

TELECOMMUNICATIONS
REGULATORY COMMISSION
VIRGIN ISLANDS

**SPECTRUM AWARD MITA -
CONSULTATION REPORT DOCUMENT**

5 July 2016

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1. Introduction

- 1.1. This Report summarises the issues raised in response to the Telecommunications Regulatory Commission's (**Commission**) Modified invitation to Apply for a 700, 1900 MHz and AWS-1 Spectrum Award Consultation (**Consultation**) and the Commission's view on matters raised in the responses. Where appropriate, it notes the action the Commission will take as a result, including where amendments will be made to the Modified Invitation to Apply (**MITA**).
- 1.2. This Report is being published at the same time as the Spectrum Award MITA. The MITA provides the definitive version of the rules for the Award. Where there is any difference between this report and the MITA, the MITA will take precedence.
- 1.3. Written responses were received from Caribbean Cellular Telephone (**CCT**), Digicel (BVI) Limited (**Digicel**) and Cable & Wireless (BVI) Limited (**Flow**). These responses are published on the Commission's web site along with this Consultation Report Document.
- 1.4. This document follows the structure of the Modified Invitation to Apply for a 700, 1900 MHz and AWS-1 Spectrum Award Consultation Document. A summary of the questions is shown in Section 3.

2. Key changes in the MITA

- 2.1. The MITA sets out the rules for the spectrum award. The Commission's intention was that the Spectrum Award 2015 Invitation to Apply issued on 19 August 2015 (**ITA**) would be amended to take account of the Oral Judgement¹ and the Order² through modifications to be incorporated in the MITA. A number of other modifications to the ITA were proposed to allow Applicants who had previously Registered and made Applications for the Spectrum Award 2015 to amend their Applications. The Commission did this to ensure that any material changes to Applicants since the previous Applications could be taken account and that changes to operator business plans and other commitments could be properly reflected given the considerable period of time that has elapsed since previous Applications were made.
- 2.2. One respondent suggested that only changes resulting from the Oral Judgement and Order should be included in the MITA and that there should be no other changes to the ITA text. The Commission does not agree with this position. Rule 1.22 of the ITA contains the provision for the Commission to make changes to the ITA and the Commission considers it reasonable for statements that are no longer factually correct or no longer applicable in light of the passage of time to be open to amendment at this time. The Commission will revise the text of the MITA to clarify this point in the final version of the MITA.

¹ Oral Judgement delivered by Judge Byer on 13 January 2016

² Caribbean Cellular Telephone v. The Telecommunications Regulatory Commission BVIHCV 2015/237

- 2.3. One respondent opined that a new award process should be started rather than continuing to proceed with restarting the 2015 Award process. The Commission believes that the approach it is taking is still the most efficient basis on which to bring the spectrum in the Award to market in the most expeditious possible time and it therefore intends to continue with this approach. Starting a new award process would not be in the public interest as it would introduce further delay in bringing valuable new mobile spectrum to market in the BVI. The Commission is satisfied that the changes it has made in the MITA and the timetable it proposes to apply will not discriminate against either previous or new Applicants.
- 2.4. **Question 1: Modified Timetable for the Award.** One respondent objected to the modified timetable on the basis that it would be disadvantaged compared to those who had already applied for the Award. As stated above the Commission is satisfied that the timetable it has proposed will not discriminate against either previous or new Applicants. The Commission therefore disagrees with this position as the timetable set out in the draft MITA allows identical time to that provided in the ITA. The Commission intends to proceed with the timetable it has set out, noting that was modified on 28 June 2016. The revised timetable is shown below. The modifications take account of public holidays in the BVI and do not reduce the time available in the process.

Award events	Date and time
MITA issued	5 July 2016
Deadline for Requests for Clarification	15:30 on 12 July 2016
Deadline for Registration	15:30 on 12 July 2016
Final Date for Responses to Requests for Clarification	19 July 2016
Deadline for Application Submission	15:30 on 26 July 2016
Successful Applicants Notification Date	16 August 2016
Frequency Authorisation Grant Date	23 August 2016 – subject to compliance with the Rules and agreed Undertakings.

- 2.5. **Question 2: Changes to Lot preferences.** Two respondents objected to Applicants being able to change their lot preferences. The Commission's intention here was to allow Applicants to make amendments resulting from changes, for example, in their business plans since their previous Application. Given the level of objection to this proposed change the Commission has decided to withdraw its proposal that Lot preferences can be amended.

- 2.6. **Question 3: Changes to Additional Commitments.** Again two respondents objected to Applicants being able to change their Additional Commitments. The Commission's intention here was to allow Applicants to make amendments to items that may have timed out in their Additional Commitments and to allow them to reflect changes that may have occurred to business plans resulting from the considerable period of time that has elapsed since Additional Commitments were submitted. Given the nature and purpose of the Additional Commitments the Commission believes that prior Applicants should be able to amend them now. This is a fair position given that any new Applicant will be making Additional Commitments based on conditions today and not those that applied in September 2015. The Commission believes it is important that all Additional Commitments submitted by Applicants reflect the best view of what they believe is possible in each of the categories to be assessed on the Application date.
- 2.7. **Question 4: Change to timeframe to agree and sign Undertakings.** No respondent objected to the proposal to agree and sign undertakings at least two working days prior to Registration.
- 2.8. **Question 5: Replacement of guarantees in Undertakings with a compliance incentive in Frequency Authorisations.** Two respondents objected to the replacement of Guarantees with a compliance incentive. One respondent in particular raised a concern that the relevant clause in the draft Frequency Authorisation was inconsistent with section 76 of the Telecommunications Act, 2006 (**Act**) since it provided for termination of the Frequency Authorisation in circumstances other than those envisaged on a strict reading of section 76(1) of that Act. On conscientious consideration of this concern, we are persuaded that it is correct and have amended draft clause 2.5.3 accordingly as follows:

"Without prejudice to any other right of action available to the Commission, the Commission shall have the right, subject to section 76 of the Act, to suspend this Frequency Authorisation absent exigent circumstances upon 90 days' written notice if the Authorisation Holder is in breach of the Undertakings and has failed to cure the breach to the Commission's satisfaction within the 90 day notice period".

Other matters raised in responses:

- 2.9. **Spectrum caps.** Two respondents raised concerns regarding the spectrum caps set out in the MITA. There is no difference in the Commission's position between the ITA and the MITA and this matter was therefore outside of the scope of the MITA Consultation. The Spectrum Caps were set in the Spectrum Management Framework (**SMF**) and the Commission will apply them as stated in the Award.
- 2.10. **Availability of spectrum for mobile services.** One respondent raised concerns regarding the availability of spectrum for mobile services and the need for mobile operators to have enough spectrum to operate efficiently. The Commission has set spectrum caps in the SMF and it believes that the caps provide sufficient spectrum for a mobile operator to build and operate a network at a good quality of service in the BVI. As previously stated consideration of the spectrum caps was outside the scope of this consultation. The Commission will review the spectrum caps when it reviews the SMF, which it plans to do in its 2016/17 work programme. The respondent raised a

further point and suggested that the Commission should, as part of the Award, impose a requirement that all operators must surrender the spectrum which they hold in any band, which has not been actively used for at least three months prior to the date of Registration. The Commission disagrees that such a condition should be included in the Rules for the Award. The Award is only concerned with the spectrum to be made available to operators as part of the Award and spectrum that must be surrendered for the purpose of complying with spectrum caps resulting from the Award of this spectrum. The status of other spectrum is a matter for separate review by the Commission, which it will progress through its planned review of the SMF and its ongoing work on efficient use of spectrum and regularising of Frequency Authorisations.

2.11. **Changes to the MITA.** Section 2.1 highlights that the Commission used the MITA as an opportunity to make changes to the ITA beyond those flowing from the Oral Judgement and the Order. The Commission in the ITA included a provision (see Sections 1.22-1.24) that gave it the ability to amend the Award Rules. The Commission has notified those who had previously submitted Applications (see ITA 1.24) and others who have an interest in the Award of the changes to the ITA through this Consultation.

2.12. **Publication of non-confidential responses.** One respondent questioned the Commission's approach to publication of non-confidential responses. The Commission included the following text in its cover sheet "If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here." The respondent's argument is that it is in the interests of transparency to publish all consultation responses on receipt. While the Commission fully supports transparency in such exercises, the Commission disagrees with the respondent on this particular point. While information submitted may be non-confidential, it may never the less provide an insight into aspects of the respondent's strategy that they may prefer not to be public knowledge until the consultation is complete. In all cases the Commission will always make the final decision regarding the time of publication of consultation responses.

3. Summary list of questions

Question 1: Do you agree with the modified timetable proposed for the Award. If not please give reasons for your response.

Question 2: Do you agree with permitting an Applicant to change its Lot preferences (Form E)? If not please give reasons for your response.

Question 3: Do you agree with permitting an Applicant to change its Additional Commitments? If not please give reasons for your response.

Question 4: Do you agree with the proposed change to the time frame to agree Undertakings 2 working days prior to Registration? If not please give reasons for your response.

Question 5: Do you agree with the replacement of guarantees in the Undertakings with a compliance incentive in the Frequency Authorisation? If not please give reasons for your response.