



**Review of Flow's Fixed Regulated Services  
Consultation Document**

issued by the

**Turks and Caicos Islands  
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# 1 Introduction

With this Consultation Document, the Turks and Caicos Islands Telecommunications Commission (the “Commission”) is initiating its third consultation process to review and, as necessary, establish a new price regulation regime to be applied to fixed services<sup>1</sup> provided by Cable & Wireless (Turks & Caicos Islands) Limited (referred to herein as “Flow”).

In January 2006, as part of the liberalization process in the telecommunications sector in Turks & Caicos Islands (“TCI”), Flow was granted a new, non-exclusive Telecommunications and Spectrum Licence (“2006 Licence”) that, among other things, included an “Initial Price Cap Regime” applicable to its fixed services for which it was deemed dominant. The Initial Price Cap Regime<sup>2</sup> was in effect from January 2006 to March 2009.

In September 2008, the Commission initiated its first consultation process to review the Initial Price Cap Regime. As a result of that consultation process, in February 2009 the Commission issued Telecommunications Decision 2009-4, *Decision on the Second Price Cap Regime* which established a new price cap regime<sup>3</sup> for Flow’s fixed services. The Second Price Cap Regime was in effect from April 2009 to March 2013.

In January 2013, the Commission initiated its second consultation process to review the Second Price Cap Regime. As a result of that consultation process, in March 2013 the Commission issued Telecommunications Decision 2013-3, *Fixed Services Price Regulation Review Decision* (“Decision 2013-3”). This decision represented the Commission’s first application of the forbearance provisions included in the *Telecommunications Ordinance 2009* (the “Ordinance”) and was reflective of the changes in the telecommunications sector in TCI since 2006. Under Decision 2013-3, the Commission forbore from *ex-ante* price regulation of most of Flow’s fixed regulated services,<sup>4</sup> subject to the following three conditions (the “2013 Forbearance Conditions”):

- i) Flow was required to provide a stand-alone (basic) residential fixed access service with a price cap of \$20 per month (with the associated installation fee also capped at the March 2013 rate level);

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<sup>1</sup> These include: i) residential access at a fixed location; ii) business access at a fixed location; iii) domestic calling from a fixed location; iv) international calling from a fixed location; v) domestic private leased circuits; and vi) international private leased circuits.

<sup>2</sup> The Initial Price Cap Regime was a simplified form of price caps regulation. It did not have a grouping of services in baskets nor did it have an explicit productivity factor. Rather, it only included a service-by-service price increase mechanism based on a measure of inflation.

<sup>3</sup> The Second Price Cap regime was a traditional form of incentive price caps regulation including elements such as productivity and inflation factors and multi-service baskets.

<sup>4</sup> Decision 2013-3 forbore unconditionally with respect to the *ex-ante* price regulation of all other fixed regulated services, including bundles that include fixed services.

- ii) Flow was required to provide a stand-alone (basic) business fixed access service with a price cap of \$45 per month (with the associated installation fee also capped at the March 2013 rate level); and
- iii) Flow was required to provide stand-alone (basic) domestic fixed calling services with a 15¢/minute price cap for fixed-to-fixed (“FTF”) calls and a 30.75¢/minute price cap for fixed-to-mobile (“FTM”) calls.<sup>5</sup>

These 2013 Forbearance Conditions came into effect in July 2013 and remain in effect at this time.

The Commission indicated that it would review Decision 2013-13 after a period of four years. As a first step for this review, the Commission undertook a comprehensive market data and collection exercise to assist with its review of fixed service markets in TCI. The second step is this present consultation process – effectively the Commission’s third consultation process on Flow’s fixed services – which is intended to seek interested parties’ input on the Commission’s preliminary market assessment findings and proposed regulatory safeguards applicable to Flow’s fixed services.

## **1.1 Market Data and Information Collection**

For the purpose of conducting the present review of fixed service markets in TCI, the Commission collected market data and information from internal as well as publicly available third-party sources. In addition, the Commission collected market data and information directly from Flow and other licensed operators in TCI, including Andrew’s Communications Ltd. (“ACL”) and Digicel (TCI) Ltd (“Digicel”). In this respect, the Commission issued three sets of Requests for Information (“RFIs”) to collect data relevant to its fixed services market assessment.

- i) **First Round RFIs**, issued in September 2016 to Flow, ACL and Digicel, asked respondents to provide historical data on fixed service revenues and volumes as well as Internet, mobile and wholesale services, as applicable, for the fiscal years 2012-13 to 2015-16. In addition, the RFIs asked respondents to provide information on price trends, promotions and innovations and, more generally, the state of rivalry or competition in each of these markets. Responses were received from all three operators.<sup>6</sup>

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<sup>5</sup> The latter FTM price cap was also subject to further mandated “flow-through” reductions when the Commission determined that the price cap on domestic network interconnection rates be reduced. In this regard, in Telecommunications Decision 2014-4, *Decision on the Review of Interconnection Rates*, issued 20 June 2014, the Commission decided that the price cap on domestic network interconnection rates would be reduced in stepwise fashion over three years. As a result, the price cap on stand-alone (basic) FTM calls was reduced in lockstep and, accordingly, the FTM price cap was reduced from 30.75¢/minute to \$0.2975/minute as of 1 July 2014, \$0.2900/minute as of 1 April 2015 and 28.25¢/minute as of 1 April 2016, where it stands at this time.

<sup>6</sup> The Commission notes that while respondents provided the requested historical service revenue and volume data, no information was provided on price trends, promotions and innovations or the state of rivalry or competition.

- ii) **Second Round RFIs**, issued in December 2017, asked the same respondents to provide updated historical data, including fiscal year 2016-17 and first-half of fiscal year 2017-18. In the request, parties were also asked to provide initial comments, if any, on the price regulation approach included in Decision 2013-3. Responses to the data update request were received from all three operators, but only Flow provided comments on Decision 2013-3 (“Flow’s Initial Comments”).
- iii) **Third Round RFIs**, issued November 2018 to the same three parties, asked respondents to provide updated historical data, in this case including fiscal year 2017-18 and first-half fiscal year 2018-19. In the request, parties were also asked to provide initial or further comments, if any, on the price regulation approach included in Decision 2013-3. Responses to the data update request were received from Flow and Digicel, but not ACL. No further comments on the Decision 2013-3 were provided.

The Commission has made use of the market data and information provided in the RFI responses as well as Flow’s Initial Comments to prepare this Consultation Document. The Commission urges interested parties to provide whatever additional market data and information they consider to be relevant to the review of Decision 2013-3 with their responses to this Consultation Document.

## **1.2 Public Consultation Process**

Pursuant to the *Telecommunications (Administrative Procedure) Regulations 2008* (the "Administrative Regulations"), the Commission is initiating the present consultation process to seek comment on the proposed price regulation approach to be applied to Flow’s fixed services in TCI. The Commission notes that it has engaged the services of external consultants<sup>7</sup> to assist it with the preparation of this Consultation Document and, more generally, the present Decision 2013-3 review process.

This Consultation Document, along with all referenced Government and Commission documents, is available on the Commission’s website at <http://www.telecommission.tc>. Respondents who wish to provide comments on this Consultation Document are invited to submit their responses in writing to the Commission. Responses should also be submitted in electronic form to facilitate further distribution and posting on the Commission’s website.

Given the nature of the issues at hand, the Commission has included two phases in the current consultation process – comments and reply comments. It should be noted that reply comments should be strictly limited to responses to other interested parties’ comments and/or proposals. The filing deadlines for interested parties’ (“Respondents”) comments and reply comments (“Responses”) on this Consultation Document are:

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<sup>7</sup> By way of background, these are the same external consultants that assisted the Commission in the first and second periodic review processes.

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- **Comments:** no later than 4:30 p.m. local time on **Monday, March 25, 2019.**
- **Reply Comments:** no later than 4:30 p.m. local time on **Monday, April 8, 2019.**

Responses must be submitted to the following addresses:

- a) E-mail to: [consultations@tcitelecommission.tc](mailto:consultations@tcitelecommission.tc)
- b) Delivery (paper and electronic copy) by hand or by courier to:

Mr. Kenva Williams  
Acting Director General  
Turks and Caicos Islands Telecommunications Commission  
Business Solutions Complex, Leeward Highway  
Providenciales,  
Turks and Caicos Islands

The Commission welcomes all Responses to this Consultation Document. The Commission invites Respondents to provide responses to the specific numbered questions (the “Consultation Questions”) and any other issues Respondents consider relevant. Respondents are requested to indicate the number of the Consultation Question(s) to which each comment relates. Respondents are not required to comment on all Consultation Questions. The Commission is under no obligation to adopt the views or proposals of any Respondent.

The Commission encourages Respondents to support all Responses with relevant data, analysis, and information based on the TCI market conditions and/or experience of other countries. The Commission may give greater weight to Responses supported by appropriate evidence.

Copies of all submissions filed by Respondents in relation to this Consultation Document will be published on the Commission’s website (<http://www.telecommission.tc>). With a view to having as open a public consultation process as practical, the Commission encourages Respondents to structure their Responses not to include any confidential information. If necessary, Respondents may submit Responses that include claimed confidential information in the form of two Responses:

- **Redacted Responses** in which any claimed confidential information would be excluded or blacked out. The other comments and information, not claimed as confidential, would be included in this version. This is the public version Response that would be posted on the Commission website.
- **Confidential Responses** would be identical to the Redacted Response except that it would include the claimed confidential information for the use of the Commission. The Confidential Response would be retained in strict confidence by the Commission and, therefore, not be posted on the Commission website or otherwise shared with the public in any way.

Claims of confidentiality will be determined by the Commission on a case-by-case basis, and in compliance with the requirements set out in Section 19 of the Administrative Regulations.

Table 1 summarizes the expected timeline for this consultation process and the related Commission decision.

<b>Table 1 – Consultation and Decision Process Timeline</b>	
<b>Event</b>	<b>Date</b>
First Round RFIs	September 20, 2016
Responses	November 2016 – February 2017
Second Round RFIs	December 8, 2017
Responses	January – February, 2018
Third Round RFIs	November 14, 2018
Responses	December 2018
Commission Consultation Document	February 22, 2019
Initial Comments	March 25, 2019
Reply Comments	April 8, 2019
Commission Decision Document	Second Quarter, 2019
Implementation	Second Quarter, 2019

## **2 Legal and Regulatory Framework**

### **2.1 Background**

Section 2 of the Ordinance defines a “dominant” licensee as one that “enjoys, either individually or jointly with others, a position of economic strength that enables it to behave independently of competitors and customers in any relevant market for telecommunications services”. Annexes A and B of Flow’s 2006 Licence designate Flow as dominant in the provision of fixed services, including domestic and international telephone as well as leased line services.

Section 17 of the Ordinance provides the Commission with the authority to establish a series of licence conditions for a dominant licensee, including regulating the operations and service prices of the licensee. Further, Section 27(2) sets out the general conditions under which the Commission may establish “rates regulation regimes” and Section 27(3) sets out specifically that the Commission shall design an “incentive-based rates setting mechanism” in instances where the Commission finds that a provider is dominant in the provision of a service. Section 27(4) sets out that the Commission shall establish, monitor and ensure compliance with the regime set out in Section 27(3). Sections 27(5) to 27(12) set out further provisions relating to the details of any price regulation regime established by the Commission.

Sections 3 to 7 inclusive of the *Telecommunications Pricing Regulations 2005* (the "Pricing Regulations") provide further direction on the specific form and details of any incentive-based rates-setting mechanism, as referred to in Section 27(4) of the Ordinance that may be established by the Commission. More specifically, the Pricing Regulations set out the details of a price cap-based rates-setting mechanism.



While the Ordinance provides the Commission the power and authority to impose a price regulations on a dominant licensee, it also provides the Commission with the ability to relax or entirely lift such constraints where warranted. Specifically, Section 29 of the Ordinance provides the Commission with the authority to forbear from the imposition of *ex ante* regulations where it finds “as a question of fact” that such forbearance would be consistent with the TCI telecommunications policy objectives and that the service(s) in question “is or will be subject to competition sufficient to protect the interests of users”.

It should be noted as well that Section 16 of the Ordinance sets out the process for the Commission to make a “dominance” determination for a particular licensee. The Commission has not, however, to date made such a determination. Flow was designated dominant with respect to its fixed network and services by the Government at the time its 2006 Licence was issued. Section 16(3) of the Ordinance provides the Commission with the authority to review a licensee's dominance designation for a service or group of services and, if found appropriate, revoke the applicable dominance designation(s).

## **2.2 Telecommunications Competition Guidelines**

With a view to supplementing the legal and regulatory framework in TCI, in November 2017 the Commission issued the *Telecommunications Competition Guidelines* (the “Guidelines”). The Guidelines provide assessment frameworks for both dominance and forbearance reviews. In both cases, a similar market assessment exercise is required that consists of two elements: (i) defining of the relevant market(s) in question and (ii) assessing of the nature and extent of competition in the defined relevant market(s) to determine if a licensee is dominant.

The Guidelines also provide specific criteria that can be used for each of these elements of a market assessment. Where market dominance is found to exist in a given relevant market, the Guidelines also provide criteria to determine the need for and appropriateness of *ex-ante* remedies or, alternatively, forbearance in whole or part and on a conditional or unconditional basis. In addition, in the case of an operator (such as Flow) that has previously been designated as dominant in a relevant market, if it is found to no longer be dominant, then its dominance designation could be revoked. The Guidelines provide the criteria for conducting such an exercise.

## **2.3 Forbearance versus Dominance Review**

In 2012, Flow filed an application with the Commission, pursuant to section 16 of the Ordinance, requesting that it be declared non-dominant with respect to the provision of all fixed services. In response, the Commission conducted a public consultation process that included a market assessment of fixed services markets in TCI and that process ultimately led to Decision 2013-3. However, rather than conduct a dominance review under section 16 of the Ordinance (as proposed by Flow), the Commission opted instead for a forbearance review of fixed services



under section 29 of the Ordinance.<sup>8</sup> Given the process followed, it is important to note that Decision 2013-3 did not alter or revoke Flow's existing dominance designations with respect to fixed services as set out in its licence.

The Guidelines include a set of considerations that can be used to determine whether a forbearance or dominance review process is preferable in a case at hand.<sup>9</sup> These considerations include: (i) relative flexibility offered under a forbearance versus dominance framework; (ii) potential risks associated with reliance on *ex-post* safeguards (as may be necessitated by a non-dominance approach); (iii) market data availability and (iv) expected market trends, among any other considerations that may be deemed relevant.

After taking these considerations into account, the Commission continues to be of the view that a forbearance review is the appropriate approach to follow for the present review of the price regulation approach established in Decision 2013-3. It offers greater flexibility and eliminates risks associated with potential reliance on *ex-post* safeguards. More importantly, based on current market data and information as well as expected market trends, the Commission's preliminary market assessments described below suggest that Flow's dominance designations remain necessary and appropriate in any event. In other words, the Commission considers that there is no reasonable basis to justify or warrant revocation of Flow's existing dominance designations at this time. The basis for this preliminary view is set out in Section 4.2 below.

## **2.4 Forbearance Framework**

As noted in the Guidelines, the Commission can proceed in two ways in relation to make a forbearance determination:

- Section 29(1) provides the Commission with a **policy basis** for a forbearance determination – i.e., any decision to forbear must be consistent with the objectives included in the *Telecommunications Policy* 2013 (the "Policy").
- Section 29(2) provides a **market-competition basis** for a forbearance determination – i.e., sufficient competition to protect the interests of users must be found to exist for the service(s) in question.
- In both cases, section 29(3) requires that forbearance (whether in whole or part and conditional or unconditional) must not be likely to impair unduly the establishment or continuance of a competitive market for the service(s) in question.

For a policy-based forbearance assessment, the Commission would take into account the Policy and other Government or Commission policy pronouncements, international best practices and the following objectives that are referenced in section 4 of the Ordinance:

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<sup>8</sup> The rationale for following a forbearance rather than dominance review of Flow's fixed services is discussed in Decision 2013-3, Section 2.1.

<sup>9</sup> Guidelines, Section 3.3.4.

- to respect the principle of technological neutrality;
- to facilitate, maintain and promote effective and sustainable competition; and
- to promote the interests of consumers and to encourage licensees to operate efficiently.

For a market-based forbearance assessment, the Commission would follow the two-part market assessment framework set out in the Guidelines involving (i) the definition of the relevant market(s) in question and (ii) the assessment of the nature and extent of competition in the defined relevant market(s).

In the case at hand, the Commission has relied on both approaches to review the price regulation approach to be applied to Flow's fixed regulated services, using the Decision 2013-3 approach as a conceptual starting point.

## **2.5 Decision on Digicel's Anti-Competitive Conduct Complaint**

Also of relevance to the present consultation process is Decision Notice 2018-6, issued by the Commission 26 October 2018, on Digicel's complaint, dated 31 October 2017, regarding certain alleged anti-competitive conduct by Flow arising from Hurricane Irma ("Digicel's Complaint"). In Decision Notice 2018-6, the Commission concluded that Digicel's claims of alleged anti-competitive conduct by Flow set out in its Complaint were unfounded. In its Complaint, Digicel also claimed that Flow is dominant in the provision of certain fixed services and facilities, specifically including international connectivity services, domestic underground backhaul connectivity services and access to underground ducting infrastructure. As a consequence, Digicel proposed that Flow be subject to *ex-ante* regulation with respect to the provision of or access to of these services and facilities.<sup>10</sup> In the Decision 2018-6, the Commission deferred consideration of Digicel's *ex-ante* regulatory proposals with respect to these services and facilities to the present review of Decision 2013-3, so they could be reviewed and assessed in context with all of Flow's fixed services for which it is designated as dominant. Digicel's specific claims and proposals as set out in its Complaint are addressed in sub-section 4.1.2 below.

## **3 Preliminary Market-Based Forbearance Assessment**

As noted, a forbearance assessment can be policy-based and/or market-competition based. The Commission follows both approaches in this Consultation Document. The market-based forbearance assessment is addressed first in what follows and the policy-based forbearance assessment is addressed second further below in Section 4.3.

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<sup>10</sup> For example, mandated access to such services or facilities 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.

As also noted, a market-based forbearance assessment involves two elements – the definition of relevant markets in question and the assessment competition in those markets. The following sub-sections address each of these two elements of the market-competition based forbearance assessment.

## **3.1 Proposed Relevant Markets**

### **3.1.1 Relevant Market Definition Criteria**

As set out in the Guidelines, the definition of a relevant market definition should take into account the product and geographic dimensions of a market in question, including in the former case the users of the product (e.g., residential versus business and retail versus wholesale). In determining the scope of a relevant market, the Guidelines indicate that the following factors may be considered:

- i) demand-side substitutability in order to determine the extent to which users may substitute other available products for the those under specific consideration; and
- ii) supply-side substitutability in order to determine the extent to which suppliers are in a position to supply products, in the short term or potentially in the medium to long term, that would be considered by users as potential substitutes to those under consideration.

The Guidelines also indicate that any other factor deemed pertinent to an assessment of substitutability may also be taken into account such as consideration of the smallest group of products and the smallest geographic area in relation to which a provider could potentially impose and profitably maintain a small but significant non-transitory increase in price (i.e., referred to as a “SSNIP” test).

Further, the Guidelines also state that telecommunications sector market analysis experience in other jurisdictions could also be considered as a basis for defining relevant markets in TCI.

### **3.1.2 Proposed Relevant Markets**

In the proceeding leading to Decision 2013-3 the Commission developed a streamlined process that relied in large part on experience in other international jurisdictions.<sup>11</sup> The Commission considers this previous relevant market definition exercise is fully consistent with the Guidelines and, consequently, the resulting fixed service relevant market definitions remain valid today. Therefore, the Commission proposes the same set of six fixed services relevant market definitions established in Decision 2013-3 be used for the present process. Table 2 lists the proposed defined relevant markets and provides a description of the main services covered in

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<sup>11</sup> In addition, the Commission also carried out a detailed substitutability analysis for fixed access and calling market segments to assess whether fixed and mobile access and calling were effective substitutes.

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each case, which includes related vertical and/or ancillary services in some cases. Note that the geographic scope of each defined relevant markets remains TCI-wide or national in scale.

<b>Table 2 – Proposed Defined Relevant Markets</b>		
<b>No.</b>	<b>Relevant Markets</b>	<b>Service Inclusions</b>
<b>1.</b>	Residential Access at a Fixed Location	<ul style="list-style-type: none"> <li>• Standalone (basic) local access (i.e. Residential Direct Exchange Line (“DEL”))</li> <li>• Residential value added services (“VAS”), including services such as caller ID and voice mail (“VM”)</li> <li>• Bundled local access services (including bundled basic local access, VAS and/or domestic and/or international calling services, etc.)</li> <li>• Includes all related services, such as installation, activation or re-connection</li> </ul>
<b>2.</b>	Business Access at a Fixed Location	<ul style="list-style-type: none"> <li>• Standalone or basic single-line local access (e.g., a Business DEL)</li> <li>• Multiline local access (including PBX and Government)</li> <li>• Business VAS</li> <li>• Bundled local access services (e.g., including single-line or multiline local access, VAS and/or domestic and/or international calling services, etc.)</li> <li>• Includes all related services, such as installation, activation or re-connection</li> </ul>
<b>3.</b>	Domestic Calling from a Fixed Location	<ul style="list-style-type: none"> <li>• On-Island and Inter-Island Fixed-to-Fixed (“FTF”) calling (including "on-net" and "off-net" calling)</li> <li>• Domestic Fixed-to-Mobile (“FTM”) calling (including "on-net" and "off-net" calling)</li> </ul>
<b>4.</b>	International Calling from a Fixed Location	<ul style="list-style-type: none"> <li>• International calling – all destinations</li> <li>• International calling card services</li> </ul>
<b>5.</b>	Domestic Private Leased Circuits (“DPLC”)	<ul style="list-style-type: none"> <li>• All DPLC services (i.e., all transmissions speeds and technologies)</li> <li>• Includes all related services, such as installation, activation or re-connection</li> </ul>
<b>6.</b>	International Private Leased Circuits (“IPLC”)	<ul style="list-style-type: none"> <li>• All IPLC services (i.e., all transmissions speeds and technologies)</li> <li>• Includes all related services, such as installation, activation or re-connection</li> </ul>

Several issues relating to this proposed set of relevant market definitions should be further addressed.

First, these proposed market definitions are technology neutral. While Flow’s fixed services are for the most part provided using wireline technology (e.g., copper and fibre), the services could equally be provided using wireless technology. For instance, fixed wireless technology can and is being used in TCI to provide telephony services to customers at fixed locations as well as point-to-point services. In addition, the market definitions are also neutral with respect to transmission technology – e.g., circuit switched, Internet Protocol (IP”) or other transmission protocol. As long as services are effectively and functionally substitutable, they should be considered as part of the same relevant markets, regardless of technology.

Second, and in respect of this same technology neutrality issue, the question of whether mobile and/or over-the-top (“OTT”) voice over IP (“VoIP”) Internet-based services are effective

substitutes for fixed access and calling needs to be revisited. The substitutability of these services with fixed access and calling services was contested in the proceeding that led to Decision 2013-3. In its Initial Comments,<sup>12</sup> Flow claimed that market trends suggest that consumers are increasingly relying on mobile, OTT and, more generally, data services rather than fixed line services for voice communication purposes. In effect, Flow argued that these services are substitutes for fixed access and calling and, therefore, should be included in the same relevant markets as fixed access and calling.

While Flow's position on this issue is noted, for the same reasons set out in Decision 2013-3,<sup>13</sup> the Commission remains of the view that there is no conclusive evidence that mobile and/or OTT services are effective substitutes for fixed access and calling services in TCI at this time. The consumer survey data available in the context of the Decision 2013-3 proceeding suggested that fixed and mobile access and calling services were viewed more so as complements than substitutes by both consumer and business users in TCI. The Commission is of the view that those survey results remain valid today. Recent trends in both fixed and mobile telephony demand and revenues do not, in the Commission's view, provide a compelling basis to reverse this conclusion at this time. Moreover, the Commission is not aware of any other regulator in the region that has declared fixed and mobile access and calling services as being in the same relevant market. Lastly, given the pricing and service functionality differences between OTT and fixed access and calling services, the Commission continues to view them as more complementary than substitute services for fixed access and calling services.

Therefore, for the purposes of the present process, the Commission is of the preliminary view that mobile services should not be included in the same relevant markets as the fixed access and calling services included in Relevant Markets #1 to #4 listed in Table 2. At the same time, however, the Commission appreciates that mobile and OTT services do provide a degree of pricing discipline in fixed access and calling markets, and has taken this into account in its proposed price regulation approach discussed below.

Third, the Commission notes that the relevant market definitions included in Table 2 are primarily intended for retail services, not necessarily wholesale services which were the target Digicel's Complaint. However, there is nothing precluding the sale of these services in some cases to other operators, such as DPLC and IPLC services, in which case they could also be viewed in that context as wholesale or upstream services. In the Commission's view the issue is whether the specific upstream services and facilities identified in Digicel's Complaint – i.e., international connectivity services, domestic underground backhaul connectivity services and access to underground ducting infrastructure – fall into one or more of the relevant markets listed in Table 2 or, alternatively, fall into a different relevant market(s).

In this respect, the Commission is of the preliminary view that international connectivity services fall within the currently defined Relevant Market #6 for IPLC services. In addition, the Commission is of the preliminary view that domestic underground backhaul connectivity falls

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<sup>12</sup> Flow's Initial Comments, page 7.

<sup>13</sup> Decision 2013-3, Section 2.2.

within the currently defined Relevant Market #5 for DPLC services.<sup>14</sup> On the other hand, the Commission does not consider that access to underground ducting infrastructure falls within any of the relevant markets in Table 2. Indeed, the Commission is of the preliminary view that underground ducting infrastructure does not constitute a relevant service market in and of itself,<sup>15</sup> but rather falls within a broader network support structure market, which would include underground facilities of various forms, above-ground pole and tower attachments and possibly other structures. In any event, the Commission's considers that defining and reviewing such a wholesale market is outside the scope of the present review.

With respect to the Commission's above-noted relevant market definition proposals and related discussion, parties are invited to respond to the following question:

**QUESTION 1: Relevant Markets: Do you agree with the Commission's proposed set of defined fixed service relevant markets for forbearance review purposes? If not, explain why not and provide any suggested modifications you consider appropriate with supporting rationale.**

## **3.2 Preliminary Forbearance Assessment Results**

### **3.2.1 Forbearance Assessment Criteria**

The Guidelines provide a set of criteria to assess the nature and extent of competition in a relevant market to determine whether forbearance may be warranted in a relevant market. These criteria include consideration of the following factors:

- i) market-specific data pertaining to the relevant market, including product price, volumes and revenue levels and trends, financial resources and profitability;
- ii) availability of existing and potential competitive alternatives, including those using different technologies and also their scale of operation in terms of supply capacity and geographic coverage;
- iii) market shares or concentration levels and trends as determined by reference to revenues, subscribers or other relevant metrics;
- iv) evidence of rivalrous behaviour in the form of declining prices, vigorous sales and marketing promotions and expanding scope of marketing activities;

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<sup>14</sup> Consistent with first issue noted above, Commission considers that the relevant market for DPLC services should be defined on a technology-neutral basis, encompassing above and below ground connectivity services, including wireless in the former case, since all are substitutable. The fact that underground wireline services may be more reliable during relatively rare extreme weather events does not provide a sufficient basis to establish a separate relevant market for underground backhaul connectivity services.

<sup>15</sup> The Commission's initial view is that underground ducting does not fall into relevant market for DPLC services since it does not provide a connectivity service, but rather a network support structure.

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- v) consumer and technological trends affecting the nature and scope of existing and potential competition in the relevant market;
- vi) barriers to entry, including those of a financial, technical, regulatory nature that may have the effect of limiting entry or expansion in the relevant market; and
- vii) any other factors that the Commission considers appropriate.

The Commission notes these criteria are consistent with those used in the context of Decision 2013-3. Consequently, the Commission intends to use largely the same criteria for the present context. A summary of the proposed market-based forbearance assessment criteria is provided in Table 3.<sup>16</sup>

No.	Test Criteria	Description & Relevance
1.	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Consideration of historical volume, price and revenue data for fixed services included in the relevant market in question</li> <li>• Consideration of historical financial performance</li> <li>• <i>Relevance: Evidence of declining trends for one or more of these factors would be supportive of forbearance</i></li> </ul>
2.	Competitive Alternatives (including evidence of rivalrous behaviour)	<ul style="list-style-type: none"> <li>• Identification of all existing and potential substitutes or alternatives by technology: wireline, fixed wireless and mobile wireless (as may be applicable)</li> <li>• Including in each case, service coverage, supply capacity and alternative pricing information (as may be applicable)</li> <li>• Evidence of falling prices, vigorous marketing activities and an expanding scope of activities by existing or potential competitors</li> <li>• <i>Relevance: Significant evidence of competitive alternatives and rivalrous behaviour would be supportive of forbearance</i></li> </ul>
3.	Market Shares	<ul style="list-style-type: none"> <li>• Estimation of revenue and/or volume-based market shares (where possible)</li> <li>• <i>Relevance: Low or declining market share would be supportive of forbearance; however, high market share in and of itself would not preclude forbearance</i></li> </ul>
4.	Market/Sector Trends	<ul style="list-style-type: none"> <li>• Consideration consumer behaviour and usage trends and technological changes affecting the nature and scope of existing and potential competition</li> <li>• <i>Relevance: Evidence of market and technology trends in favour of increased competition would be supportive of forbearance</i></li> </ul>

<sup>16</sup> The Commission notes that there are some minor changes to these criteria relative to Decision 2013-3. For instance, the Commission no longer requires Flow to prepare and file periodic Enhanced Allocation Model (“EAM”) results and, therefore, evidence on business segment specific profitability is no longer available and, therefore is not considered herein.

<sup>17</sup> These criteria are not intended to be exhaustive and, therefore, is prepared to consider any other relevant factors suggested by interested parties, assuming corresponding evidence is available as well.



<b>Table 3 – Proposed Market-based Forbearance Assessment Criteria<sup>17</sup></b>		
<b>No.</b>	<b>Test Criteria</b>	<b>Description &amp; Relevance</b>
5.	Barriers to Entry	<ul style="list-style-type: none"> <li>• Identification of any financial, technical or regulatory barriers to market entry or expansion or, more generally, competition</li> <li>• <i>Relevance: Absence of any significant barriers to entry would be supportive of forbearance</i></li> </ul>

### **3.2.2 Preliminary Market-based Forbearance Assessment Results**

To conduct its preliminary market-based forbearance assessment of the six fixed service defined relevant markets under consideration, the Commission has relied on a variety of market data and information, including:

- RFI responses provided by Flow, Digicel and ACL which provide over 5 years of historical subscriber, usage and revenue data for the fixed services in question as well as mobile services (where applicable);
- Flow's Initial Comments;
- Submissions made by Digicel and Flow in relation to Digicel's Anti-Competitive Conduct Complaint;
- Historical financial statements filed with the Commission by Flow and Digicel;
- Market information and announcements sourced from operators' websites and media reports, including information of mergers and acquisitions affecting TCI; and
- General market data and information for the Caribbean region for comparative purposes.

The preliminary results of the Commission's market-based forbearance assessments for each of the six defined relevant markets are provided in the Annex. Much of the market data and information used for this purpose, especially operators' RFI responses and financial statements, is competitively sensitive in nature and, therefore, treated as confidential. As a result, the summary information provided in the Annex is necessarily high-level in nature.

The Commission's preliminary conclusions with respect to each defined relevant market are:

- 1) **Relevant Market #1 - Residential Access at a Fixed Location:** While there is no direct competition in the relevant market for residential fixed access at this time, potential competition from fixed wireless service may emerge and considerable indirect competitive pressure exists from mobile service. Based on currently available market information and trends, the Commission considers on a preliminary basis that forbearance continues to be appropriate on a conditional basis for the relevant market for residential access at a fixed location.

- 2) **Relevant Market #2 - Business Access at a Fixed Location:** Direct competition exists (via Digicel's fixed wireless services) in the business fixed access services relevant market, although it currently appears to be focussed on multiline business customers. Mobile access services likely provide some degree of competitive pricing discipline in this market. Based on currently available market information and trends, the Commission considers on a preliminary basis that forbearance continues to be appropriate on a conditional basis for the relevant market for business access at a fixed location.
- 3) **Relevant Market #3 - Domestic Calling from a Fixed Location:** Direct competition exists (using fixed wireless technology) in the fixed domestic calling relevant market, although it currently appears to be focussed on multiline business customers. Otherwise, there is some degree of competitive pressure from mobile calling service for both residential and business customers. Based on currently available market information and trends, the Commission considers on a preliminary basis that continued forbearance on a conditional basis is appropriate for the relevant market for domestic calling from a fixed location.
- 4) **Relevant Market #4 - International Calling from a Fixed Location:** Direct competition exists (using fixed wireless technology) in the relevant market for international calling from a fixed location, although it currently appears to be on multiline business customers. There is also significant competitive pressure from OTT services and international calling cards as well as indirect competitive pressure from mobile services. Based on currently available market information trends, the Commission considers on a preliminary basis that continued forbearance on an unconditional basis is appropriate for relevant market for international calling from a fixed location.
- 5) **Relevant Market #5 - Domestic Private Leased Lines:** Direct competition exists in the relevant market for DPLC services from Digicel, and Digicel has indicated that it plans to expand its presence in the market. Based on currently available market information and trends, the Commission considers on a preliminary basis that forbearance continues to be appropriate for the relevant market for DPLC services. Based on currently available market information and trends, the Commission considers on a preliminary basis that continued forbearance on an unconditional basis is appropriate for this relevant market.
- 6) **Relevant Market #6 - International Private Leased Lines:** There is no current competitive alternative to Flow in the relevant market for IPLC services; however, Digicel is planning to enter the market in the near term by landing its own subsea fiber in TCI. Based on currently available market information and trends, including imminent new entry, the Commission considers on a preliminary basis that forbearance continues to be appropriate the relevant market for IPLC services. Based on currently available market information and trends, the Commission considers on a preliminary basis that continued forbearance on an unconditional basis is appropriate for this relevant market.

With respect to the Commission's findings and conclusions described in the Annex and summarized above, parties are invited to respond to the following question:

**QUESTION 2: Preliminary Market Assessment Results: Do you agree with the Commission's preliminary market assessment results for each of the six relevant markets listed above and as supported by market assessment evidence provided in the Annex? Please provide your responses separately for each relevant market, as may be applicable, and, in each case, provide supporting rationale for your position, including any additional market data and/or information that you believe the Commission should take into account when assessing the extent of competition in the defined relevant markets in question.**

## **4 Preliminary Forbearance Determination**

Based on the preliminary forbearance assessments, the Commission considers that while forbearance continues to be appropriate for all of Flow's fixed regulated services, certain forbearance conditions remain necessary and appropriate to protect and promote the interest of consumers in certain relevant markets.

In developing its preliminary forbearance determinations and proposals outlined below, the Commission has taken into account Flow's Initial Comments as well as the submissions made in the context of the proceeding leading to Decision 2018-6, which are discussed below.

### **4.1 Parties' Initial Comments and Proposals**

#### **4.1.1 Flow's Initial Comment**

Flow's Initial Comments expressed strong support for the forbearance framework and associated "light touch" regulations established in Decision 2013-3. It suggested that the price regulation approach adopted in Decision 2013-3 helped foster increased investment in telecoms technology and service improvements in TCI over the past five years. In this respect, Flow highlighted several significant fixed and mobile networks investments undertaken in TCI in recent years.<sup>18</sup>

In addition, Flow noted that both it and Digicel have recently invested in network capacity and functionality enhancements in order to become "total communications and entertainment providers", including fixed broadband and subscription TV services. Further, Flow also highlighted some of the new, innovative programming content and interactive TV services currently being made available by itself and Digicel in TCI. In this respect, Flow emphasized the fact that it does not compete with Digicel just for telecommunications customers, but also for

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<sup>18</sup> These included: a) Flow's 2015 \$10 million investment in its TCI fixed network to launch of its "Superfast Broadband" services with download speeds up 48 Mbps; b) Digicel's 2014 acquisition of WIV Cable TV and its sister company TCT, which operates the TCExpress high-speed cable Internet service; c) Digicel's 2014 acquisition of the submarine fibre assets of Caribbean Fibre Holdings, which includes a submarine fibre network with a reach of roughly 3,100 km in the Caribbean region; d) Digicel's recent joint venture with Deep Blue Cable to construct a regional submarine fibre network that will encompass both the Caribbean and the Americas, with 12 landing stations in the Caribbean, including TCI; e) Digicel's recent "digitization agreement" with Cisco, which reportedly will produce significant improvements in Digicel's network and resiliency and f) Flow and Digicel's investments in 4G LTE technology, which made TCI one of the first countries in the Caribbean to launch such mobile services.

subscription TV service customers in the residential, business and hospitality service markets more generally.

In view of the investments and developments in the telecommunications and, more generally, communications markets in TCI, Flow suggested the existing 2013 Forbearance Conditions (i.e. price caps on basic residential and business access services and basic domestic FTF and FTM calling) should be eliminated. Alternatively, Flow added that, if the price caps are retained, then the caps should be set equal to the annual rate of inflation. Flow noted that over the period 2013 to 2017, inflation in TCI was 6.0% in aggregate or, on average, 1.7% per year. Flow suggested that going forward, it should be permitted to increase basic access and calling rates by the annual rate of inflation if it so chooses.

In response, the Commission first acknowledges Flow's support of the Decision 2013-3. Otherwise, the Commission disagrees with Flow's first proposal that the 2013 Forbearance Conditions now be eliminated since, based on its preliminary markets assessments, the Commission considers that conditional forbearance remains appropriate for Flow's residential and business fixed access and domestic calling services (for the reasons set out in the Annex, Tables A1, A2 and A3). That said, the Commission is prepared to consider Flow's alternative proposal that the 2013 Forbearance Conditions, which involve price caps on the on Flow's residential and business basic standalone access services and domestic FTF and FTM call rates, be potentially raised to some degree.

In this respect, the Commission notes that price caps are typically specified using an inflation ("I") minus productivity offset ("X") formula (i.e., "I - X"), where the I factor is normally measured annually as the previous year's change in the Consumer Price Index ("CPI"). Under the 2013 Forbearance Conditions, the applicable price caps were set on the basis that  $X = I$ . This established a set of "nominal" price caps under which prices were capped at their existing 2013 levels. Under Flow's proposal, the applicable price caps would be set on the basis that  $X = 0$ , which would establish "real" price caps under which prices would be allowed to increase up to the annual rate of inflation. Many alternatives exist as well. The X-factor could be to a specific level (based on actual historical or proxied productivity performance) and/or other specific price rules could be also implemented (such as fixed annual or longer-term maximum price increase limits).

As pointed out in Flow's Initial Comments, annual inflation in TCI averaged about 1.7% over the last five years. This has no doubt placed upward pressure on Flow's operating costs. However, Flow provided no evidence on its productivity performance over that same time period, which would have been expected to offset inflation pressures in whole or part. Indeed, given the rapid pace of technological change in the telecommunications sector, some degree of productivity improvement would be expected over time. As well, Flow provided no evidence on relative levels or trends in fixed access or calling prices in the region or, for that matter, price trends for its other non-price capped bundled fixed services. Further, Flow offered no evidence on whether or not the affordability of its basic residential fixed services would be negatively affected if prices were allowed to increase annually as proposed. The Commission notes that there may be justification for raise the current price caps set out under the 2013 Forbearance Conditions; however, Flow offered none in its Initial Comments. This consultation process will provide Flow and other interested parties an opportunity to provide further comments and

evidence on the appropriate forbearance conditions for residential and business basic fixed access and domestic calling services.

Based on its preliminary market assessments, the Commission considers that there two primary options that can be considered as potential forbearance conditions applicable to Relevant Markets #1 to #3 going forward: Option a) would involve implementing a nominal price cap (effectively the status quo) and Option b) would involve implementing a real price cap, along with maximum rate increase constraints as an added consumer safeguard.<sup>19</sup> Note that under Option b), unused price cap headroom could be carried forward into subsequent years.

More specifically, in respect of Relevant Markets #1 to #3, the Commission proposes the following forbearance condition options can be considered for consultation purposes:

### **Relevant Market #1 - Residential Access at a Fixed Location**

- **Option a):** Flow's stand-alone (basic) residential fixed access service would be capped at the current price level of \$20/month.
- **Option b):** Increases in the price of Flow's stand-alone (basic) residential fixed access service price increases would be capped at the annual rate of CPI inflation, subject to the condition that the maximum annual increase in any given year would be limited to \$0.50/month.

### **Relevant Market #2 - Business Access at a Fixed Location**

- **Option a):** Flow's stand-alone (basic) business fixed access service would be capped at the current price level of \$45/month.
- **Option b):** Increases in the price cap applied to Flow's stand-alone (basic) business fixed access service would be set equal to the annual rate of CPI inflation, subject to the condition that the maximum annual increase in the price cap in any given year would be limited to \$1.25/month.

### **Relevant Market #3 – Domestic Calling from a Fixed Location**

- **Option a):** Flow's stand-alone (basic) FTF and FTM call services and would be capped at current price cap levels of \$0.1500/minute and \$0.2825/minute, respectively.
- **Option b):** Increases in the price caps applied to Flow's stand-alone (basic) FTF and FTM call services would be set equal to the annual rate of CPI inflation, subject to condition that the maximum annual increase in the FTF and FTM price caps in any given year would be limited to \$0.005/minute and \$0.010/minute, respectively.

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<sup>19</sup> Note that the maximum rate increase condition is intended to avoid "rate shock" in any one year from cumulated price cap headroom or unusually large increases in annual inflation.

In the case of Flow's FTM rate, the Commission notes that Telecommunications Decision 2014-4, *Decision on the Review of Interconnection Rates*, 20 June 2014, requires Flow to "flow-through" any Commission-directed reductions in the price cap for the domestic Mobile Termination Rate ("MTR") simultaneously to its FTM price cap on a 1 to 1 basis.<sup>20</sup> This existing flow-through requirement would remain in place under any decision resulting from the current process.

**QUESTION 3: Forbearance Condition Options for Relevant Markets #1 to #3: The Commission asks interested parties to provide comments on the suggested forbearance condition options for Flow's residential and business standalone (basic) access services and domestic FTF and FTM call rates which collectively fall in Relevant Markets #1 to #3. All comments and, as may applicable, alternative forbearance condition suggestions should include supporting rationale and evidence.**

#### **4.1.2 Digicel Complaint**

As discussed above, in its Complaint, Digicel argued that Flow was dominant in the provision of international connectivity services, underground backhaul connectivity services and access to underground ducting infrastructure and, consequently, Digicel suggested that Flow should be subject to *ex-ante* regulation with respect to the provision of these services and facilities. Specifically, in its Complaint, Digicel asked the Commission to implement the following *ex-ante* remedies:<sup>21</sup>

- 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.

In Decision 2013-3, while recognizing Flow's dominant status in the DPLC and IPLC service markets (i.e., Relevant Markets #5 and #6), the Commission nevertheless found that it would be appropriate to unconditionally forbear from imposing any *ex-ante* regulations on Flow in these two markets. In its Complaint, Digicel suggested, to the contrary, that specific *ex ante* regulations are necessary. Digicel was provided an opportunity in response to the Third Round RFI process to provide further input on and support for such *ex ante* regulations, but did not do so. All the same, the Commission assumes that Digicel maintains its position that its proposed *ex*

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<sup>20</sup> For instance, a 1.0¢/minute reduction in the MTR price cap would require a simultaneous 1.0¢/minute reduction in Flow's FTM price cap.

<sup>21</sup> Digicel Complaint, page 7.



*ante* regulations remain necessary; therefore, the Commission considers that they should be considered in the current Decision 2013-3 review process.

In this respect, the Commission notes that, in its Complaint, Digicel indicated that its proposed *ex ante* remedies were intended as “interim” measures until it completes construction of its own subsea fiber to Providenciales and associated domestic fiber network. As Digicel indicated, its planned network build would have the effect of removing all dependence on Flow's international and domestic network and facilities.<sup>22</sup> Until these facilities are in place, Digicel's proposed that interim *ex ante* remedies be applied to domestic backhaul connectivity services provisioned using underground facilities (i.e., effectively a sub-segment of the relevant market for DPLC services) and access to Flow's underground ducting infrastructure be mandated. Otherwise, no specific *ex ante* remedy proposal was seemingly made with respect international connectivity or IPLC services.

Therefore, as interpreted by the Commission, Digicel's *ex ante* regulation proposals in its Complaint could be framed in the context of the current process as follows:

- **Relevant Market for DPLC Services:** impose an obligation on Flow to provide underground backhaul fibre connectivity services on a regulated basis (i.e., where the terms and conditions of offer are no less favourable than those by which Flow provides such services to its own business units or affiliates).
- **Relevant Market for Network Support Structures:** impose an obligation on Flow to provide access to its underground ducting infrastructure on a regulated basis (i.e., where the terms and conditions of offer are no less favourable than those by which Flow provides such services to its own business units or affiliates).

In the first case, the Commission is of the preliminary view that the DPLC market remedy proposed by Digicel is unnecessary. An *ex-ante* remedy applied strictly to “underground” DPLC services appears to be too narrowly focussed. Rather than focus DPLC services required for routine, day-to-day domestic connectivity purposes, it focuses instead on “underground” services that would be necessary during extreme weather conditions. In other words, the proposed remedy does not appear to be aimed at addressing dominance concerns per se, but rather emergency preparedness requirements.

The Commission considers that a crucial issue arising from Digicel's Complaint and, more specifically, Digicel's network outage that occurred following Hurricane Irma is the need for a formal Emergency Preparedness Agreement (“EPA”) to be in place in TCI to avoid such outages in the future. Indeed, as a follow-up to Decision Notice 2018-6, Flow and Digicel were directed to jointly prepare and file a draft EPA with the Commission by January of this year; however, as of the date of this Consultation Document a draft EPA is yet to be completed. The Commission considers that it is possible that the EPA, once finalized, may address the concerns raised in Digicel's Complaint and, as a result, eliminate the need for Digicel's DPLC market *ex-ante* remedy.

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<sup>22</sup> Ibid.



In the second case, the Commission considers that Digicel's proposal relating to mandated access to underground ducting infrastructure to be outside the scope of the current proceeding, since it does not apply to fixed service markets covered in Decision 2013-3. A separate exercise would need to be conducted to define and assess the relevant market for network support structures. Further, as noted above, the Commission emphasized in Decision 2018-6 that a carrier has the ability to seek access to the telecommunications facilities of another carrier as contemplated under the Interconnection Regulations and hence to the extent that Digicel requires access to the underground ducts of Flow, where spare capacity exists, it may wish to consider such an application.

Therefore, the Commission is of the preliminary view that unconditional forbearance remains appropriate for both Relevant Markets #5 and #6.

**QUESTION 4: Preliminary Forbearance Determinations for Relevant Markets #5 and #6: Do you agree with the Commission's preliminary forbearance determination with respect to Relevant Market #5 and #6. If not, please explain why not. In addition, please provide any modifications and/or additions you consider warranted along with the supporting rationale and evidence.**

#### **4.1.3 International Calling from a Fixed Location**

Based on its preliminary market assessment discussed above and summarized in the Annex, the Commission is of the preliminary view that there is no reason to alter the existing Decision 2013-3 forbearance determination with respect to the market for International Calling from a Fixed Location, Relevant Market #4. Consequently, on a preliminary basis, the Commission considers that unconditional forbearance remains appropriate in this relevant market.

**QUESTION 5: Preliminary Forbearance Determination for Relevant Market #4: Do you agree with the Commission's preliminary forbearance determination with respect to Relevant Market #4, International Calling from a Fixed Location. If not, please explain why not. In addition, please provide any modifications and/or additions you consider warranted along with the supporting rationale and evidence.**

#### **4.1.4 Summary Preliminary Forbearance Options and Determinations**

Table 4 below provides a summary of the Commission's preliminary forbearance determinations and proposed forbearance conditions. While on a preliminary basis the Commission considers that forbearance conditions should be retained for to Relevant Markets #1, #2 and #3, it is currently undecided as to whether the nominal price caps set under the 2013 Forbearance Conditions should be retained or, alternatively, replaced by real price caps together with other possible pricing safeguards. Otherwise, the Commission considers that the remaining three Relevant Markets could continue to be subject to unconditional forbearance. That said, the Commission also remains open to modifying the proposed forbearance conditions or introducing additional forbearance conditions in any of the six defined relevant markets should a compelling, evidence-based case for doing so be made.

<b>Table 4 – Preliminary Forbearance Determinations</b>			
<b>No.</b>	<b>Relevant Market</b>	<b>Forbearance</b>	<b>Preliminary Forbearance Conditions</b>
<b>1.</b>	Residential Access at a Fixed Location	Conditional price deregulation	Two options considered: (a) nominal price cap approach or (b) real price cap approach, possibly with additional pricing constraints
<b>2.</b>	Business Access at a Fixed Location	Conditional price deregulation	Two options considered: (a) nominal price cap approach or (b) real price cap approach, possibly with additional pricing constraints
<b>3.</b>	Domestic Calling from a Fixed Location	Conditional price deregulation	Two separate options considered for FTF and FTM per minute call rates: (a) nominal price cap or (b) real price cap, possibly with additional constraints, in each case
<b>4.</b>	International Calling from a Fixed Location	Unconditional price deregulation	None
<b>5.</b>	Domestic Private Leased Circuits	Unconditional price deregulation	None
<b>6.</b>	International Private Leased Circuits	Unconditional price deregulation	None

## **4.2 Scope of Forbearance**

The Commission considers that the scope of forbearance determination in the decision resulting from this consultation process would remain the same as set out in Decision 2013-3.

Accordingly, the resulting forbearance determination under Section 29 of the Ordinance would apply to *ex-ante* price-related regulatory provisions for all of Flow's fixed services in the six relevant markets under consideration, with the exception of those services that would continue to be subject to forbearance conditions. The specific *ex-ante* price-related regulatory provisions thereby addressed by the forbearance determination would include: Sections 17(b), 27(2)(a), 27(2)(b) and 27(3) to 27(11) inclusive of the Ordinance and Sections 4, 5, 6 and 7 of the Pricing Regulations.

## **4.3 Policy-Based Forbearance Assessment**

The Commission is of the view that its preliminary forbearance options and determinations set out above would be consistent with the policy-based forbearance provisions set out in Section 29(1) of the Ordinance. Subject to ongoing compliance with the proposed forbearance conditions, the Commission is of preliminary view that:

- the proposed scope and extent of forbearance would be consistent with the telecommunications policy objectives for TCI;
- the fixed services provided by Flow in the defined relevant markets are currently or will be subject to sufficient competition to protect the interests of users; and

- refraining from regulating the fixed services provided by Flow in the defined relevant markets in question would not unduly impair the establishment or continuance of competitive markets for the services in question.

The Commission will, however, conduct an assessment of its final forbearance determination in relation to the policy-based forbearance provisions set out in Section 29(1) of the Ordinance in its Decision resulting from this consultation process.

## **5 Reporting Requirements and Other Matters**

Under Decision 2013-3, most of the previously existing price cap regulation filing requirements were eliminated. However, several ongoing reporting requirements were retained. These include:

- The filing of Flow's annual audited statutory financial statements (which is a condition of licence in any event).
- The filing of an annual Forbearance Compliance letter (on April 1<sup>st</sup> each year) confirming ongoing full compliance with the established Forbearance Conditions, including all service and pricing requirements applicable to standalone (basic) residential and business fixed access services and domestic fixed calling services. The annual Forbearance Compliance letter should also include confirmation of compliance with any flow-through MTR price cap reductions that may have taken place in any given year.

The Commission considers that these filing requirements should be retained going forward.

In addition, the Commission considers that the forbearance determination resulting from this proceeding should remain in effect until it is next reviewed. In this respect, the Commission intends to conduct a review the decision resulting from this proceeding within five years. That said, in accordance with the procedures and filings requirements set out in the Guidelines, parties are permitted to request a forbearance review or, for that matter, a dominance review be conducted at any time.

With respect to these and any other matters deemed relevant to this consultation, parties are invited to respond to the following question:

**QUESTION 6: Other Matters: Do you agree with the Commission's reporting requirement and forbearance review timing proposals? If not, please explain why not. In addition, please provide your comments on any other issues you consider relevant to the Commission's decision in this consultation.**

## Annex – Market Analysis Summaries

<b>Table A1</b>		
<b>Relevant Market #1: Residential Access at a Fixed Location</b>		
<b>No.</b>	<b>Forbearance Test Criteria</b>	<b>Preliminary Assessment</b>
<b>1</b>	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Flow residential fixed access prices constant over last five years</li> <li>• Flow residential fixed access volumes and revenues generally declined over last five years, as in preceding five-year period</li> </ul>
<b>2</b>	Competitive Alternatives (including Rivalrous Behaviour)	<ul style="list-style-type: none"> <li>• No direct residential fixed access service competitive alternatives available</li> <li>• Fixed wireless may become a competitive alternative for residential subscribers in the future (given it is currently available for business subscribers)</li> <li>• Over-the-top (“OTT”) applications over a broadband Internet connection provide a weak competitive alternative (e.g., they do not include a local telephone number or provide accurate location information to emergency service providers)</li> <li>• Mobile not considered an effective substitute in the residential fixed access market, but likely provides some degree of fixed pricing discipline for residential fixed access services</li> </ul>
<b>3</b>	Market Shares	<ul style="list-style-type: none"> <li>• Flow residential fixed access market share in terms of access lines and revenues effectively 100% (excluding any consideration of mobile access services)</li> <li>• No change in level market share over last five years</li> </ul>
<b>4</b>	Market/Sector Trends	<ul style="list-style-type: none"> <li>• In most countries, residential fixed access lines are generally declining, while mobile access increasing – as is also the case in TCI</li> </ul>
<b>5</b>	Barriers to Entry	<ul style="list-style-type: none"> <li>• Financial: high cost of fixed line entry, although wireless technology provides a means to mitigate such costs and cable TV operators have successfully entered this market in other countries using their existing cable network facilities</li> <li>• Technical/Regulatory: absence of local number portability and availability of unbundled local loops</li> </ul>
	<b>Preliminary Conclusion</b>	While there is no direct competition in the relevant market for residential fixed access at this time, potential competition from fixed wireless service may emerge and considerable indirect competitive pressure exists from mobile service. Based on currently available market information and trends, the Commission considers on a preliminary basis that forbearance continues to be appropriate on a conditional basis for the relevant market for residential access at a fixed location.

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<b>Table A2</b>		
<b>Relevant Market #2: Business Access at a Fixed Location</b>		
<b>No.</b>	<b>Forbearance Test Criteria</b>	<b>Preliminary Assessment</b>
<b>1</b>	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Flow single-line business fixed access prices constant over last five years</li> <li>• Flow business fixed access volumes and revenues declined slightly over last five years</li> </ul>
<b>2</b>	Competitive Alternatives (including Rivalrous Behaviour)	<ul style="list-style-type: none"> <li>• Direct competition from Digicel who provides a fixed wireless single-line and multiline alternative</li> <li>• OTT applications over a broadband Internet connection provide a weak competitive alternative (e.g., excludes ability to have a local telephone number and generally not practical for business customer purposes)</li> <li>• Mobile not considered an effective substitute in the business fixed access market, but likely provides some degree of competitive pricing discipline for business fixed access services</li> <li>• No evidence of discounted pricing or promotions provided by Flow or Digicel</li> <li>• Larger businesses and government customers may have a degree of countervailing buying power, especially those who purchase a variety of telecom services (such a fixed access, Internet access, leased circuits and/or mobile services)</li> </ul>
<b>3</b>	Market Shares	<ul style="list-style-type: none"> <li>• Flow business fixed access market share in terms of access lines and revenues relatively high</li> <li>• Flow market shares declining slightly over the last five years</li> </ul>
<b>4</b>	Market/Sector Trends	<ul style="list-style-type: none"> <li>• Business fixed access line growth generally flat or declining slowly in most countries, as is the case in TCI</li> </ul>
<b>5</b>	Barriers to Entry	<ul style="list-style-type: none"> <li>• Financial: high cost of fixed line entry, although wireless provides a means to mitigate such costs as demonstrated by Digicel's entry</li> <li>• Technical/Regulatory: absence of local number portability and availability of unbundled local loops</li> </ul>
	<b>Preliminary Conclusion</b>	<p>Direct competition exists (via Digicel's fixed wireless services) in the business fixed access services relevant market, although it currently appears to be focussed on multiline business customers. Mobile access services likely provide some degree of competitive pricing discipline in this market. Based on currently available market information and trends, the Commission considers on a preliminary basis that forbearance continues to be appropriate on a conditional basis for the relevant market for business access at a fixed location.</p>

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<b>Table A3</b>		
<b>Relevant Market #3: Domestic Calling from a Fixed Location</b>		
<b>No.</b>	<b>Forbearance Test Criteria</b>	<b>Preliminary Assessment</b>
<b>1</b>	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Flow fixed-to-fixed (“FTF”) calling rates constant at 15¢ per minute over last five years</li> <li>• Flow’s fixed-to-mobile (“FTM”) calling rate cap reduced from 31.75¢ to 28.25¢ per minute over last five years as a result of mandated flow-through mobile termination rate reductions<sup>23</sup></li> <li>• Flow’s FTF and FTM call minute volumes and revenues have generally declined over last five years</li> </ul>
<b>2</b>	Competitive Alternatives (including Rivalrous Behaviour)	<ul style="list-style-type: none"> <li>• No existing direct residential fixed calling competitive alternative</li> <li>• Digicel provides a competitive alternative for multiline business customers, but not residential or small business customers at this time</li> <li>• No evidence of discounted pricing or promotions provided by Flow or Digicel</li> <li>• OTT provides at best a weak alternative for domestic calling purposes</li> <li>• Mobile calling provides an indirect competitive alternative – however, effective domestic calling rates available with currently available mobile rate plans are generally higher than those available with fixed line access</li> <li>• On balance, mobile calling likely provides some degree of competitive pricing discipline on fixed domestic call rates</li> </ul>
<b>3</b>	Market Shares	<ul style="list-style-type: none"> <li>• Flow residential fixed domestic calling market share is effectively 100%, and has not changed for years</li> <li>• Flow business fixed domestic calling market share is estimated to be high, but likely declining slightly over time</li> <li>• These market share estimates exclude consideration of mobile calling</li> </ul>
<b>4</b>	Market/Sector Trends	<ul style="list-style-type: none"> <li>• Fixed access domestic calling volumes generally decreasing in most countries, as is the case in TCI</li> </ul>
<b>5</b>	Barriers to Entry	<ul style="list-style-type: none"> <li>• Financial: relatively high cost of entry (although wireless provides a means to mitigate such costs)</li> <li>• Technical/Regulatory: absence of local carrier pre-selection and availability of unbundled local loops</li> </ul>
	<b>Preliminary Conclusion</b>	Direct competition exists (using fixed wireless technology) in the fixed domestic calling relevant market, although it currently appears to be focussed on multiline business customers. Otherwise, there is some degree of competitive pressure from mobile calling service for both residential and business customers. Based on currently available market information and trends, the Commission considers on a preliminary basis that continued forbearance on a conditional basis is appropriate for the relevant market for domestic calling from a fixed location.

<sup>23</sup> Telecommunications Decision 2014 – 4, *Decision on the Review of Interconnection Rates*, June 20, 2014.

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<b>Table A4</b>		
<b>Relevant Market #4: International Calling from a Fixed Location</b>		
<b>No.</b>	<b>Forbearance Test Criteria</b>	<b>Preliminary Assessment</b>
<b>1</b>	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Flow standalone fixed Caribbean region call rates lower, but other international call rates generally constant over last five years</li> <li>• Flow fixed international call volumes and revenues declined slightly over last five years</li> </ul>
<b>2</b>	Competitive Alternatives (including Rivalrous Behaviour)	<ul style="list-style-type: none"> <li>• No direct residential competitive alternative at this time</li> <li>• Digicel provides a competitive alternative for business customers, although focused more so on multiline rather than single-line subscribers at this time</li> <li>• No evidence of discounted pricing or promotions provided by Flow or Digicel</li> <li>• OTT alternatives available to residential and business customers</li> <li>• International calling card options also available</li> <li>• Mobile international calling can be a competitive alternative for certain international call destinations and, therefore, mobile likely provides some degree of competitive pricing discipline for fixed international call rates</li> </ul>
<b>3</b>	Market Shares	<ul style="list-style-type: none"> <li>• Flow's market share for international calling from fixed location unknown, but likely not very high and also likely declining</li> </ul>
<b>4</b>	Market/Sector Trends	<ul style="list-style-type: none"> <li>• Fixed international minute volume trends in other countries generally declining given the growing number of international calling options available (including, OTT, calling card, call-back and dial-around)</li> </ul>
<b>5</b>	Barriers to Entry	<ul style="list-style-type: none"> <li>• Technical/Regulatory: absence of local carrier pre-selection</li> </ul>
	<b>Preliminary Conclusion</b>	<p>Direct competition exists (using fixed wireless technology) in the relevant market for international calling from a fixed location, although it currently appears to be on multiline business customers. There is also significant competitive pressure from OTT services and international calling cards as well as indirect competitive pressure from mobile services. Based on currently available market information trends, the Commission considers on a preliminary basis that continued forbearance on an unconditional basis is appropriate for relevant market for international calling from a fixed location.</p>



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<b>Table A5</b>		
<b>Relevant Market #5: Domestic Private Leased Circuits (DPLC)</b>		
<b>No.</b>	<b>Forbearance Test Criteria</b>	<b>Preliminary Assessment</b>
<b>1</b>	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Flow DPLC volumes and revenues declined slightly over last five years</li> </ul>
<b>2</b>	Competitive Alternatives (including Rivalrous Behaviour)	<ul style="list-style-type: none"> <li>• Direct competition from Digicel who provides a fixed wireless alternative, but who also plans build out of underground fiber network facilities<sup>24</sup></li> <li>• Larger businesses and government customers may have countervailing buying power, especially those who purchase a variety of telecom services (such a fixed access, Internet access, leased circuits and/or mobile services)</li> <li>• No evidence of discounted pricing or promotions provided by Flow or Digicel</li> </ul>
<b>3</b>	Market Shares	<ul style="list-style-type: none"> <li>• Flow DPLC market share high in terms circuit volumes, but lower in terms of revenues</li> <li>• Flow DPLC market share has generally declined over last five years</li> </ul>
<b>4</b>	Market/Sector Trends	<ul style="list-style-type: none"> <li>• DPLC services generally transitioning from lower to higher speeds and legacy to IP technologies in most countries, as appears to be the case in TCI</li> </ul>
<b>5</b>	Barriers to Entry	<ul style="list-style-type: none"> <li>• Financial: relatively high cost of wireline-based entry (although wireless provides a means to mitigate such costs) – but, as noted above, Digicel has indicated that it is planning to construct underground fiber network facilities in TCI to eliminate its reliance on Flows' DPLC facilities for backhaul connectivity purposes</li> </ul>
	<b>Preliminary Conclusion</b>	<p>Direct competition exists in the relevant market for DPLC services from Digicel, and Digicel has indicated that it plans to expand its presence in the market. Based on currently available market information and trends, the Commission considers on a preliminary basis that forbearance continues to be appropriate for the relevant market for DPLC services. Based on currently available market information trends, the Commission considers on a preliminary basis that continued forbearance on an unconditional basis is appropriate for this relevant market.</p>

<sup>24</sup> Digicel indicated that it has plans build underground fiber network facilities in TCI in its Anti-Competitive Conduct Complaint, dated 31 October 2017, page 7.

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<b>Table A6</b>		
<b>Relevant Market #6: International Private Leased Circuits (IPLC)</b>		
<b>No.</b>	<b>Forbearance Test Criteria</b>	<b>Preliminary Assessment</b>
<b>1</b>	Relevant Market Specific Data	<ul style="list-style-type: none"> <li>• Flow IPLC generally revenues have grown over the last five years</li> </ul>
<b>2</b>	Competitive Alternatives (including Rivalrous Behaviour)	<ul style="list-style-type: none"> <li>• Since Cable &amp; Wireless' acquisition of Columbus International in 2014, there has been no direct IPLC competition from alternative service providers</li> <li>• New entry is likely however, since Digicel has indicated that it is planning to construct subsea facilities to TCI,<sup>25</sup> which would connect TCI to its broader Caribbean/Americas regional submarine network (operated by Digicel's subsidiary Southern Caribbean Fiber and currently under construction through a joint venture with Deep Blue Cable)</li> <li>• Larger businesses and government customers likely have countervailing buying power, especially those who purchase a variety of telecom services (such a fixed access, Internet access, leased circuits and/or mobile services)</li> </ul>
<b>3</b>	Market Shares	<ul style="list-style-type: none"> <li>• Flow IPLC market share appears to be virtually 100% at this time</li> <li>• Flow's market share increased with the acquisition of Columbus International</li> </ul>
<b>4</b>	Market/Sector Trends	<ul style="list-style-type: none"> <li>• IPLC services generally transitioning from lower to higher speeds, legacy to IP technologies in most countries, as appears to be the case in TCI</li> </ul>
<b>5</b>	Barriers to Entry	<ul style="list-style-type: none"> <li>• Financial: high cost of entry, however, as noted above, Digicel plans to construct subsea facilities to TCI in the near term</li> </ul>
	<b>Preliminary Conclusion</b>	<p>There is no current competitive alternative to Flow in the relevant market for IPLC services; however, Digicel is planning to enter the market in the near term by landing its own subsea fiber in TCI. Based on currently available market information and trends, including imminent new entry, the Commission considers on a preliminary basis that forbearance continues to be appropriate the relevant market for IPLC services. Based on currently available market information trends, the Commission considers on a preliminary basis that continued forbearance on an unconditional basis is appropriate for this relevant market.</p>

<sup>25</sup> Digicel indicated that it has plans Digicel intends to land its own subsea fiber in TCI in its Anti-Competitive Conduct Complaint, dated 31 October 2017, page 7.