complaint

In its Complaint, Digicel set out a detailed timeline of events covering the period September 4 to 12, 2017 that form the basis of its claim of anti-competitive conduct by Flow. According to Digicel, these events included the following:

- 1) Between September 4 and 7, 2017, in anticipation of the oncoming hurricane season (including the expected imminent arrival of Hurricane Irma in the area of TCI), a "Cooperation Agreement" was agreed to between Digicel and Flow under which Digicel would provide Flow with 300 megabits ("Mb") of microwave backhaul capacity from Providenciales to Grand Turk as a "swap" for 4 gigabits ("Gb") of underground backhaul fiber capacity provided by Flow from Flow's landing station in North West Point to Richmond Hill. According to Digicel, the objective of the agreement was to ensure that both Digicel and Flow were in a position to continue to offer a reasonable level of service during hurricane season.
- 2) On September 7, 2017, Hurricane Irma reached TCI and as of 2:00 pm that day, Digicel migrated its traffic to Flow's underground fiber as contemplated under the Cooperation Agreement. Digicel made available capacity on its microwave link, but Digicel noted that Flow did not provide the necessary configuration details to Digicel to bring the link into service for Flow.
- 3) At around 1:30 pm, September 10, 2017, Digicel lost all international connectivity and all local connectivity to Flow. Digicel found that this outage was due to Flow disconnecting the underground backhaul fiber link. Digicel claimed that the disconnection appeared to be "deliberate" and "malicious" and that Flow was not responsive to Digicel's requests to re-establish connectivity and correct the outage.
- 4) During the morning September 11, 2017, Digicel stated that it became aware that Digicel subscribers in Providenciales were approached by Flow employees and were being advised to switch to Flow because of the service outage on Digicel's network.
- 5) Also, during the morning September 11, 2017, Digicel reported the matter to the Premier and Deputy Premier as well as the Governor, who convened a meeting on the matter that same day. According to Digicel, Flow's CEO stated at the meeting that since Flow's

“primary route was compromised, they considered it necessary to take back the fiber pair being used by Digicel”. Digicel indicated that the Governor requested that the matter be resolved forthwith; however, despite numerous communications between Digicel and Flow over the course of the day, the outage was not corrected.

- 6) Digicel indicated that during the same morning the Commission was also involved to resolve the issue. According to Digicel, in response to a Commission inquiry of the matter, Flow responded that “since the Hurricane damaged Flow's primary link to the Arcos Station, Flow switched to its secondary link. Therefore, Flow could no longer maintain Digicel on the secondary link.”
- 7) On the afternoon of September 11, 2017, Digicel sought and obtained an Emergency Order from the Supreme Court ordering Flow to immediately reconnect Digicel to the backhaul fiber link. However, according to Digicel, Flow did not comply with the Order.
- 8) At around 6:30 pm on September 11, 2017, Digicel stated that it had restored connectivity on a microwave link between North West Point and the Richmond Hill switch site. This allowed for the resumption of Digicel’s mobile voice and data services.
- 9) At around 8:00 am on September 12, 2017, Digicel indicated that Flow restored 1 Gb of connectivity on its underground backhaul fiber link out of the 4 Gb agreed to under the Cooperation Agreement.
- 10) At around 4:00 pm on September 12, 2017, Digicel indicated that, through legal counsel, Flow met with Digicel to find a solution to the issue and Flow agreed to provide forthwith to Digicel not less than 4 Gb of capacity between Richmond Hill and Northwest Point. At the same time, Digicel agreed to use all reasonable efforts to provide microwave backhaul connectivity between Providenciales and Grand Turk as soon as possible.
- 11) On September 20, 2017, Digicel and Flow entered into a “Settlement Agreement” that formalized the terms of the initial Cooperation Agreement.

2.1.2 Digicel’s Claimed Impacts of the Outage

In terms of impacts of the network outage, the Digicel claimed in the Complaint that:

- 31,000 Digicel subscribers could not make or receive international calls;
- All data services were not available to Digicel's subscribers, which included mobile data services, broadband services (Play), Direct Internet Access services and video;
- There was no connectivity between Digicel customers and Flow customers;
- The outage impacted subscribers to Digicel’s VoIP services, such as Government agencies, hospitals and the Department of Disaster management and Emergencies; and
- Digicel also incurred a cost of roughly \$42,000 running its own above-ground fiber facility between Richmond Hill and Northwest Point.

In the Complaint, Digicel stressed that the Commission should recognize that “these service outages occurred at a time when TCI was in a most vulnerable position, when connectivity was critical to ensure the safety of families, the security of businesses and access to emergency services and the users affected included those agencies for whom it was most critical to retain full connectivity to provide assistance to the public at that time.”

2.1.3 Allegations of Anti-Competitive Conduct

In support of its anti-competitive conduct allegations, Digicel made a series of claims, including that:

- i) Flow is dominant and/or holds significant market power (“SMP”) in the upstream markets for international connectivity and underground ducting infrastructure in TCI.
- ii) Digicel requires access to wholesale (upstream) international connectivity with backhaul connectivity to provide retail (downstream) mobile voice and data services. Therefore, if access to international connectivity or backhaul connectivity is compromised, Digicel's ability to provide retail mobile voice and data services would be stifled.
- iii) Flow deliberately disconnected Digicel on September 10, 2017 with the intent to gain a competitive advantage over Digicel (e.g., take customers from Digicel) while Digicel suffered a service outage due to damage to its networks caused by Hurricane Irma.
- iv) Flow’s actions were deliberate and anti-competitive as they were done with the objective of unduly gaining market power at a time when Digicel could not possibly compete effectively.
- v) At the very least, Flow acted recklessly without regard for the welfare of the public at a time when it was most critical for connectivity to be maintained. Moreover, by failing to give prior notice to Digicel, Flow breached the duty of care implicit in its obligations as an operator of public telecommunications networks in TCI to operate its networks for the benefit of the public.

In support of these allegations, Digicel claimed that if Flow had given advance warning of its intent to disconnect Digicel, an alternative solution could have been implemented that would have facilitated maintaining service to both Flow and Digicel subscribers. Digicel noted that such a solution was in fact implemented two days later on September 12, 2017. Digicel further claimed that if it was, in fact, Flow's intention to provide connectivity to Digicel in “good faith”, then this alternative solution could have been implemented on September 10, 2017 and the loss of service to Digicel subscribers could have been minimized, if not avoided entirely.

As well, Digicel claimed that Flow agreed to the terms of the Cooperation Agreement with the understanding that it was likely that it would have had to accommodate Digicel traffic in addition to its own traffic in the event Digicel's aerial connectivity was lost during a hurricane. Digicel suggested, therefore, that Flow may not have entered into the Cooperation Agreement in good faith, knowing that it may not have been able to accommodate Digicel in the event of failure of Digicel's aerial backhaul.

2.1.4 Requests for Relief

In terms of requested relief arising from the Complaint, Digicel asked that the Commission:

- i) Determine whether Flow's disconnection Digicel connectivity via the underground backhaul fiber link was anti-competitive and intended to and did, in fact, have the effect of preventing, restricting and/or distorting competition or substantially lessening competition in the retail markets for mobile voice and data services in TCI.
- ii) In light of (i) above, determine whether Flow's conduct constitutes a breach of sections 13.4 and 13.5 of its Licence.
- iii) Determine whether Flow's conduct to disconnect local interconnectivity:
 - a. was anti-competitive and intended to and did, in fact, have the effect of preventing and or restricting and or distorting competition and substantially lessening competition in the retail markets for mobile voice services in TCI and, as such, constitutes a breach of sections 13.4 and 13.5 of its Licence; and
 - b. was in breach of section 5(3) of the Interconnection Regulations.
- iv) Assuming the Flow's conduct is found to be anti-competitive, determine whether the effects of the conduct were exacerbated by the fact that it resulted in service outages at the most vulnerable time for TCI when it was critical for connectivity to be maintained for all subscribers in TCI.

Further, while acknowledging that it intends in the future to land its own subsea fiber in TCI and construct its own dark fiber network, thereby removing all dependence on Flow's international network and facilities, for the immediate term, Digicel requested that the Commission:

- v) Determine that Flow is dominant in the markets for the provision of international connectivity services – i.e., International Private leased Circuits (“ILPCs”), international managed data services and associated wholesale landing station services in the TCI.
- vi) Upon making such a dominance determination, amend Flow's licence to include the obligation to provide underground backhaul connectivity and access to its underground network on terms and conditions that are no less favourable than the terms and conditions by which Flow provides such access to its own business units or affiliates.
- vii) Order Flow to enter into an agreement with Digicel to provide access to its underground ducting infrastructure on terms and conditions that are no less favourable than the terms and conditions by which Flow provides such access to its own business units or affiliates. Digicel added that such an Agreement should include mandatory penalty clauses in the event of breach by Flow and should be executed within fourteen days of the date of the Commission's order.

2.2 Flow's Response

At the outset of its Response, Flow rejected Digicel's assertion that Flow's conduct was anti-competitive and, accordingly, considered Digicel's request for relief to be unfounded and,

therefore, unnecessary. Moreover, Flow argued that involving the Commission in what Flow considers to be a commercial dispute is, in its view, an abuse of process and suggested that the Commission dismiss the Complaint.

More specifically, Flow's Response addressed the following issues:

- i) *The "Cooperation Agreement"*: Flow disputed Digicel's characterization of the Cooperation Agreement. It referred to it as "informal ad hoc arrangement" agreed to via a brief exchange of emails at the 11th hour just before the arrival of Hurricane Irma. Flow suggested that the fact that Digicel was unable to provide a written copy of the agreement is testament to its "ad hoc" nature.
- ii) *"Emergency Agreement" designation*: Flow also disputed Digicel's characterization of the arrangement as an "Emergency Agreement". Flow noted that the use of that term was not explained in the Complaint. Flow went on to suggest that Digicel's network design – i.e., the lack of its own secure, robust transmission link between its office in Richmond Hill and the ARCOS-1 cable landing station – was the root cause of Digicel's network outage. Flow claimed the outage was a result of Digicel's poor network design and could or should have been addressed by Digicel from inception, not at the very last possible moment in ad hoc fashion by relying on a competitor (i.e., Flow).
- iii) *Flow-Digicel interconnection*: Flow claimed that Digicel's statement that, on September 10, 2017 when Flow disconnected its backhaul link, Digicel "suddenly lost all international connectivity (voice and data) and all connectivity to Flow" is incorrect and misleading. While Flow acknowledged that it disconnected a single backhaul link between Richmond Hill to the ARCOS-1 landing station, Flow claimed that it did not disconnect, impede or interfere in any way with its local interconnection to Digicel. Flow suggested that if Digicel lost connectivity to Flow's local network, then that was not caused by Flow, but by Digicel's own network design. Flow went on to speculate that the root cause may have been due to Digicel locating its local switch outside of TCI.
- iv) *Flow communication with Digicel during the outage period*: Flow disputed claims made by Digicel regarding certain communications between Digicel and Flow staff following the network outage on September 10 and 11, 2017. Contrary to the portrayal of events included in the Complaint, Flow claimed that its staff worked diligently to find a feasible network sharing arrangement to correct Digicel's network outage and seek approval to implement that arrangement from senior management. Flow indicated that as soon as a suitable network sharing arrangement was determined to be feasible, it would be communicated to Digicel and implemented. Flow claimed that such a solution was identified on September 11, 2017; however, Flow also claimed that Digicel had trouble at its end connecting to the Flow link.
- v) *The duration of the Digicel outage*: In the Complaint, Digicel stated that Flow restored 1 Gb of connectivity to Digicel at around 8:00 am on September 12, 2017. Flow claimed this is incorrect. According to Flow, it restored 2 Gb of connectivity to Digicel

on September 11, 2017 between 4:00 and 6:00 pm. Flow claimed that it assisted Digicel staff resolve technical issues at Digicel's end, so the connection was fully implemented by 8:00 pm September 11, 2017. Consequently, according to Flow, the outage was significantly shorter than implied in the Complaint (i.e., roughly 27 hours versus over 40 hours implied by Digicel). Flow also noted that it restored a further 2 Gb of connectivity to Digicel on September 13, 2017.

- vi) *Formal Settlement Agreement*: Flow noted that the Complaint makes reference to an emergency Order obtained by Digicel from the Supreme Court. In this respect, Flow stated that this order was obtained without notice to Flow and, as such, Flow was not afforded an opportunity to put its position to the Court. In any event, after receiving the Order, Flow stated that a meeting was promptly arranged between the parties, which took place the following day on September 12, 2017. Flow added that it was during this meeting that the terms of a formal Settlement Agreement, which addresses the facility swap, was negotiated and finalized (and then later signed as of September 20, 2017).
- vii) *Digicel's allegations of anti-competitive conduct by Flow*: In its Response, Flow addressed three matters in this regard:
 - a. *Assertion of dominance*: Flow noted that while Digicel claims that Flow is dominant and/or holds SMP in the upstream markets for international connectivity and underground ducting infrastructure in TCI, Flow noted that no evidence in support of this claim was offered. Flow added that, while making this claim, Digicel acknowledged that it is taking steps to construct additional backhaul capacity using underground technology and also offers domestic transmission services in competition with Flow. Flow also pointed out that in Decision 2013-3¹ the Commission determined that the markets for domestic and international private leased services ("DPLCs" and "IPLCs") were sufficiently competitive that "unconditional price deregulation" was warranted. Flow asserted that nothing has changed since Decision 2013-3 was issued that would support Digicel's dominance assertions in its Complaint.
 - b. *The issue of intent*: Flow disagreed with Digicel's assertion that Flow's disconnection of Digicel from the underground backhaul link was deliberate, malicious and intended to harm Digicel. Flow claimed that the disconnection was made in the aftermath of a natural disaster to maintain emergency services to the population at large, as well as maintain a level of service to its own customers, not with the intent to harm Digicel. It added that due to the high call volumes and capacity constraints at the time, Flow needed to take the backhaul fiber link in question back to continue providing critical emergency services for the entire TCI population. Flow also noted that it was also the case that the services provided to Flow's own customers were being degraded during this time. Flow claimed that it was not aware of the impact that the disconnection would have on Digicel's

¹ Telecommunications Decision 2013-3, *Fixed Services Price Regulation Review Decision*, March 27, 2013.

network at the time; however, once it was made aware of the effect, Flow claimed that it took immediate steps to identify a solution to restore connectivity.

- c. *Harm caused by the alleged anti-competitive act:* Setting aside the question of whether or not Flow has SMP in the DPLC and/or IPLC markets, Flow asserted that Digicel has offered no evidence and Flow is not aware of any evidence showing that Digicel was significantly harmed by or that Flow significantly benefitted from the disconnection of the backhaul link (i.e., the alleged anti-competitive act). In Flow’s view, there is no evidence of any “substantial lessening of competition” resulting from Digicel’s temporary network outage. In addition, Flow vehemently denied that it gave any instructions to its staff to advise Digicel customers to switch to Flow due to Digicel’s network outage, as alleged by Digicel.
- viii) *Digicel’s request for relief:* Flow noted that in the Complaint, Digicel is asking the Commission to impose a number of measures, regulations and penalties on Flow "until such time that Digicel is able to fully sustain international connectivity without dependence on Flow's facilities". Flow argued the proposed relief is not justified since the Commission has already determined that the DPLC and IPLC markets are sufficiently competitive to warrant unconditional price deregulation. Therefore, Flow argued that the necessary precondition (i.e., SMP) for the relief requested is not satisfied.
- ix) *An abuse of process:* Lastly, Flow argued that there is no need for the Commission to intervene or introduce new regulations relating to this matter since Digicel and Flow implemented a written agreement for Flow to provide Digicel backhaul capacity for the duration of hurricane season including, if requested by Digicel, to provide the same or similar capacity sharing arrangement to Digicel during the subsequent hurricane season (i.e., 2018). Consequently, Flow claimed that the Complaint is in effect an abuse of process. According to Flow, the agreement at issue was made between “two strong commercial parties” and does not require the Commission’s involvement to initiate or resolve. Flow noted that the dispute at issue arose from a contractual matter that both parties are competent to address jointly through other means. In Flow’s view, the Complaint amounts to an effort by Digicel to involve the Commission in a matter that is not truly regulatory in nature and which should not require the resources of the Commission to fix. Therefore, Flow recommended that the Commission decline to intervene in what is a commercial disagreement between two companies who are perfectly capable, both financially and otherwise, of resolving what is a non-regulatory matter. As also noted by Flow, it considers the matter has already been effectively resolved.

2.3 Digicel’s Reply

In its Reply to Flow’s Response, Digicel claimed that Flow had attempted to exculpate itself from action by the Commission by trivialising the seriousness of its conduct as well as by disputing the need for Commission involvement in the matter at hand, which Digicel considers relate to the reliability of telecommunications in TCI.

While Digicel noted Flow's claim that it disconnected Digicel without notice to ensure customers had continued access to emergency services, the immediate effect of the disconnection was to leave all of Digicel's customers without access to these same critical services. Digicel added that given the scale of the outage, it is perhaps the single most critical incident to have threatened the robustness and reliability of telecommunications in TCI. Consequently, Digicel argued that not only is it entirely within the remit of the Commission to consider the matters in the Complaint, but it is the responsibility of the Commission to take steps to prevent the reoccurrence of such conduct.

In the balance of its Reply, Digicel offered the following comments:

- i) *Access to international connectivity and underground ducting infrastructure*: In response to Flow's arguments that it does not possess SMP with respect to the provision international connectivity and underground ducting infrastructure, Digicel claimed that Flow is, in fact, the sole provider of these services in TCI. Digicel added that it is dependent on these upstream services to provide downstream retail services. Therefore, consistent with the provisions set out in section 28(2)(a) and (c) of Ordinance, Digicel argued that the Commission has the authority to review and intervene in competitive matters in these markets.

Digicel went on to dispute criticisms made by Flow regarding Digicel's network design. It reiterated that Flow is the only provider of international connectivity services and underground ducting infrastructure in TCI and, therefore, Flow was Digicel's sole option to provide underground capacity from the ARCOS-1 cable landing station to Digicel's site on Richmond Hill. In addition, Digicel noted that while Flow did not dispute the existence of the Cooperation Agreement, Digicel considered it "unfortunate" that Flow trivialized its importance by characterizing it as being an "informal ad hoc arrangement" thereby implying that the agreement was one that could be readily set aside. To the contrary, Digicel noted that the express purpose of the agreement was to provide capacity in the event of an operator suffering outages because of a hurricane strike and, therefore, would not be set aside during such an event.

- ii) *Flow's decision to disconnect Digicel on September 10, 2017*: Digicel noted in its Reply that Flow did not dispute that it disconnected Digicel on September 10, 2017 without prior notice. Regarding the specifics of the disconnection, Digicel claimed that Flow's version of the course of events from September 10 to 12, 2017 contain several inconsistencies and misrepresentations. For one, contrary to Flow's claims, Digicel stated that once it reported the outage to Flow on September 10, 2017 there was no further communication with Flow. Second, Digicel disputed Flow's claim that it had restored service by 6:30 pm on September 11, 2017. Digicel claimed the mobile and international connectivity services that were restored at that time were done so by Digicel itself using its own microwave facilities.² Third, Digicel refuted Flow's suggestion the loss of local connectivity in TCI was due to Digicel's own network design or operation issues, but rather the network disconnection initiated by Flow. In this respect, Digicel confirmed that

² In its Reply, Digicel indicated that the Flow transmission link was restored at 3:30 am September 12, 2017, several hours earlier than the 8:00 am time included in the Complaint.

its local switch is in fact located in TCI, contrary to allegations made by Flow that it is located outside of the country and, therefore, may have been the source of the outage.

- iii) *Flow acted recklessly without regard for the welfare of the public*: Digicel noted Flow's claims that it was unaware of the effects of the disconnection would have on Digicel's customers at the time the disconnection was made. However, Digicel stressed that had Flow simply given Digicel prior notice of the intended disconnection, such issues and concerns could have been clarified at the onset. By not doing so, Digicel maintained that Flow acted recklessly and without due regard for the welfare of the public.
- iv) *The issue of harm*: In response to Flow's claims that Digicel offered no evidence of significant harm to Digicel or significant benefit from Flow's conduct, Digicel noted that no such requirement exists under sections 13.4 or 13.5 of Flow's Licence. According to those provisions, for the conduct in question to be considered anti-competitive it need only be "intended to or likely to have the effect of unfairly preventing, restricting or distorting competition" or lead to or "likely to lead to a substantial lessening of competition". That said, Digicel reiterated that it lost connectivity for many of its services for 32,000 customers for various periods of time over the course of September 10 to 12, 2017. As well, according to Digicel, there was a strong likelihood that, if it had not aggressively pursued this matter and approached the courts for relief, Flow's conduct may have continued for as long as it could possibly have been sustained. In Digicel's view, therefore, the question for the Commission to consider is, absent the intervention of the court, whether it was more likely than not that such conduct would have resulted in the prevention, restriction or distortion of competition in any retail market in TCI.
- v) *The Complaint is not an abuse of process*: Lastly, Digicel disagreed with Flow's argument that the Commission need not intervene in this matter since an agreement has already been reached between Digicel and Flow and that the matters raised in the Complaint are exclusively within the commercial remit of the operators. Digicel argued that given Flow's dominance in the markets for international connectivity and underground ducting infrastructure and the likelihood of repeated similar conduct on Flow's behalf in the future, the Commission should investigate and issue a determination of the matters raised in the Complaint. Digicel considers that it is appropriately within the Commission's authority under the Ordinance to do so and, contrary Flow's assertions, not an abuse of process.

2.4 Flow's Further Response

In response to Digicel's Reply, Flow addressed four matters in its Further Response:

- i) *Digicel's claimed dependence on Flow's upstream services*: Flow noted that while Digicel claims in its Reply that it is dependent on Flow upstream services to provide downstream retail services, it also noted that Digicel indicated that it "operates its own aerial fiber and microwave upstream services, in competition with Flow". Flow claimed that Digicel is apparently suggesting that only Flow has invested in underground transmission technology and this outcome is somehow a source of market failure the Commission must address. However, Flow noted that Digicel has stated that it is taking

steps to construct additional backhaul capacity using underground technology. Therefore, Flow reiterated that Digicel's prior decision to forgo investing in underground transmission capacity is not a “market failure or indication of an insurmountable entry barrier”, but rather a reflection of Digicel's own investment priorities.

- ii) *Digicel’s claim that Flow acted recklessly or without regard for the welfare of the public:* Flow argued that Digicel’s claim that in disconnecting Digicel from its fiber transmission facility Flow acted recklessly and without regard for the welfare of the public is patently false and directly contradicted by the facts on record. Flow claimed that the very reason it disconnected Digicel was its concern for the public's and its own customers' welfare. It added that had Digicel designed its network better and made the same investments in the TCI as Flow, then it may have better been able to safeguard the welfare of its own customers.
- iii) *Digicel’s claims regarding the Commission’s powers to intervene:* While Flow did not dispute or question the Commission's powers to intervene where there are legitimate concerns with the reliability of telecommunications in TCI, it nevertheless reiterated that there is no need to do so since the matter at hand is a commercial dispute and one that has already been resolved. Flow also reiterated that it would be an abuse of the Commission's powers to intervene in a matter that is effectively a commercial disagreement between these two companies.
- iv) *Relief requested by Digicel:* Lastly, according to Flow, even if the Commission granted the remedy sought by Digicel from this dispute – i.e., a regulation obligating Flow to share its underground duct network with Digicel – it would not prevent a similar dispute from occurring in the future. Flow indicated that faced with a similar predicament of meeting its obligations to the public and its customers in the case of a national emergency, it would take the same actions as those it took in this case. In other words, in Flow’s view, even if the Commission were to provide the relief requested by Digicel, it would not prevent Flow from effecting a similar disconnection in the future, if doing so was necessary to preserve the access of its own customers to emergency services.

2.5 Digicel’s Further Reply

In its Further Reply, Digicel addressed several issues:

- i) *Flow’s assertions regarding Digicel’s network design:* Digicel noted that in its Further Response Flow continued to criticize Digicel’s network design in an attempt to play down the seriousness of the Complaint. Digicel argued that its network design is immaterial to the Complaint. The fact of the matter in Digicel’s view is that Flow disconnected its network without notice and that disconnection amounted to an abuse of Flow’s market position.
- ii) *The rationale of Flow’s actions:* Digicel also noted that Flow continues to claim that the disconnection was done to ensure the availability of emergency services to the public and its own customers. However, in doing so, Digicel reiterated that it disconnected all Digicel’s customers from having access to the same emergency services. In Digicel’s

view that the Commission should recognize that Digicel's customers represent a large segment of the public and include staff of key organisations who were involved with the provision of relief to the public. Digicel claimed that by deciding to disconnect Digicel without notice, Flow effectively made the decision to prioritise its own customers over Digicel's despite having agreed to provide the capacity to Digicel throughout the hurricane season. Digicel further claimed that Flow had the market power to readily do so knowing that there were no other alternatives available, which Digicel characterized as a "manifestation of unregulated monopolistic conduct by Flow".

- iii) *Flow's intent to comply with the Cooperation Agreement*: Given Flow's rationale for disconnecting Digicel's network link, Digicel questioned once again (as it did so in the Complaint) whether Flow entered into the Cooperation Agreement in good faith. In addition, Digicel reiterated that had Flow given notice of its intention to disconnect Digicel, a reasonable solution could have been implemented from the onset that could have avoided or at least minimized the loss of service to Digicel subscribers. Digicel noted with significant concern Flow's statement in its Further Response that it would take the same action in the future under similar circumstances. Consequently, Digicel emphasized that its Complaint is a matter of significant public importance when an operator (who is the sole operator/provider in a specific market) can unilaterally decide to disconnect large numbers of persons in a time of public emergency. Therefore, according to Digicel, the Commission should reject any arguments which trivialize the Complaint as a simple commercial disagreement and which discourages the Commission from exercising its powers under the Ordinance.

Lastly, Digicel went on to reiterate the matters that it believes the Commission should consider under the Ordinance, Flow's Licence and the Interconnection Regulations arising from Flow's disconnection of Digicel's network on September 10, 2017. Similarly, Digicel also reiterated the relief sought in regard to its Complaint.

3 Matters to be determined by the Commission

The key events relevant to the Complaint that both parties appear to agree on are as follows:

- i) A Cooperation Agreement was established between Digicel and Flow shortly before the arrival of Hurricane Irma, and involved a "swap" of backup transmission facilities involving (a) microwave backhaul capacity from Providenciales to Grand Turk to be made available by Digicel and (b) underground backhaul capacity from Flow's landing station in North West Point to Richmond Hill to be made available by Flow.
- ii) On the day Hurricane Irma hit TCI, September 7, 2017, Digicel migrated its traffic to the underground backhaul link. Several days later in the aftermath of the hurricane, on September 10, 2017, Flow disconnected Digicel from the link. Flow claimed that it disconnected Digicel to maintain the availability of emergency services to the public and its own customers; however, this action also resulted in the widespread loss of service to Digicel's customers.

- iii) The Digicel network outage that resulted from underground backhaul link disconnection occurred around 1:30 pm on September 10, 2017 and continued through to the late afternoon on September 11, 2017, at which time partial restoration was accomplished. Full restoration did not occur until the early morning hours of September 12, 2017. Consequently, Digicel's network outage lasted between 30 hours and 40 hours, when taking into account partial versus full restoration timeframes.

In relation to these events, Digicel argued in the Complaint that Flow's actions were anti-competitive in that they were intended to and/or did, in fact, have the effect of preventing, restricting and/or distorting competition or substantially lessening competition in the retail markets for mobile voice and data services in TCI in breach of sections 13.4 and 13.5 of Flow's Licence.³ In relation to this claim, Digicel argued that Flow is dominant in the provision of international connectivity services, underground backhaul capacity and underground ducting infrastructure in TCI, which are upstream services on which Digicel depends on to provide downstream, retail services in competition with Flow. Therefore, in effect, Digicel argued that Flow's actions amounted to an abuse of dominance.

In the Complaint, Digicel also claimed that Flow's conduct to disconnect Digicel's local interconnectivity was in breach of section 5(3) of the Interconnection Regulations.⁴ This allegation was also framed in the Complaint as a potential abuse of dominance since Flow's decision to disconnect the underground backhaul link being used by Digicel (which disconnection led to, or at was coincident with, the loss of local interconnectivity) was, in Digicel's view, motivated and enabled by Flow's dominant position in the markets in question.

Lastly, the Complaint claims that Flow's actions were reckless and undertaken without regard for the welfare of the public in general at a time when it was most critical for connectivity to be maintained. By failing to give prior notice of the disconnection, Digicel claimed that Flow breached the duty of care implicit in its obligations as an operator of public telecommunications networks in TCI to operate its networks for the benefit of the public. In the Commission's view, this aspect of the Complaint raises issues with respect to emergency preparedness in TCI in times of natural disasters caused by severe weather events.

Therefore, the Commission considers that the following matters arising from the Complaint are within the scope of its authority and should be addressed in this Decision:

- i) Claims that Flow's conduct was anti-competitive in breach of sections 13.4 and 13.5 of Flow's Licence (see Section 4 of this Decision) and the Telecommunications

³ Sections 13.4 and 13.5 of Flow's Licence states:

13.4 The Licensee shall not engage in anti-competitive pricing and other similar practices or any other activities, whether by act or omission, which have; or are intended to or likely to have, the effect of unfairly preventing, restricting or distorting competition in any market for the Licensed Services, as may be further specified in Regulations ...

13.5 Without limiting the generality of Clause 13.4 above, any act or omission which leads, or is likely to lead, to a substantial lessening of competition in the market for any telecommunications network or telecommunications service is prohibited. The Commission will issue Guidelines describing, or may otherwise determine, what constitutes a substantial lessening of competition and the procedures for assessing it.

⁴ Section 5(3) of the Interconnection regulations states:

The duty to interconnect. ... obligates carriers and service providers to refrain from refusing, obstructing or in any way impeding, other than for the grounds set forth in section 22(2) of the Ordinance, as the Commission may determine, and justified in writing, the interconnection of another carrier or service provider entitled to obtain such interconnection.

Competition Guidelines (see Section 5) and, consequently, the Commission should award certain relief requested by Digicel (See Section 6).

- ii) Claims that Flow's conduct was in breach of section 5(3) of the Interconnection Regulations (see Section 7).
- iii) Claims that Flow's conduct was reckless and undertaken without regard for the welfare of the public and, therefore, raises questions regarding emergency preparedness in TCI (see Section 8).

The Commission does not intend to address any other specific accusations regarding specific actions taken or not taken in relation to the execution, operation or interpretation of the Cooperation Agreement as raised in the Complaint and/or related parties' responses and replies.

4 Anti-Competitive Conduct under the Licence

Sections 13.4 and 13.5 of the Licence prohibits acts by the Licensee that have, or are intended or are likely to have the effect of unfairly preventing, restricting or distorting competition (13.4) or which lead or are likely to lead to a substantial lessening of competition (13.5).

It should be remembered that the core of Digicel's complaint was an unplanned, one-time, relatively short-duration outage in the context of a highly disruptive hurricane. Although this outage was unwelcome and prejudicial to Digicel and its customers, the question to be asked is whether it was sufficiently anti-competitive as contemplated by the language of the Licence such that Flow should be condemned and potentially sanctioned for violating its Licence conditions.

Digicel supports its claim that the disconnections were anti-competitive by asserting that certain Digicel subscribers in TCI were approached by persons known to be Flow employees and were advised to switch to Flow because of the service outage on Digicel's network. Flow vehemently denied this claim in its Response. Importantly, Digicel did not provide any evidence of resulting harm to its retail mobile business – e.g., in terms of immediate, short or longer-term market share losses to Flow or reputational harm to Digicel's mobile brand.

In the Commission's view, there is insufficient evidence to support the conclusion that Flow's disconnection of the underground backhaul link provided to Digicel, and the concurrent disconnection of local interconnectivity, was an anti-competitive act. The Commission is not convinced of any negative effect on Digicel's business as a result of these disconnections. Moreover, the context of the disconnections is relevant. They occurred in the immediate aftermath of a Category 5 hurricane, and the connections were restored in relatively short order. Accordingly, the Commission does not consider that Flow's conduct was intended to have, or did have, an effect on Digicel that was sufficiently predatory, exclusionary or disciplinary to qualify as anti-competitive contrary to sections 13.4 and 13.5 of the Licence.

That said, the Commission does not consider that Flow acted reasonably or appropriately when it disconnected Digicel without notice and thereby causing Digicel customers to lose local and international connectivity for well over a full day during a time of national emergency. The Commission addresses this aspect of the Complaint in Section 8 of this Decision below.

5 Anti-Competitive Conduct under the Telecommunications Competition Guidelines

The Commission notes that it recently issued the *Telecommunications Competition Guidelines*⁵ (the “Guidelines”) that provide a framework for assessing anti-competitive conduct and, in particular, abuse of dominance claims. Such assessments typically involve defining the relevant market(s) in question, determining whether a firm(s) is dominant in the market(s) in question and then assessing the actual or likely impacts of the alleged anti-competitive conduct on maintaining or enhancing dominance.

The Guidelines had not been issued when Digicel filed its Complaint in October 2017. It is therefore understandable that neither Digicel nor Flow directly pursued the analytical approach discussed in the Guidelines, although certain of the evidence and argument would inform such an approach were it undertaken. Accordingly, the Commission considers it useful to look to the analytical approach described in the Guidelines in an effort to help assess the anti-competitive conduct claims made by Digicel.

An assessment of this claim, following Section 4 of the Guidelines, involves a three-step process:⁶

- a) defining of the relevant markets in question and determining whether Flow is dominant in those markets;
- b) determining if Flow has engaged in anti-competitive acts; and
- c) determining if the anti-competitive acts maintain or enhance Flow’s dominance.

It should be noted that all three steps must be satisfied before a remedy will be invoked by the Commission. If any one step fails, the finding of abuse of dominance likewise fails.

The Commission does not intend to undertake an exhaustive review of market definition and assessment of dominance. Instead, a somewhat abbreviated view of these issues can be undertaken in this case, as the key determining issue is whether Flow engaged in anticompetitive acts.

5.1 Market Definition

In the Complaint, Digicel lists several “upstream” services, including international connectivity and underground backhaul connectivity services (including access to underground ducting infrastructure), that it relies on to provide downstream, retail services in TCI. Since these services were all affected by Digicel’s network outage, they are all subject to its claim of anti-

⁵ *Telecommunications Competition Guidelines*, November 30, 2017.

⁶ A finding of dominance can also be made under section 16 of the Ordinance, and potentially leading to ex ante regulation under section 17. This is further discussed in Section 2 of the Guidelines. However, Digicel’s complaint focuses on the contravention of sections 13.4 and 13.5 of the Licence, and that is most appropriately addressed under Section 4 of the Guidelines.

competitive conduct. However, no attempt was made in the Complaint or in Digicel's reply comments to provide specific relevant market definitions that include these services.

The Commission notes that in Decision 2013-3, a set of relevant market definitions were established for retail fixed network services offered by Flow.⁷ They included separate relevant markets for retail DPLCs and IPLCs. The Commission considers that underground backhaul connectivity services likely fall within the DLPC market. While underground services may be more reliable than similar aboveground services during a hurricane, they are nevertheless substitutable under normal markets conditions and, therefore, may well be in the same relevant market. The Commission considers that international connectivity services likely fall within the IPLC market, as also acknowledged by Digicel in the Complaint.

The Complaint also refers to access to underground ducting infrastructure, which if offered, would be considered a wholesale rather than retail service. Wholesale services were not considered in the proceeding that led to Decision 2013-3. Therefore, there no assessment of the scope of the relevant market for such wholesale infrastructure or support-structure related services (whether underground or aboveground) was conducted. That said, in the context of the Complaint, access to underground ducting infrastructure does not form any part of the basis for Digicel's claim of anti-competitive conduct, but instead an element of the request for relief arising from the Complaint. Consequently, for the purposes of this Decision, a market definition pertaining to wholesale infrastructure or, more specifically, the support-structure market associated with the provision of connectivity services, need not be assessed.

Lastly, in the Complaint, Digicel also made reference to the "downstream" retail mobile voice and data services as being the market in which it suffered harm from the alleged anti-competitive conduct. In Decision 2013-3, the Commission concluded that the relevant market for fixed access and calling services did not include mobile voice services. For the purposes of this Decision, the Commission considers that it can likely continue to rely on that conclusion. Consequently, for now, the retail market for mobile voice and data services can be considered as a separate relevant market. As shown below, this assumption does not affect the Commission's conclusions regarding Digicel's claims of anti-competitive conduct in any event.

5.2 Market Dominance

In the Complaint, Digicel claims that Flow is dominant in the provision of international connectivity services and underground ducting infrastructure. In support of these claims, Digicel states that Flow is the sole provider in TCI of underground backhaul connectivity and underground ducting infrastructure and that Digicel depends on Flow for international connectivity. At the same time, it acknowledged that it owns and operates aboveground wireline and wireless microwave transmission facilities in TCI through which it self-supplies domestic backhaul connectivity. It also indicated that it is currently in the process of establishing an international subsea link with TCI and constructing its own dark fiber network with the objective of eliminating all dependence on Flow's international network and facilities. Consequently, the

⁷ At the time operating as LIME.

evidence that Digicel offered in support of its dominance claims is contradictory and, in the Commission's view, not persuasive.

As noted above, underground backhaul connectivity services likely fall into the DPLC market and international connectivity services likely fall into the IPLC market. As a condition of licence Flow was designated as dominant in these two markets. While these designations were reconsidered in the proceeding that led to Decision 2013-3, they were left unchanged by the Commission. That said, as pointed out by Flow, in Decision 2013-3 the Commission nevertheless decided to forbear unconditionally from regulating the prices of DPLC and IPLC services given the market data and information available at that time. For the purposes of this Decision, however, the Commission considers that Flow's dominance designations in these two relevant markets continue to apply.

As noted above, the Commission considers it unnecessary for the purpose of this Decision to develop a market definition pertaining to wholesale connectivity-related infrastructure or support structures in TCI (including above and underground technologies). And no assessment of whether Flow is dominant in such a market is necessary for the purposes of the Commission's determinations on the Complaint.

Lastly, as to the downstream retail market for mobile voice and data services, in which Digicel alleged suffered harm from Flow's actions, no assessment of dominance was offered by Digicel in its Complaint – including whether or not Digicel itself is dominant, Flow is dominant or Digicel and Flow are jointly dominant in the market for mobile voice and data services. In any event, for the purposes of this Decision, such an assessment is unnecessary since the conclusions reached by the Commission below are not dependent on the results of such an assessment.

5.3 Assessment under the Guidelines

As noted above, making a claim of abuse of dominance requires evidence that the dominant party engaged in anti-competitive acts. As explained in the discussion of Flow's actions under sections 13.4 and 13.5 of the Licence, the Commission does not consider that Flow's conduct was intended to have, or did have, an effect on Digicel that was sufficiently predatory, exclusionary or disciplinary to qualify as anti-competitive contrary to those sections of the Licence. The same reasoning applies when looking at anti-competitive acts under the Guidelines. Accordingly, Digicel's claim would not prevail. There is no need to consider the next step in an abuse of dominance assessment namely whether the anti-competitive acts by the dominant party lead to the maintenance or enhancement of its dominant position.

6 Relief Sought by Digicel for Anti-competitive Conduct

Based on the claims of Flow's dominance and anti-competitive conduct, Digicel asked that the Commission implement the following remedies:

- i) Amend Flow's Licence to include the obligation to provide underground backhaul connectivity and access to its underground network on terms and conditions that are no less favourable than the terms and conditions by which Flow provides such access to its own business units or affiliates.

- ii) Order Flow to enter into an agreement with Digicel to provide access to its underground ducting infrastructure on terms and conditions that are no less favourable than the terms and conditions by which Flow provides such access to its own business units or affiliates. The Agreement shall include mandatory penalty clauses in the event of breach by Flow and should be executed within fourteen days of the date of the Commission's order.

As indicated above, the Commission does not consider that Digicel established that Flow's conduct was anti-competitive contrary to sections 13.4 and 13.5 of the Licence. Hence the Commission does not agree to impose the relief sought by Digicel.

That said, Digicel and Flow have taken steps to address some aspects of the relief sought by Digicel. The Settlement Agreement, as executed on September 20, 2017, demonstrates that Digicel and Flow have been able to reach a commercial agreement on some aspects of the services requested by Digicel. Moreover, Flow indicated that it is willing to provide to Digicel during subsequent hurricane seasons the capacity sharing described in the Settlement Agreement.

The Commission also notes that in the coming months it intends to review the forbearance conditions set out in Decision 2013-3 (the "Forbearance Review"). This review will involve a reconsideration of the rationale for and ongoing appropriateness of the current regulatory treatment of Flow's retail fixed network services. It will also include reconsideration of the relevant market definitions, market power assessment and, where necessary, *ex ante* regulatory measures. The Commission's previous decision to forbear unconditionally from regulating DPLC and IPLC services will be reconsidered as part of that process. While the Commission has been collecting market data on all fixed markets in TCI in anticipation of the Forbearance Review, parties will have an opportunity to provide additional evidence to either support the introduction of *ex ante* regulatory measures or maintain the status quo. Consequently, while the Commission does not consider that any regulatory measures are necessary with respect to Flow's DPLC and IPLC services as a result of the Complaint, new *ex ante* measures may be considered in the context of the forthcoming more comprehensive review and assessment of these markets in the context of the forthcoming Forbearance Review.

In addition, the Commission reminds the parties that a carrier has the ability to seek access to the telecommunications facilities of another carrier as contemplated under Part VII of the Interconnection Regulations. Section 20 of the Interconnection Regulations states:

20. (1) A carrier shall provide other carriers with access to all telecommunications facilities that it owns or controls on a timely basis, with such access not to be unreasonably withheld, as may be further determined by the Commission.

(2) A carrier may deny access to telecommunications facilities only for reasons of safety, security, reliability or difficulty of a technical or engineering nature.

To the extent that Digicel requires access to backhaul connectivity and underground ducts of Flow, it may wish to consider whether, and to what extent, an application under Part VII might be appropriate.

7 Breach of the Interconnection Regulations

In the Compliant, Digicel claimed that Flow's disconnection of local connectivity, which occurred at the same time as the underground backhaul disconnection, was in breach of section 5(3) of the Interconnection Regulations. The Commission notes in this regard that neither Digicel nor Flow provided a convincing explanation as to why and how the disconnection of local connectivity occurred. Although the local interconnectivity outage occurred concurrently with the underground backhaul disconnection, it is not clear if the latter solely caused the former, or whether other acts or omissions contributed to the outage.

Section 5(3) of the Interconnection Regulations states as follows:

The duty to interconnect specified in subregulation (1) obligates carriers and service providers to refrain from refusing, obstructing or in any way impeding, other than for the grounds set forth in section 22(2) of the Ordinance, as the Commission may determine, and justified in writing, the interconnection of another carrier or service provider entitled to obtain such interconnection.

Based on the claims and arguments included in the Complaint as well as parties' responses and replies, the Commission is not persuaded that Flow's conduct resulted in a breach of section 5(3) of the Interconnection Regulations.

The Cooperation Agreement involved the "swap" of backhaul facilities – i.e., a point-to-point microwave capacity in Digicel's case and an underground backhaul fiber link in Flow's case. In principle, the facility swap was intended to provide backup backhaul capacity during Hurricane Irma, and therefore it was not technically an interconnection arrangement. Accordingly, to the extent that the failure to provide the agreed-upon backhaul capacity led to the disconnection of local connectivity, this would not necessarily breach Flow's interconnections obligations.

Moreover, the Cooperation Agreement was so short and devoid of specifics that it did not address the circumstance of permitted interruption. Although Digicel believed that no permitted interruption was allowed, Flow took the opposite position. Even if the Cooperation Agreement did encompass interconnection, the Commission is reluctant to find the breach of section 5(3) in such circumstances, especially given the short duration of the disconnection.

It is also unclear if Flow understood that interrupting the backhaul link would lead to the loss of local connectivity for Digicel. Again, absent suitable evidence that Flow intended to curtail Digicel's local interconnectivity, or understood that this would be the likely result of the interruption of the backhaul link, or was willfully blind to this possibility, the Commission is reluctant to find a breach of section 5(3).

Although the Commission does not find a breach of section 5(3), the Commission does agree with Digicel that the impact of the backhaul disconnection on local interconnectivity could have been better managed, and perhaps even avoided, had Flow given Digicel advance notice of the planned disconnection of the backhaul capacity.

8 Emergency Preparedness in TCI

In addition to its claims of anti-competitive conduct, Digicel also asserted that by disconnecting the underground backhaul link provided to Digicel, Flow acted recklessly without regard for the welfare of the public. As well, Digicel asserted that by failing to give prior notice to Digicel, Flow breached the duty of care implicit in its obligations as an operator of public telecommunications networks to operate its networks for the benefit of the public, especially so during severe weather conditions when it was critical that connectivity be maintained for all subscribers in TCI.

The Commission agrees that Flow's failure to give Digicel advance notice of the disconnection of the underground backhaul link provisioned to Digicel was inappropriate and, more importantly, had the effect of putting TCI citizens' safety and security at risk given the state of emergency that existed at the time. While Flow claims it was unaware of the impact the disconnection would have on Digicel's ability to continue to provide service, Flow nonetheless failed to communicate with Digicel in a time of national emergency when doing so was critical to the maintaining communications for the public at large, not just Flow's customers.

Under section 4 of the Ordinance, among other things, the functions of the Commission include:

(e) to set standards for the quality of telecommunications services to be delivered to the public;

(h) to carry out investigations and hold enquiries with respect to any matter in relation to its functions or duties under this Ordinance;

(j) to prescribe standards for the protection of consumers and the public;

The Commission considers that Digicel's network outage caused by Flow's actions when the country was in a state of emergency following the devastating impact of Hurricane Irma highlight the need for more thorough emergency preparedness measures in TCI. The Cooperation Agreement represented an attempt by Digicel and Flow to put in place a commercial backup network capacity arrangement in advance of Hurricane Irma. However, the terms and conditions of the agreement were very limited in nature and, as a consequence, have led to dispute between the parties. As an emergency preparedness aid, the inadequacies of the Cooperation Agreement are readily apparent.

The Commission considers that a more comprehensive Emergency Preparedness Agreement should be implemented between Flow and Digicel. In times of national emergency, it is essential that these two licensees cooperate to help ensure the continuing operation of vital telecommunications networks on which the population relies. With an expected rise in the number and severity of hurricanes in the Caribbean region in the future, inaction, or incomplete ad-hoc arrangements, can no longer be acceptable.

Such an Emergency Preparedness Agreement would address, among other things, cooperative measures to help ensure that emergency communications traffic, regardless of the licensee that originates or terminates the traffic, can continue to be conveyed on a non-discriminatory basis.

The Commission's jurisdiction to require the implementation of such an Emergency Preparedness Agreement derives from section 8.1 of the Licence, the equivalent section 10.1 of Digicel's licence, and section 20 of the Interconnection Regulations.

9 Conclusions and Next Steps

In conclusion, the Commission rejects Digicel's claim that Flow's disconnection of the underground backhaul fiber link under the Cooperation Agreement in the aftermath of Hurricane Irma, and the related local interconnectivity disconnection, was a violation of sections 13.4 and 13.5 of Flow's Licence. It also rejects Digicel's claim that the local interconnectivity disconnection was a breach of section 5(3) of the Interconnection Regulations. Consequently, the Commission denies Digicel's requested relief related to these claims.

As noted above, in the coming months, the Commission it intends to review the forbearance conditions set out in Decision 2013-3. The Forbearance Review will provide an opportunity to reconsider whether any *ex ante* regulatory measures may be necessary with respect to Flow's DPLC and IPLC services based on more comprehensive market data and information. It is possible that through that process, certain elements of the relief requested by Digicel could be addressed.

Digicel may also want to consider its ability to seek access to Flow's telecommunications facilities under Part VII of the Interconnection Regulations.

The Commission considers that the network outage suffered by Digicel in the aftermath of Hurricane Irma highlights the need for a more formal and comprehensive emergency preparedness plan in TCI. Therefore, the Commission directs Digicel and Flow to jointly develop an Emergency Preparedness Agreement that encompasses a telecommunications network capacity backup plan, together with implementation measures, that would be in place in times of national emergencies, including those resulting from severe weather events. The Commission, therefore, directs Digicel and Flow to submit a draft Emergency Preparedness Agreement to the Commission for approval within 45 days of this Decision.

In the event that the parties are not able to develop a mutually acceptable draft Emergency Preparedness Agreement within 45 days, the Commission directs the parties to each file a report explaining the status of the negotiations on the agreement, the issues that have been settled and the issues that remain outstanding. The Commission will then decide on what further process should occur to finalize an Emergency Preparedness Agreement.