

CABLE & WIRELESS (Turks & Caicos Islands) Limited

Response to TCI Telecommunications Commission

On

Public Consultation into the Provision and Licensing of Television Services (including Internet Protocol Television (IPTV) Services) in the Turks and Caicos Islands

November 17, 2017

Flow's Response

TCI Public Consultation into the Provision and Licensing of Television Services (including Internet Protocol Television (IPTV) Services) in the Turks and Caicos Islands

November 17, 2017

SECTION I

1. INTRODUCTION

1.1. Cable and Wireless Limited, (“Flow”), welcomes the Opportunity to respond to the Turks and Caicos Islands Telecommunications Commission’s (the “Commission”) *Public Consultation into the Provision and Licensing of Television Services (including Internet Protocol Television (IPTV) Services) in the Turks and Caicos Islands* (the Consultation Document) published August 14, 2017 and to which responses are to be submitted by November 17, 2017.

1.2 Flow expressly states that failure to address any issue raised in the Consultation Documents does not necessarily signify its agreement in whole or in part with any position taken on the matter by the Commission or respondents. Flow reserves the right to comment on any issue raised in the Consultation Document at a later date. The responses contained herein are preliminary and subject to change as better information becomes available.

1.3 All responses to this submission are to be sent to Mrs. Delleriece Hall at delleriece.hall@cwc.com and Ms. Melesia Sutherland at melesia.campbell@cwc.com.

SECTION II

2. FLOW’S RESPONSE TO PART I – Is Flow Currently Authorised to Provide IPTV Services in the TCI?

Do you agree with the definition of IPTV in section 4.5?

2.1 We do not agree with the Commission’s definition of IPTV as presented in the Consultation Document. Further, we do not believe a definition of IPTV, beyond a basic reference to multimedia services provided over broadband networks, is required. However, if a definition must be adopted, which we do not agree, the definition presented by the ITU is too broad. We would qualify the ITU definition by adding the following to the end of the ITU definition:

“IPTV services are value added services, provided over the top of and requiring the existence of, an existing broadband network connection. IPTV is not a broadcasting service.”

2.2 Flow’s view is that the Commission’s adoption of the ITU definition is convenient given that it is so broad. However, this definition does not emphasize the most critical element of the service, which is that it is fundamentally an “add-on” service to a broadband connection, whether the service is provided by the owner and operator of the broadband network or not. In simpler terms, IPTV is an Over-the-Top (OTT) service. This is the single most defining quality of an IPTV service, and is relevant insofar as it is critical to the consideration of the question of whether, if at all, IPTV services should in any way be regulated, and to what extent, if at all, IPTV services should be regulated in the same manner as other forms of television provision.

2.3 The approach of the Commission to the definition of IPTV is important to the question of how and to what extent, IPTV services may be regulated. Flow’s position is that IPTV services should not be regulated like other forms of television:

(i) First, regulating “domestic” IPTV services is unfair given that regulation of “foreign” IPTV services, like Netflix, is probably “impossible,” using the Commission’s own words.

(ii) Second, IPTV services are not “broadcast services,” in the sense of free-to-air television content available to the general public on an unpaid basis. IPTV services must be sought out by the subscriber and specifically consented to, and does not utilize spectrum to reach the customer.

(iii) Third, IPTV services are not provided as a stand-alone service .They are a value-added service, which are dependent on a high speed broadband connection to the subscriber. Without that broadband connection, IPTV services are not possible. They therefore run over the top of a broadband network to create increased value in the broadband network, and enhance the utility of a high speed internet connection.

(iv) Fourth, the market for IPTV services is vastly different to other types of television. For example, the pricing is different. By virtue of being a value added service, subscribers pay a premium, over and above the basic cost of the initial broadband connection. Consumers of free-to-air programming do not pay subscription fees. Rather, funding for free-to-air television is provided via advertising revenues. The subscriber/consumer of IPTV services is therefore fundamentally different to the consumer of general television content, who in most cases, will pay nothing to

receive free-to-air programming. Any member of the public with a television can consume free-to-air television content. However, only customers who have high speed broadband connections can access IPTV services.

2.4 It is wrong and misguided to assume that these two categories of subscriber/consumer will automatically overlap, and more so to do so in the context of the TCI. The Commission has advanced no data or research which suggests that the persons consuming public television services belong to the same as the group consuming IPTV services, or even subscription television services more broadly.

2.5 In short, it is wrong to presume that IPTV services should be regulated merely because the regulation of television generally, is being contemplated. This basic, but misguided assumption, informs the Consultation Document and the Commission's entire approach to the matter of regulating television services in the TCI. The Commission proceeds from a regulatory bias that regulation of television is a desirable and necessary objective, such that all manner of provision of television should be regulated in the same way.

2.6 This thinking is fallacious and likely to give rise to problems in the local market for television services. Treating all television services alike, and in particular, free-to-air broadcasters the same as subscription television providers, is a deeply inappropriate way to approach the issue of television regulation. At the heart of this mistaken approach, the Commission appears to have adopted a superficially laudable but ultimately misplaced principle of technology neutrality. In short, the Commission appears to take the view that television should be regulated irrespective of the mode of delivery or the technology utilized to deliver it to the public. This is understandable but inappropriate.

2.7 Flow's objections are not based on a request to treat different technologies, e.g. wireless versus wire-line providers, differently. Rather, Flow's objection to the manner in which the Commission proposes to treat the regulation of television is based on the Commission's failure to recognize that there are differences in the markets for television services; that not all television markets are the same.

2.8 In taking the "one-size-fits-all" approach advocated by the Commission, the development of television services in the TCI will likely be affected and the very objectives which the Commission

seeks to promote, in particular, increasing the quality and variety of content available to TC Islanders, will be undermined.

2.9 To properly address the issue of regulation of television services in TCI therefore, it is important to understand the nature of IPTV and its place in the market:

- (i) It is key to first appreciate that IPTV is not a broadcasting service;
- (ii) Secondly that IPTV services cannot be provided without a high speed broadband connection, and are therefore a value-added or adjunct, Over-the-Top service to broadband.
- (iii) Thirdly, and perhaps most importantly, consumers of IPTV services, seek out such services for different reasons, than they seek out locally produced stations or content. In other words, the reasons for the consumption of IPTV services are not the same as the reasons for consumption of locally produced and or broadcast stations. In short, IPTV services are fundamentally data services, and customers do not look to subscription television services, like IPTV, for (a) local content; (b) content which is socially acceptable to all concerned; and (c) as a substitute for local stations, where they exist. On the contrary actually, by the very nature of the service, IPTV services may be able to provide a variety of content to specific viewers, which some members of the public may find offensive and corrupting to public morality, for example. For these reasons, it is probably a mistake to attempt to regulate IPTV services in the same manner as other types of television, including free-to-air broadcasters.

2.10 Put another way, the regulatory imperatives (e.g. promoting certain types of content) which may be highly relevant to regulation in one market, are completely inappropriate to another market, and may in fact hinder or restrict the development of one or both markets. For this reason, the Commission should not seek to take a one-size-fits-all approach to the issue of television regulation, and ideally, should ensure that definitions of services reflect market and technological realities, where any definition must be adopted at all. This is of course without prejudice to Flow's view that no formal definition of IPTV is required at this time.

Do providers of IPTV services in the TCI need to be licensed for the business activity of television broadcasting under the Business Licensing Ordinance and Regulations?

2.11 No. This question is deeply flawed and exposes a troubling bias on the part of the Commission with respect to the provision of IPTV services. We discuss this further below, but note at the outset that the requirement to obtain a separate business licence in respect of IPTV would lead to poor regulatory outcomes.

2.12 First, it is wrong to regard IPTV services as a “television broadcasting service.” As Flow has already noted, there is a fundamental difference between the manner in which IPTV services are provided and broadcast television services are provided. Not all television is the same, and generally, for the purposes of any regulation, a distinction should be made between free-to-air television and subscription based television services. “Television broadcasting” is a term which should ideally be restricted to the broadcast of signals via spectrum free-to-air, and this should be so even where a subscription service uses spectrum to reach customers. Specifically, for the purposes of the Business Licensing Ordinance and Regulations, a distinction should be made between what is a “broadcasting service” and what is a “telecoms service,” which just happens to enable the provision of television programming and content. If the express and sole purpose of the business being undertaken is to provide television programming and content, including local programming, free-to-air for consumption by the general public, then it would be appropriate to require a television broadcasting licence under the Business Licensing Ordinance. However, if this is not the core business of the entity in question, this seems burdensome and an unnecessary duplication of regulation. Instead, the focus should be on ensuring that the actual core business activity is properly identified and authorised under the Ordinance.

2.13 Second, an IPTV service is an “adjunct” or value added, Over-the-Top, service. This means that, by definition, it cannot exist independently of an underlying broadband connection. In such circumstances, it would be wrong and improper to require a party providing IPTV services to obtain a separate and distinct, broadcasting business licence under the Ordinance. In those circumstances, a party should only be required to obtain a business licence in respect of the underlying telecoms service they are providing, which is internet or broadband service.

2.14 In short, IPTV services cannot be provided on a standalone basis. They do not constitute a broadcasting service. They do not constitute the broadcast of signals over the air for reception by the public. IPTV services are data services, and involve the transmission of data packets. This is an inevitable conclusion which must be drawn from the way in which the service is provided. After all,

the Commission does not suggest or propose that IPTV providers should also obtain a “radio broadcasting” licence under the Ordinance, even though audio signals can also be transmitted via a broadband network, and frequently are transmitted over Flow’s network. This is because the Commission inherently recognizes that the nature of the activity of IPTV is fundamentally different to either “television” or “radio” broadcasting.

2.15 Instead, IPTV services are a ‘telecoms’ service, which is a distinct area of business activity under the Ordinance. They should therefore be treated as such, and a requirement on any operator to obtain a “broadcasting” licence under the ordinance would erode the clear distinction between IPTV services and traditional broadcasters, which should be maintained. As explained above, the basis of this distinction is not technology. Rather, the basis of the distinction is that they are different areas of economic activity, relate to different markets, are not direct substitutes for each other, and should not be regulated as if they are interchangeable, as the Commission proposes.

2.16 In any event, Flow is fully authorised under the Business Licensing Ordinance and Regulations to provide IPTV services, and does not and should not be required to obtain an additional broadcasting service licence to permit it to offer IPTV services.

2.17 The Business Licensing Ordinance defines a business as “any form of trade, commerce, manufacture, craftsmanship, profession, vocation or other activity carried on for the purpose of gain, but does not include an office or employment” (s. 2). Section 3 requires all persons carrying on business in the TCI to be licensed under that Ordinance, and section 4 provides that “Where the business to be licensed consists of separate and distinct undertakings which are not reasonably incidental in nature or degree to the main activity of the relevant business, whether on the same premises or not, a licence shall be obtained for each undertaking.”

2.18 Flow is the holder of a Business Licence under the category of Telecommunications. Based on the nature of the IPTV service as a value added, Over-the-Top service riding Flow’s telecommunications network, no further or additional licensing under the Business Licensing Ordinance or Regulations is or should be required or contemplated. There is no separate or distinct undertaking involved in the provision of IPTV services, which are part and parcel of the main activity of the business. Indeed, IPTV services are quintessentially “incidental in nature and degree to the main activity of” internet services provision by Flow. It therefore would make little sense,

given the nature of the IPTV service as a telecoms service, to require an additional business licence in respect of the same.

Does a 2006 licence under the Telecommunications Ordinance authorise a holder to provide IPTV services in the TCI?

2.19 Yes. As the holder of a Telecommunications and Spectrum Licence with respect to a full suite of telecommunications services, Flow is fully licensed to provide the full suite of telecommunications services in its portfolio, including but not limited to IPTV services. The Telecommunications and Spectrum Licence issued to Cable and Wireless (West Indies) Limited on 25th January 2006, authorizes the company to offer the Licensed Services as set out in Annex A of the Licence. Specifically, Annex A states:

1.1 All telecommunications services that the Licensee provides in the Turks and Caicos Islands on the Commencement Date ... including but not limited to:

1.1.1 Domestic and international public telephone services...

1.1.2 Domestic and international data services (including leased lines, paging, frame relay and virtual private network services).

1.1.3 Domestic and international text...

1.1.4 *Any present or future modifications, upgrades or enhancements to telecommunications services included in this Clause 1.1.* (emphasis provided).

...utilizing the Licensed Networks set out in Annex B:

1.1 Any telecommunications networks in use as of the Commencement Date and used by the Licensee at and after the Commencement Date to provide any of the telecommunications services listed on Annex A...

1.2 Any enhancements, augmentations, updates, upgrades, replacements and routine or normal expansions of the networks...

As such, the company is fully licensed under the Telecommunications Ordinance.

The Ordinance defines a telecommunications service as follows:

“telecommunications service” means a service consisting of –

- (a) conveying, emitting, receiving, switching or transmitting messages or having messages conveyed, emitted, received, switched or transmitted, by means of a telecommunications system; and
- (b) installing, maintaining, adjusting, repairing, altering, moving, removing or replacing telecommunications equipment which may be connected to a telecommunications system;”

2.20 The language of Annex A is broad and comprehensive, and also forward or future looking. The Annex specifically authorizes the provision of “domestic and international data services,” and recognizes the possibility of “enhancements, augmentations, updates, upgrades, replacements and routine or normal expansions of the networks.” Flow’s licence covers telecommunications services consisting of “conveying, emitting, receiving, switching or transmitting messages... by means of a telecommunications system.” As explained earlier, Flow’s IPTV services represent a value added service, provided over the top of its existing broadband service, and therefore represents what is effectively a data service, achieved via means of “upgrades” to Flow’s broadband network for the purpose of “switching or transmitting messages” via that network. The consequence is that the definition of the services Flow is authorised to provide, clearly covers the provision of IPTV, among other things. Put another way, Flow’s 2006 licence clearly contemplated enhancements to Flow’s network that would allow for the provision of data related services like IPTV. It is a mistake to assume that IPTV is not covered by the licence, merely because IPTV is not specifically mentioned. In reality, the licence granted to Flow in 2006 is forward looking, broadly drafted and comprehensive in its coverage of the rights Flow is entitled to exercise under its terms.

2.21 Annex A therefore clearly contemplates the provision of internet services and value added services attached to the same, like IPTV. The scope of the services covered under the licence is wide and supports the full service list of telecommunications services in the Licence. This is further reinforced by the classification of the company’s Licence as a Full Telecommunications Service & Network Licence under the Telecommunications (Fee Structure) Regulations, and in particular, by the expanded charges for a Full Telecommunications Service & Network Licence under those Regulations.

2.22 It is important to recognize that Flow’s right to provide IPTV services arises principally from its position as an internet service provider. As we have reiterated throughout this response,

IPTV services are not broadcast services and should not be treated as such, in the same way that YouTube, Netflix, Hulu, Amazon Prime, Apple TV and a host of OTT services making content available for download or streaming via the internet, cannot reasonably be considered “television broadcast services” or that podcasts over the internet cannot reasonably be considered “radio broadcasting services.” Flow’s IPTV services are an OTT operating over its broadband network, and Flow’s right to provide that service, derive from and attach to its right to provide internet services in TCI.

2.23 However, even if the Commission disagrees with this argument, the same conclusion – that Flow is entitled to provide IPTV services under its 2006 licence – would follow if the Commission were to insist that IPTV services could only be provided pursuant to the issuance of a valid “Subscriber Television” licence.

2.24 We have noted the Commission’s remarks in the Consultation Document that “the Telecommunications Commission” has not issued a ‘Subscriber Television’ licence, as mentioned in the Telecommunications (Fees Structure) Regulations, to any provider of television services in the TCI.” This is factually, manifestly, grossly incorrect. Contrary to its assertions, the Commission has indeed issued a ‘Subscriber Television’ licence to Flow, by virtue of the Commission’s decision to issue Flow with a “Full Telecommunications Services & Network Licence” (hereafter “the omnibus licence.”) This is because, as may be gleaned from both the scope of the omnibus licence and the particular fees attached to it, the intent of the Commission in granting Flow the licence, was specifically to cover all types of telecommunications services. This includes, among other things, the main categories of services recognized and described by the Fees Regulations; meaning fixed, internet service, mobile and indeed, subscriber television services. Accordingly, the Commission has in fact issued a ‘Subscriber Television’ licence in the TCI, and moreover, intended to issue such a licence, because the Commission was aware, and or believed that “Subscriber Television” services fell within the ambit of the ‘Full Telecommunications Services & Network Licence’ it actually issued.

2.25 The Commission must recognize the legal peril that arises if it now asserts that the licence which was issued to Flow in 2006, with the intent to authorize it to operate under certain terms and conditions, was suddenly a different instrument, which no longer covers all the services Flow was invited to believe the Licence covered. This is because, notwithstanding that the sections of the Telecommunications Act relating to broadcasting were never brought into effect, Flow has been

paying the Government of the TCI a licence fee, commensurate with its position as a “full service provider.” This term was clearly intended by the Commission to refer to a provider entitled to offer fixed public telephony, mobile public telephony, internet services and subscription television services and any other such services that may be capable of being carried over the provider’s network. By virtue of issuing the licence with a fee structure that was commensurate with its expansive scope, the Commission invited Flow to rely on this instrument as a comprehensive authorization to provide all the services it purported to cover.

2.26 This is a matter of fact about which there has been no controversy between the relevant parties, for well over a decade, and which has legal implications for both the Commission and for Flow. The Licence represents a binding legal instrument, granting rights to the party to whom it is addressed. The Government of TCI has accepted payments made by Flow in respect of that Licence, and the Commission has never suggested that Flow should surrender its omnibus licence to obtain separate or different licences, as a result of some defect in the omnibus instrument. Thus, all the parties implicated in the licence grant - the Commission, Flow, and the Government of TCI - have acted and relied upon the 2006 licence as if it were a valid omnibus licence granting certain rights and privileges to Flow, including the right to provide internet and “subscriber television” services. In reliance on that instrument, Flow has both paid the fees associated with that belief and made certain commercial decisions, including the decision to develop and establish IPTV services, in the TCI. In other words, irrespective of the status of the provisions of the Act relating to television broadcasting, both Flow and the Government of the TCI have acted as if Flow is entitled to offer subscription television services on a commercial basis, and all the parties have acted as if the Licence granted to Flow in 2006 is a valid instrument. Indeed, this understanding between the parties, which has been given legal effect by the payment of licence fees by Flow and the acceptance of those fees by the Government of TCI, remained intact until Flow’s right to provide IPTV services was challenged by other parties. Until that time, there was no disagreement between the Commission, Flow, and the Government of TCI, about the scope of Flow’s omnibus licence.

2.27 Accordingly, if the Commission now asserts that the licence did not in fact cover the services it purported to cover, this would mean that both Flow and the Commission have been operating under a mistaken view of Flow’s rights to operate in the TCI. The implications are that the fees paid to the state in respect of the licence, should not have been paid; that the Commission was somehow

mistaken in its view as to the precise scope of the licence instrument it intended to issue; that the true scope of the licence was significantly different and smaller than what was purported by the Commission; and that the corresponding value of the licence was substantially below the level prescribed in the Fees Regulations. Ultimately, the implications are that Flow would have a legal claim against the Commission for having issued a licence instrument that did not in fact authorize the services it purported to authorize, and it is a claim which Flow fully intends to pursue should its rights to offer IPTV services are not fully recognized by the Commission.

2.28 However, if it is true that the Commission does not believe that Flow's provision of IPTV services was covered by a licence it issued, this would be a bizarre state of affairs, in which a legitimate regulator was fundamentally mistaken as to the nature of the services it was actually licensing. Flow thinks this is an extremely unlikely scenario, and we expect that, despite the Commission's recent reticence on the issue of Flow's right to provide IPTV, the Commission will ultimately agree that its intentions with respect to the design and creation of the omnibus licence, was clear and unambiguous. In short, we expect the Commission to agree that its desire with the omnibus licence, was always to enable the provision of multiple telecommunications services via a single instrument, including in particular, subscription television services.

2.29 In any event, whether the Commission is prepared to accept this basic truth or not, it should be mindful of the fact that payment by Flow of the prescribed fees for the licence, is legally dispositive of whether Flow is entitled to provide subscription television services. In stark terms, if Flow has paid the fees associated with the licence, it must by law, be authorised to provide the services. Put even more bluntly, there is a contract between the Government of TCI, the Commission and Flow, which unequivocally authorizes Flow to provide IPTV services, among other things. That contract must be respected, and Flow will act to enforce it if required.

2.30 The Commission is also making a mistake by assuming that because the part of the Act dealing with broadcasting was not brought into force, no action may be taken by the Commission with respect to licensing or authorizing the service. This is legally incorrect. The absence of the provisions of the Act on broadcasting does not mean that the Commission cannot issue a licence for subscription television services. The Commission is competent and legally empowered to design and determine the scope of any license instrument it issues under the Telecommunications Act. Rather, it simply means that there are no enabling provisions for that area of the Commission's work, or in

other words, it simply means there are no enabling provisions in the act for broadcasting. It does not mean the Commission was not able to issue a licence or to take any action in respect of the subject as the Commission's consultants appeared to have concluded.

2.31 Having reviewed the Consultation Document as a whole therefore, it is impossible to avoid the conclusion that the Commission's logic in respect of the issue of Flow's rights to provide IPTV services in TCI, is somewhat confused and contradictory. Even if the Commission does not accept the proposition that Flow's current licence is both (a) valid in its expansive scope; and (b) clearly intended to cover subscription television services, the Commission appears oblivious to the fact that there is only one logical conclusion which can be drawn from such circumstances. Specifically, if the Commission were correct in its assertion that subscription television services could not be authorised under the Telecommunications Act because the relevant sections of the Act relating to broadcasting were never brought in to force, (we do not agree,) the consequence would be that subscription television services would be an unregulated activity in TCI. In such a case, the issue of Flow's licence is irrelevant, because Flow, and any other entity offering subscription television services in TCI, would not need a licence to provide the service.

2.32 In short, the Commission appears to have completely missed the basic point that there can logically, only be two outcomes with respect to the current treatment of IPTV and subscription television services in TCI. Either; (a) the services are currently regulated, in which case, they require a licence; or (b) the services are not currently regulated, in which case, no licence to provide the service is required. If the first scenario is true, Flow's licence empowers it to provide a subscription television service, because both Flow and the Commission have acted as if its omnibus licence covered this service, and Flow has paid for the licence, and such payments have been accepted by the state, on the basis of that understanding. Legal rights, and legitimate expectations have accrued to Flow as a consequence of that action by the Government and the Commission. Neither party can now argue otherwise and deny the rights Flow enjoys. But in any event, if however, the second scenario was true, because the part of the Telecommunications Act dealing with broadcasting was never brought into force, no licence would be required to provide IPTV or subscription television services in the TCI. In either case, the outcome is that Flow is legally entitled to provide IPTV services to the general public.

2.33 Accordingly, while the Consultation Document is somewhat unclear or confused about the current legal status of subscription television services, the Commission seems to have completely missed a basic, fundamental point. If the Commission's true position is that subscription television services are not currently covered by legislation, it means that the activity is perfectly legal and permissible under existing law. In this case, Flow is entitled to provide IPTV services irrespective of the scope of its licence. By the Commission's own logic therefore, Flow has been perfectly entitled to offer these services whenever it so chooses.

2.34 To reiterate, we do not agree that subscription television services are currently unregulated in TCI. As we have argued from the outset, Flow's right to provide IPTV service flows from and attaches to its authorization to provide internet services. IPTV services are a value added, OTT service which runs over Flow's broadband network. However, even if this were not the case, and the Commission regarded IPTV services as a separate service requiring discrete authorization, Flow's omnibus licence specifically authorizes Flow to provide subscription television services such as IPTV. Where however, the Commission does not believe that subscription television services are currently addressed by existing legislation, including current licences, this would mean that any entity in TCI, including Flow, could provide IPTV services without the need for special authorization. By the Commission's own reasoning, there is no law in force in the TCI against this.

2.35 In conclusion, Flow's arguments in respect of its rights to provide IPTV services may be summarized as follows:

- (i) IPTV services do not constitute "television broadcasting" but are rather an OTT/data service, operating over its broadband network;
- (ii) Even if this is wrong, and IPTV were to be considered a television broadcasting service, Flow is fully authorised in any event, under its existing "Full Telecommunications Service & Network" Licence, to provide IPTV services;
- (iii) The finding that Flow is lawfully entitled to provide IPTV services under its existing licence, is the only logical, legal conclusion, which may be drawn from the fact that Flow has paid a licence fee commensurate with the nature of its licence as a "Full Telecommunications Network & Services" licensee, authorised to provide a full range of telecommunication

services, and both the Government of TCI and the Commission, have accepted that Flow's licence payments, are made on that basis; but

- (iv) Even if IPTV services were not covered by Flow's omnibus licence, which we do not agree is the case, the consequence would be that IPTV services are not a licensable activity in TCI, and that there would be no law prohibiting the provision of the service, such that there would be no need to obtain any special authorization to offer such services to the public to begin with. Put simply, if Flow's licence does not cover IPTV, and the sections of the act relating to broadcasting are not in force, there is no legal impediment to providing IPTV services in TCI, because such services are not currently regulated. Using the Commission's own logic therefore, Flow would therefore be fully entitled to offer IPTV services to the general public on a commercial basis, because no law in force in TCI requires special authorization to enable this.

2.36 The remainder of our response is dedicated to addressing the other questions raised by the Commission in Part II of the Consultation Document.

SECTION III

3. FLOW'S RESPONSE TO PART II – Is the Existing Regulatory Regime in the TCI Satisfactory for the Regulation of Television Services

Do you agree with the objectives we have set out for television in TCI? If not, what is an appropriate set of objectives?

3.1 No. We do not agree with objectives 5 and 6.

3.2 Protecting consumers from "harmful or offensive content" is a complex and difficult area of regulation which should only be pursued where there is compelling evidence that the market requires it at this time. It should not be an objective of the current exercise by the Commission. Regulation of harmful or offensive content is fraught with legal challenges and is often controversial. It is an area of regulation which can be difficult to manage, due to the constitutional issues it frequently raises. What is "harmful or offensive" to some parties may be desirable, educational, or beneficial to others. Intrusive or ill-considered content regulation could give rise to abuses of Turks

& Caicos Islanders', as well as operators' rights, to freedom of expression, to receive and share ideas freely and without hindrance by organs of the state, like the Telecommunications Commission. These are fundamental human rights which are protected in TCI, and it represents an entirely new area of regulatory enterprise by the Commission to determine the circumstances when reasonable exceptions to those human rights may be asserted.

3.3 The consequence of this is that this area of regulation is expensive, and resource intensive. It will require the recruitment and development of new staff and resources in order to enable the Commission to discharge this mandate. Moreover, due to the local sensitivities which are involved in such regulation, it is not an area which can easily be addressed via technical input by foreign consultants, but rather, it will be an area of regulation which will require the Commission to develop rules, disciplines, procedures and policies in an organic, continuous way. The need for reinforcement of the Commission's technical and human resources to achieve this objective therefore, will be significant. The result will be increased costs on operators, for benefits which the Commission has not sufficiently studied, argued for, defended or established.

3.4 Specifically, there is no data or evidence which suggests that offensive content is a major problem or concern in TCI at this time. The Commission's own Consultation Document conceded that there are few if any complaints by citizens of the TCI, regarding the content received on their devices (whether television or not). While it is therefore a laudable objective in theory, the Commission has not established that there is a significant problem which the market is failing to resolve, and which demands intervention.

3.5 A key issue is also whether regulation to manage "harmful or offensive" content has the same relevance in the age of convergence. Given the multiplicity of means by which consumers can access and consume content, it is doubtful whether the regulation of content is as desirable or as effective as it was before customers could access OTT's like Netflix, Apple TV, and Amazon streaming services. Any attempt to regulate content would of necessity, have to be focused on locally originating content, since for practical reasons, the Commission will never be able to regulate the content consumers in TCI can access via those OTT's. Attempting to prescribe content requirements for foreign channels would similarly be fraught with danger and or impossible. The Commission would have to assume the role of determining what information the public should and shouldn't receive. This would be legally dubious at best. Moreover, there would be an inherent

danger in imposing some level of content regulation on local licensees which would result in the creation of asymmetric burdens on local operators who are already disadvantaged in their ability to compete with unlicensed OTTs. In fact, as a general rule, the Commission should think very carefully through whether any regulation on subscriber television operators in TCI is even desirable, given the intense competition ‘home grown’ subscription television providers already face compared with foreign OTTs.

3.6 Given this lack of a cost/benefit analysis by the Commission and the obvious regulatory imbalance, regulation on local operators would create, we do not believe that this is an issue the Commission should be focused on at this time. For the avoidance of doubt, Flow does not object to content regulation in principle, provided it is appropriate to the market involved and the need for it is well established and supported by data. However, from all available evidence, including the Commission’s own remarks with respect to the issue of complaints about content, the market for television in TCI is operating relatively well, insofar as the content available to TC Islanders is generally acceptable in quality and diversity. The Commission should allow the market to continue to self-regulate on the issue of “harmful or offensive content,” unless an actual and specific problem can be identified. If at some point, specific concerns are raised by enough members of the public, some analysis can be made to determine what is the most appropriate and proportionate intervention to be adopted, hopefully in consultation with the industry.

3.7 We also do not agree that objective 6 is a worthwhile objective to pursue as the Commission defines it. Although it is not clear what precisely the Commission means by the objective of “creating a level playing field between networks and channels,” what is reasonably clear is that the Commission proposes to treat all television distribution as the same, with one glaring exception, which we address later below. For the moment, is it enough to note that the Consultation Document exposes a troubling bias on the part of the Commission. In particular, and as discussed earlier, the Commission appears to believe that all manner of television provision is the same. Another way of putting this is to say that the Commission suggests that all markets for television services are the same; or that there is no differentiation in the markets for television content.

3.8 We do not agree. Under the Commission’s proposals, subscriber television providers would be treated the same as free-to-air broadcasters of television services. While we acknowledge that there are no free-to-air television broadcasters in TCI, we do not agree with the principle that these

activities are the same and merit the same treatment. The economic and commercial activity associated with free-to-air television broadcast is fundamentally different to the commercial assumptions and economic activity associated with subscription television provision.

3.9 We have addressed some of the reasons for this above. Free-to-air broadcasters earn revenue in different ways than subscription television broadcasters. Consumers of free-to-air broadcasts may not directly overlap with consumers of IPTV services. It is simply misguided to assume that because both activities involve “television,” they must be regulated precisely the same way. This argument is not based primarily on the technology utilized by broadcasters versus subscription providers. It is rather related to the nature of the commercial activity they engage in. Free-to-air signals can be received by any member of the public with a working television. Subscription television services are typically sought out by a customer and must be explicitly contracted for and consented to. Moreover, they do not even need to be watched on a ‘television.’

3.10 This aside, the implications are that these types of activity require different regulatory approaches. For example, due to its spontaneity and its ubiquitous nature, some minimum content regulation of free-to-air broadcasts is not unreasonable. However, content regulation aimed at preventing “harmful and offensive” content of subscription services is almost a contradiction in terms – why should any regulator or organ of the state presume to determine the content that consumers can explicitly consent to receive, beforehand?

3.11 And there is even an argument to be made that subscription television provided via the internet is fundamentally different to subscription television provided via coaxial cable, for example. As we have been at pains to point out, Flow’s IPTV services are an OTT, a value added service riding over the back of its broadband network. The clearest evidence of this is that the service remains completely unavailable in areas of the TCI where Flow’s broadband network does not exist. By contrast, subscription television services provided via means of satellite, cable or MMDS, are provided via networks and technology created purely for that purpose. In those circumstances, our view is that the Commission should not seek to authorize the service but should rather focus on the networks that enable them. In the case of the satellite, cable or MMDS operators, regulation should focus on the appropriate authorization for establishment and maintenance of the appropriate telecommunications network. Similarly, in the case of IPTV service providers, regulation should

focus exclusively on authorizing the relevant telecommunications network required to enable the service – in this case an internet services or broadband network.

3.12 Accordingly, our concern with respect to this objective is that the Commission has adopted a broad and sweeping position for regulation of television in TCI which is inappropriate for the market, to wit: because it is television, it should (a) all be regulated; and (b) all be regulated the same way. The glaring exception of course, is that the Commission does not propose to regulate “foreign” IPTV/OTTs, such as Netflix, Apple TV, Amazon Prime, or Hulu, the same way or at all, as “domestic” IPTV, including Flow’s. This is a curious contradiction which we find difficult to accept, particularly when those “foreign” OTT’s compete directly with any subscription television service currently being provided in the TCI. Given the Commission’s disposition to “treat all services” the same, it is a curious contradiction indeed that the Commission should adopt the view that there should in fact be differentiation of treatment for some services, purely on the basis of geography; namely whether the service is “foreign” or “domestic.” We believe this is manifestly unfair.

3.13 For these reasons, we do not believe that these two objections should be considered in relation to the regulation of TV in TCI. We agree with and support the first four objectives listed. We do not suggest that alternative objectives should be considered at this time.

Do you agree with our assessment of how well the market currently delivers against these objectives?

3.14 We do not. Or rather, while we agree with the Commission’s general assessment of the market, we disagree with the conclusions it has drawn from that assessment. The Commission’s own comments on this issue, suggest that there is indeed, no real market failure in the TCI that requires targeted regulation to address it. The Consultation Document itself notes that consumers have access to a broad range of channels; there is reasonable competition which suggests prices do not need to be regulated, and that there is little cause for worry about “offensive content.” These circumstances describe a functioning, successful market for television in the TCI. We do not think these circumstances would have arisen in the context of a highly regulated market. In our view, the market for television in TCI is functioning and delivering the right services to islanders at reasonable prices. This success is a function of the lack of any, or any substantive regulation. Yet, despite admitting that the market appears to be working, the Commission still comes to the conclusion that

more regulation is best. We do not agree, and think no regulation is the best option, and regard very light handed regulation, a distant second option.

Do you agree with our assessment of the potential for regulation, appropriately and proportionately designed, to play a role in helping to deliver these objectives?

3.15 No. The Commission’s proposals are unlikely to achieve the aims they seek. For example, protecting copyright is important but as the Consultation Document acknowledges copyright legislation in the TCI will likely have the effect of reducing the variety of content available to TC Islanders. Similarly, given the small size of the market, and the presence of small local operators, regulation which requires explicit consent to have the channels they carry will likely have a negative impact on the content they can include in their offerings to the public.

3.16 Further, given the high costs of production, the limited options for funding and the extremely high cost associated with obtaining authorised content from rights holders for the foreign content it would also seek to carry, regulation to encourage “public service channels” would likely have a chilling effect on the emergence, development and sustainability of the same.

3.17 The Commission’s current proposals are too invasive and are not appropriate for the TCI market.

Do you agree with our two priority areas for regulation: promoting the wide availability of local television content, and seeking to protect consumers from harmful and offensive content?

3.18 We agree with and support the aim of promoting the wide availability of local television content, but do not agree with the means proposed by the Commission to achieve this aim. For reasons already outlined above, we do not agree with that the objective of seeking to protect consumers from harmful and offensive content should be a priority at this time.

Which of the options suggested for regulating television in TCI is most appropriate and why?

3.19 Of all of the options for regulating television in TCI, Flow believes that doing nothing, that is, not intervening in the market, is most likely to (i) encourage the production and development of local content; and (ii) promote a diversity of high quality content and distribution platforms.

3.20 By its own admission, the current market for television services in TCI is serving customers reasonably well with a diversity of high quality content, reasonable levels of competition and generally affordable prices. There is no market failure the Commission can identify and moreover, these circumstances arose in which the market for television in TCI was effectively unregulated or under-regulated. Contrary to the Commission’s assertions therefore, the regulation proposed by the Commission would not achieve the aims it seeks, but would have the effect of; (i) raising the cost of providing television services in TCI; (ii) reducing the availability of existing channels, and (iii) hampering the development and sustainability of new and different local stations and or content.

3.21 The Commission’s bias toward more and more complex regulation is obvious from the Consultation Document. But this approach is dangerous and inappropriate for a market as small as TCI. While the Commission has dismissed the ‘do nothing’ approach on the grounds that it would “not address the goals of promoting wide availability of local content, or protecting consumers from harmful or offensive content,” regulation designed to require providers to obtain express consent from every channel they carry in TCI, would have an immediate and lasting negative impact on the operations of the “smaller operators,” and favour providers like Flow and Digicel. It would however, almost certainly result in a significant loss of content from all providers in the short to medium term, and it would certainly reduce the quality, cultural relevance, and variety of available channels for an extended period of time, for all providers. Accordingly, none of the options for regulation, that is options 2A-C, would help the Commission achieve its goals.

3.22 We have already explained that we do not believe the prevention of harmful or offensive content should be an objective of any regulatory process for television at this time, and in any event, only option 2C of the Commission’s proposals would address this directly. However, for other reasons, this option would be the most inappropriate for TCI.

3.23 None of the options for regulation proposed by the Commission, including 2C, would have a positive impact on the emergence of local channels. Positive obligations on a “public service channel” or general content regulation of “standard TCI channels” would likely make such channels costly, impractical and unsustainable. The impediments to the emergence of local content and programming in TCI, are not the cost of distribution but the cost of production and the limited size of the market. These factors are not affected in any way by the Commission’s proposals in 2A-C.

Are there any other options that should be considered?

3.24 We do not agree that regulation is the best option at this time. However, should the Commission be determined to impose some level of regulation on the market, Flow believes that a light handed approach should be taken.

3.25 Specifically, no special or additional authorizations should be required to provide subscription television services. Given competition from OTTs, the rapid change of technologies and the impact of convergence specifically, Flow believes there is little benefit in attempting to impose specific licence requirements on subscription television services or providers. The best way to encourage the proliferation of such services, is to allow entrepreneurs to innovate, and develop these services without burdensome regulatory hurdles from the state.

3.26 To encourage the proliferation of local channels and content, no minimum requirements should be imposed on local channels, no content regulation should be pursued, and we further do not recommend creating multiple categories of channel, including “public service” channels with minimum requirements to provide local news and other programming. This approach would be a quintessential example of heavy handed regulation which would have the opposite effect it was intended to achieve. Flow does however, support the issuance of an authorization or licence to any entity desirous of creating a local television channel. Such a licence could provide the basis for guaranteed carriage by subscription television providers at no cost.

3.27 If, notwithstanding the submissions above concerning the treatment of subscription television services and IPTV in particular, the Commission insists that some authorization or license should be issued to entities providing subscription television services, then that authorization or license should be different from the authorization or licence granted to a local channel and be specific with respect to the activity of providing subscription television services. The instrument should be identical for all providers of subscription television services, and should make no distinction between “belonger” and “non-belongers” for purposes of licensing. The license should contain obligations for guaranteed carriage of any and all “local TCI channels” at no cost, and should not contain any major conditions with respect to programming or content. Some minimum requirements to ensure the provision of a mix of programming in a basic subscription package,

would be acceptable. This could include a basic obligation to provide a mix of educational, current affairs, entertainment, and children’s programming, for example, but no more.

3.28 Since Flow would already be authorised to provide subscription television services under its current Full Telecommunications Services & Network licence, some minimum amendments could be made to ensure that its current authorization was consistent with the authorization the Commission intended to issue to other parties. For the avoidance of doubt, Flow is not suggesting or arguing that it should be required to obtain a new or different licence or authorization to provide any of the services it currently provides, including IPTV services or any subscription television services. As we have been at pains to point out, our current licence covers the provision of such services. However, if there are other parties in TCI who require issuance of a specific “Subscriber Television Licence,” the terms and conditions of such an instrument should be standard for all parties to whom it is issued. In such circumstances, Flow does not anticipate a difficulty with consenting to some minor amendments to reflect the comments made at paragraph 3.27 above with respect only to; (i) the obligation to carry local channels at no costs; and (ii) the obligation to provide a mix of certain programming as part of a basic IPTV package.

3.29 In conclusion, and for the avoidance of doubt, Flow’s positions with respect to Part 2 may be summarized as follows:

- (i) We do not support consideration of objective 5 relating to prevention of harmful or offensive content in TCI, as the Commission has not established this is an actual problem in TCI requiring intervention;
- (ii) We do not support consideration of objective 6 relating to “creating a level playing field between networks and channels,” as we do not agree this is desirable or necessary as the Commission has defined it. We are prepared to concede only that any licence granted for an activity should be identical for all the parties to whom it is granted. However, this does not mean that we agree that subscription television services need to be “licensed” as we believe no regulation is most likely to encourage competition for provision of the service.
- (iii) We do not agree with the Commission’s assessment of how well the market for television delivers against the objectives it has identified as relevant for television in the TCI. We further believe the market is functioning properly and does not require intervention.

- (iv) We do not agree that any of the proposed regulatory options will help deliver the objectives the Commission has identified as priorities.
- (v) We do not agree with one of the priority areas relating to preventing harmful and offensive content. We support the objective of promoting local content.
- (vi) None of the options proposed by the Commission for regulating television will succeed. They are not appropriate for the market and are too invasive. They will also work against some of the very objectives the Commission has identified, including promoting local content and also promoting a high variety of quality content, due to, among other things, the requirement for consent from the channels carried.
- (vii) No regulation is ideal for the TCI market at this time. Subscription television providers should not be required to have a licence to provide the service and local entrepreneurs looking to establish local channels should not require a licence or be faced with any regulatory requirements or obligations. However, should the Commission insist that some measure of regulation must be imposed, we believe it should be a light handed approach which makes some minimum demands of the market. Specifically, we would be prepared to consent to some minor modification of our existing subscription television licence (our omnibus licence) to include obligations to provide a mix of programming content and also to require carriage of any local TCI channels at no charge. Other licences for subscription television services granted to other providers should contain the same terms and conditions as are contained in Flow's existing licence, subject to the modifications. There should be no differentiation or distinction of subscription television providers on the basis of "belonger" or "non-belonger" status. Finally, to ensure carriage of all local channels without cost, the Commission may consider developing and issuing a channel licence or similar authorization to producers of local channels, which should similarly contain standard terms and conditions, irrespective of the party to whom the licence is issued. We do not recommend regulatory conditions on content for such channels at this time, given the high cost such requirements are likely to impose on such licence holders.

SECTION IV

4. CONCLUSION

4.1 Flow thanks the Commission for the opportunity to comment on this consultation.