Policy for amendments to

The Telecommunications Act (Chap 47:31)

May 2013

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1. Policy Name

Policy to amend the Telecommunications Act, Chap 47:31 of the Laws of the Republic of Trinidad and Tobago ("the Telecommunications Act").

2. Target Audience

2.1 This Policy will impact the Telecommunications Authority of Trinidad and Tobago, as it treats with the Authority's powers in particular spheres which enable the organisation to function effectively and efficiently as the regulatory authority of the telecommunications and broadcasting sector. This Policy includes considerations relating to the further impact of convergence of the telecommunications and broadcasting sector. As such, the policy considers changes in the locus of the regulator to ensure that the ultimate objective, of increasing the competitiveness of the domestic environment, redounds to the benefit of the society. To this end, this Policy proposes amendments to align the regulation of this sector with further plans for the structured development of the wider information and communications technology (ICT) sector.

2.2 This Policy also impacts telecommunications and/or broadcasting concessionaires under the Telecommunications Act. The provisions of this Policy will impact how the markets they service are designated within the larger framework of the telecommunications and broadcasting sector. The designation of these markets may have significant impact on how they approach service provision in the domestic space. In this regard, it is reiterated that among the objectives of the Act and this policy is the imperative to create an environment attractive to inward capital investment in telecommunications and broadcasting infrastructure.

2.3 This policy will ultimately impact private citizens interested in and/or affected by the orderly and systematic development of the telecommunications and broadcasting sector in Trinidad and Tobago. Further development of the telecommunications and broadcasting sector is essential to the entrenchment of information and communications technologies (ICT's) within the society.

3. Policy Purpose

3.1 The Policy is intended to amend the framework developed for the administration and regulation of the telecommunications and broadcasting sectors as set out in the Telecommunications Act.

3.2 The Policy is thus intended to amend market regulatory rules to provide for the continued orderly development of the telecommunications and broadcasting sector after the liberalisation process begun in earnest in 2005. The policy therefore provides for the strengthening of the Authority's powers in certain instances to mitigate against activity which may have a prejudicial impact on the sector and the wider economy.

3.4 The policy also seeks to provide for appropriate competition regulation in the telecommunications and broadcasting sectors which will effectively close the regulatory gaps created by the passage of the Fair Trading Act Chap. 81:13. Section 3(g) of the said Act specifically excludes from its ambit, those companies which fall under the purview of the Telecommunications Act.

3.5 This Policy is prepared in the context of the concerns expressed with respect to the proposed amendments to the Telecommunications Act, following the Initial Consultation. Accordingly, the amended Telecommunications Act which accompanies this Policy is not intended to be the actual drafting that will be utilised to reflect the policy changes ultimately accepted. It is merely illustrative of the policy positions set out in this document. It is recognised that following this round of consultation, the formal amendments will be made by the designated legislative drafters.

4. Policy Objectives

4.1 Whereas the Policy Framework for Sustainable Development contemplates improved national infrastructure, particularly in the field of information and communications technologies (ICT's), it is imperative that the administrative framework guiding the telecommunications sector is appropriate to address the changing demands of the fast-paced economic sector.

4.2 Such a framework is deemed essential given the demands of the liberalized approach to market development pursuant to World Trade Organization (WTO) obligations, the developments in the global telecommunications market, and commitments made by the Government of Trinidad and Tobago in international fora

4.3 These frameworks reaffirm the commitment to market-based developments, tempered by a facilitative, market-geared approach to regulatory oversight to ensure that citizens continue to have access to a broad range of telecommunications services at reasonable prices. Such regulatory oversight is not intended to stifle the commercial and innovative initiatives of service providers and telecommunications resource licensees within the marketplace. Indeed the framework is intended to encourage investment in innovation and the most advanced telecommunications infrastructure to ensure that Trinidad and Tobago is not left behind in terms of technological developments. In order to achieve these outcomes, the Government proposes to reaffirm its policy that regulation should be focused on those parties that exercise control over limited resources, or provide a service or capacity that is constrained, in the marketplace. To this end, the Government wishes to further refine the role of the Authority and the associated administrative framework to provide for *inter alia*:

- wider oversight of competition practices within the sector, which will augur to the public's benefit in mitigating against supplier consolidation and abuse of market power;

- greater appreciation of the continued convergence of telecommunications systems and broadcast services, which by its very nature merits the review of several aspects of the regulatory environment;

- more effective treatment of breaches of the provisions of the Act and regulations, including the power to impose interim orders for the duration of such punitive procedures, as well as providing for the imposition of administrative penalties as a discretionary alternative to the existing criminal sanctions that are currently contained in the Act; and

- more clarity in the respective roles of the Authority and the Minister as it relates to the administration of the telecommunications and broadcasting sector.

5. Policy Context

Legislation and guidelines relevant to this Policy include:

Constitution of the Republic of Trinidad and Tobago Chap 1:01
The Telecommunications Act Chap 47:31
The Fair Trading Act Chap 81:13
Policy on Broadcast and the Broadcasting Sector (2003)[1]
Policy to Revise the Telecommunications Act (2008)

[1] http://www.ttcsweb.org/articles/computer-laws/draft-national-policy-on-broadcast-broadcasting-industry.htm

6. Overview of the conceptual context of the Telecommunications Act

6.1 Overview of recent sector development

The Government of Trinidad and Tobago remains committed to the liberalization of the economy encouraging investment through the establishment of enabling competitive markets. The Information and Communications Technology (ICT) Sector is seen as a key segment of economic development, and the telecommunications and broadcasting sectors are seen as the fundamental enabler of this burgeoning sector in the context of economic growth. This has been articulated in the National Development Agenda and National ICT Plan. Key to the development of the ICT sector is the development of a competitive telecommunications sector.

6.1.2 In this regard the Government has taken the following steps to develop the telecommunications sector:

- establishment of the Telecommunications Authority of Trinidad and Tobago as an independent regulatory authority and spectrum management agency;
- the adoption of a technology neutral approach to sector administration to provide for the framework's continued applicability as technology evolves; and
- the opening up of all segments of the telecommunications sector (domestic and international) to competition as of December 31st 2005.

A graphical representation of the structure of the domestic sector involving telecommunications and broadcasting is given below.

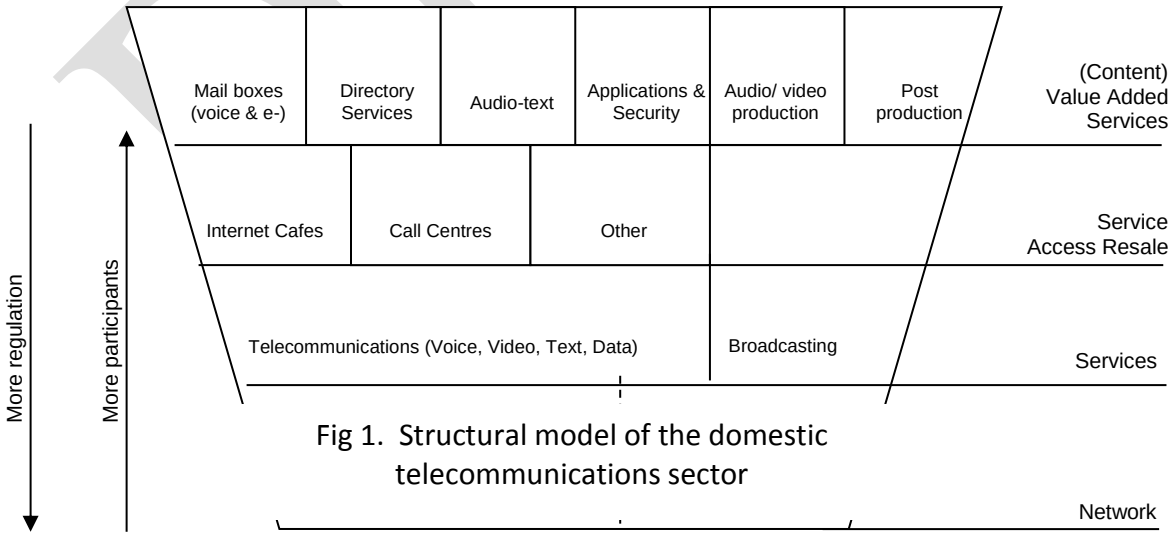

Fig 1. Structural model of the domestic telecommunications sector

In considering the model structure of the ICT sector, the government is convinced that robust development of the ICT economic space is dependent upon a vibrant telecommunications sector that is robust and effective as channels of communication both domestically and internationally.

In the context of the liberalized telecommunications marketplace, dominated by large participants, it is incumbent upon the government to continually revise the regulatory framework with two goals in mind: first, the protection of the marketplace and market conditions from emerging threats of dominance both from the base of the sector model and from its apex, and second, to continue to make the domestic marketplace within Trinidad and Tobago a competitive, attractive destination for foreign direct investment in the ICT space. To this end, the Act which provides for the regulation of the sector must be amended, to not only adequately reflect the sector mapping outlined above, but also to facilitate the implementation of strategies geared to deepening competition and local content in every layer delineated therein.

In this regard, the majority of regulatory attention should be focused on those areas in the conceptual map where there are fewer players. This regulatory oversight must be encouraging, and not overly intrusive, so as to retain and enhance the attractive investment profile that the ICT sector has enjoyed. Importantly, a regulatory authority must be adequately empowered and positioned so as to quickly identify and effectively treat with anomalies within the marketplace that can be disruptive and harmful to the opportunities for capital investment.

Governance systems should be geared towards the reinforcement of transparency and accountability and also aim to reduce bureaucratic delays. Market entry should be predictable and transparent and should act as an impetus to investment opportunities in the telecoms and downstream ICT based services. It therefore stands to reason that, the exercise of arbitrary discretion should be limited within the confines of such governance frameworks so that market forces will act as the pre-eminent determinant in the optimum distribution of capital. The Rule of Law must be reaffirmed and this should be adequately reflected within the established systems of administration.

All things being equal therefore, the framework must encourage human capital development, recognize the importance of knowledge based goods and services, encourage innovation and facilitate the expansion of related service industries.

6.2 Statements of Policy

An overview of the key policy directives required to enhance the regulatory framework is as follows:

I. The regulatory framework which is based upon the Act as its foundation should be structured so that most, if not all, of the conditions of operation in the marketplace are readily accessible, transparent and equally applied,

preferably in the form of published Regulations that **limit the need for the codification of market rules in specific authorization documents**.

II. The Act must recognise the continued convergence of (voice and data) telecommunications systems and broadcast services. Consequently provisions of the Act related to the Authority's oversight and role with respect to **price regulation, universal service, consumer protection** and oversight of **market economics and trends** must be broadened to be equally applicable to broadcasters, and subscription broadcasters particularly, going forward.

III. The Act must recognize the need for improved sector governance, facilitating frameworks that empower the Authority in the execution of its functions, but must also facilitate flexibility in the approach pursued by the Authority. Consequently, provisions related to the **Authority's role in relation to the finalization of interconnection** and **access to facilities agreements** between concessionaires should be strengthened. Also, provisions related to **the Authority's approval and certification functions** must foster timeliness, and be geared towards minimizing the opportunity for unwarranted regulatory delays.

IV. The Act must recognize the importance of a robust competitive environment for the continued development of the sector. Consequently, there should be the delegation to a competent authority of **wider oversight of competition practices** within this particular sector. Such competent authority should be adequately positioned to act in the public interest against supplier consolidation and abuse of market power.

V. The Act must provide for more effective treatment of breaches of the provisions of the Act and its Regulations. Consequently the amendments must overcome the challenge that current remedies for enforcement cannot be implemented in a timely fashion. The amendments must establish **frameworks that provide for speedy intervention** by the Authority and/or the Courts.

VI. The Act must provide **greater clarity with respect to the particular roles** of the Authority and the Minister as it relates to the administration of the telecommunications and broadcasting sector.

The Act must reflect adherence to these key policy principles. It is imperative that the amendments proposed are not only geared to adjusting the technological aspects associated with the Act, but are also designed to establish more robust systems of administration, so as to reaffirm the leading position of Trinidad and Tobago as a destination for meaningful inward investment in the field of ICTs.

7. Summary of proposed amendments to the Telecommunications Act

7.1 The Preamble is amended to reflect the revised scope proposed for the Authority, with regard to the strengthening of its competition oversight of the sector. Further, the preamble reiterates the growing relevance of broadcast service providers within the context of the Act as major suppliers of content products – and as possible alternative high bandwidth channel providers to consumers – as stakeholders for whom wider aspects of the regulatory framework are becoming more relevant than traditionally expected and experienced.

7.2 **Section 2** is amended to provide, in some cases, clarity in the definition of certain elements to ensure that the scope of application is appropriate for a more convergence-ready statutory framework.

I. An example of same is the proposed new definition for "**terminal equipment**" which is geared to be more technology neutral than that which currently exists.

II. Similarly, the definition of "**telecommunications service**" is also amended to remove the caveat "*in real time*" which was used to define what was, and was not, a telecommunications service. With the inclusion of the phrase *"in real time"* as currently drafted, services such as mobile SMS, text message services and even data file transfer may have been inadvertently excluded from the definition of telecommunications services. These services are definitely telecommunications services within the wider conceptualization of the sector's structure as discussed above, and thus the amendment will ensure that all such services are included in the definition of telecommunications services.

III. The definition of "**universal service**" is amended to confirm that broadcasting services may be included, along with voice and data services, within the framework of the universal service programme/ regime. This amendment recognizes the greater convergence of the telecommunications and broadcasting technologies and markets, which consequently requires an elimination of the regulatory arbitrage among these sectors. It should be noted that universal service is broadly defined so that its definition embraces both service and access models of universality. The revised definition of "**facility**" will include buildings or shelters where telecommunications equipment is housed. This would allow the provision of facility sharing or co-location (Section 26) to provide for co-location of competitor equipment in Exchanges or equipment shelters. Such co-location would strengthen the Authority's capacity to enforce local loop unbundling, a matter discussed in more depth later on.

IV. The definition of "**bottleneck telecommunications or broadcasting services**" introduces a new concept which is elaborated upon in the

proposed insertion of section 26A. This concept recognizes that as the functional separation of the network and transport services continues, there may be areas where there is aggregation of market power by a limited number of parties in the provision of services in such a way that these services meet the economic regulatory definition for a supply "bottleneck". The proposed amendment therefore strengthens the powers of the Authority to regulate such instances should it become necessary.

7.3 Other amendments in section 2 provide further understanding as to how these elements interact with other elements in accordance with the proposed structure of the sector. This is exemplified with amendments to the definitions of:

I. "**Telecommunications network**" – this amendment makes it clear that in a technology neutral environment, a telecommunications network can also provide broadcasting services.

II. Similarly, the proposed new definitions of "**broadcaster**" and "**channel**" are geared to identify the distinction between these parties in the definition of the wider marketplace, and clearly articulate the role of the Authority with regard to "content service providers". Content service providers (e.g. independent production houses and studios) should generally not be directly regulated by the Authority. However, there are continued instances where parties claim to be content providers when they in fact control issues of programme scheduling, exercise editorial control over content, and benefit from advertisement revenues. This question, as to whom the obligation of broadcasting applies, stands to be exacerbated with the pending implementation of Digital Terrestrial Television (DTT) in Trinidad and Tobago. In the model proposed, existing television free-to-air broadcasters would now be assigned channels by the Signal Distributor. Unless the matter of who is considered a broadcaster is defined there is the risk of much confusion as to the applicability of concessionaire's obligations to these parties in the reformed market structure. As such, the definition of these terms is geared to give legal certainty to this issue.

III. The new definition for that of "**enterprise**" is inserted in accordance with the proposed insertion of Part IVA, treating with mergers, acquisition and dominance. As discussed later on, this Part is consistent with the provisions of the Fair Trading Act, 2006, and as such, the term enterprise is deemed to have the same meaning as provided for in that Act.

IV. The new definition of "**subscription broadcasting service**" has also been introduced as the term is used throughout these recommended amendments as this market segment – that of CATV and Satellite TV service providers, which are currently inadequately covered by the regulatory regime. As an example, it is notable that sections 28 and 29 do not currently apply to CATV or Satellite TV broadcasters. As a consequence the market has experienced unilateral price increases by a dominant CATV service provider with little

oversight of the Authority, and little testing of issues such as price gouging, sector cross subsidization and other matters. This has effectively created a case of regulatory arbitrage between these persons and others who provide similar services in the public telecommunications segment some of whom are regulated while others remain outside the ambit of the Act. The addition of this term provides appropriate regulatory certainty of the particular persons to whom particular obligations are imposed in these proposed amendments.

7.4 Finally, new definitions are inserted to address the existence of conceptual "blind spot" in the current draft of the legislation. These definitions do not result in any shift in the strategic framing of the Act, but provide further context in relation to general concepts that are utilized throughout the Act. Examples of such insertions include "**consumer**", and "**market**".

7.5 **Section 3 (d)** of the Act is amended to limit the use of the terms of art "universal service" and "universal access". Where "universal service" is usually reflective of programmes geared to ensuring distinct service delivery to specific individuals or locations, "universal access" is generally reflective of programmes geared to ensuring availability within a geographic or socio-economic context. It is not the intention of this section, or the Act, to prescribe the programme objectives to be defined by the Minister in accordance with section 28, or the programme thereafter designed by the Authority. It is thought that whereas the term "universal service" has been defined in section 2 to include both options of programmes design, that it would be inappropriate to include the term of art in this section which delineates the Act's objectives. Accordingly the word "universal" is omitted. The subsection, along with subsection (f), is also amended by including broadcasting as among the services that this ubiquitous access by the public is envisioned.

7.6 **Section 3 (g)** is amended to effectively reflect the intention and objectives of the subsection.

7.7 **Section 6** is amended, changing the composition of the Board of Directors, reducing the number of telecommunications professionals, while including for the first time a representative for the broadcasting industry specifically. It is anticipated that the extension of the ambit and areas of expertise of the complement of the members of the Board shall provide greater insight into the needs of these converging segments by the Authority's leadership.

7.8 **Section 8** is amended to first rename the "Executive Director" as the "Chief Executive Officer", and then to ensure that the remuneration package afforded the Chief Executive Officer is pegged to an independent comparative scale. The section is further amended to clarify that the term of the CEO may be renewed if so desired by the Board.

7.9 **Section 9** is amended to adjust for the renaming of the Executive Director.

7.10 **Section 13** is amended as a matter of drafting efficacy.

7.11 **Section 14** is amended to also provide for decisions of the Board to be facilitated by round robin in instances which preclude the convening of a quorum at one place.

7.12 **Section 15** is amended by clarifying when a Board member is considered to have interest in a decision which will need disclosure. It also clarifies the process by which such interest shall be declared, and the action to be taken in the event that this situation occurs.

7.13 **Section 18** is amended by clarifying the role of the Authority in a number of matters:

I. First, the inclusion of subsection (1aa), and the amendment of subsections (d), (i) and (o) are geared to confirming that the Authority is singularly responsible for the management of spectrum (including the issuance of and monitoring compliance to licences) and development of technical standards. The deletion of subsection (f) also reaffirms the role of the Authority in the determination of sector-specific technical requirements.

II. The amendment of subsection (j) is enabling in nature to facilitate the widening of the Authority's function in coordinating the addressing schema used by forms of telecommunications other than telephony. This does not suggest that the Authority will forthwith assume this role upon the promulgation of such amendments, as there is considerable groundwork that is to be completed in connection with interacting with international agencies, before the performance of this function is actualized. The statement of intent however would provide strategic and policy guidance in relation to the Authority's function in this sphere.

III. The inclusion of subsections (qa) and (qb) recognizes the expansion of the Authority's responsibilities to undertake investigations pursuant to the competition regulatory powers provided to the Authority by these amendments.

IV. The inclusion of subsection (qc) to reflect the proposed amendments articulated in Part IXA, which provides the Authority with the power to levy administrative penalties against parties for particular infractions in accordance with the procedures laid out in that Part.

V. The inclusion of subsection (qd) clarifies that the Authority has to power to request any information required from concessionaires in furtherance of its obligations. This is to clarify the Authority's right to request such information even in the instance where there is no specific complaint or investigation being undertaken.

VI. The inclusion of subsections (qe) and (qf) provides for the Authority to enter into either contracts, generally for the provision of services to support its operations, or Memoranda of Understandings, specifically with regard to strengthening collaborative arrangements with other governmental, regional or international entities in support of its core functions.

VII. The amendment to subsection (r) is geared to facilitate the Authority undertaking such other responsibilities as may be identified by other written law. As the principal statutory agency that will support the development of the telecommunications and broadcasting sector, there are other functions which the Government may require the Authority to assume responsibility for from time to time. Without this amendment, the designation of other roles to the Authority under the remit of other laws would not be readily achieved.

VIII. Subsection (2) is amended to require persons who trade in radio-transmitting equipment to register with the Authority in that regard. This is a role of the spectrum management authority which was inadvertently omitted with the repeal of the Wireless Telegraphy Ordinance.

IX. The new subsection (4A) is included to clarify that the Authority may use "encouragement regulatory" approaches as an appropriate strategy to educate the population of the state of competition within any segment of the sector. Such approaches seek to publish independent information about marketplace conditions so as to inform the public of relevant impartial information which may guide their purchasing patterns in the marketplace. While the publication of such reports is not precluded under the current provisions the Act, the inclusion of this subsection reaffirms and underscores the Authority's role in this regard.

7.14 **Section 21** is amended to afford the Authority the right to withhold publication of a section of the Concession on the basis that it would prejudice national security or international obligations. This clause really seeks to rationalize a lacuna which consists currently where particularly clauses of the Unified Concession which are related to National Security matters are redacted from the version of the Concession made publicly available. While this redaction does not necessarily breach subsection 21(8), the inclusion of the proposed subsection 11 will clarify and add justification to this matter.

7.15 **Section 22** is amended to reaffirm the Authority's oversight of anti-competitive practices, and that such oversight should be provided for in the Concession.

7.16 **Section 23** is amended to establish the "must carry domestic broadcaster channel" obligation on multi-channel subscription broadcasters at the discretion of the Authority. The "must carry" obligation currently exists as article D10 in the Unified Concession and is itself an extension of the News and Information Services

obligation (articles D5 and D6) of the concession which requires the presentation by all broadcasters of at least one news magazine per day on the current affairs of the country.

7.17 Further, by insisting upon the inclusion of such an obligation of multi-channel broadcasting service providers, e.g. Cable TV, Satellite TV or DTT Signal Distributor service providers, TATT would be in effect supporting the development of the local content development sector, in a manner which limits its interference in the commercial viability of the enterprise. "Must carry" obligations are not uncommon; examples are evident in the US – found in the licence obligations of CATV operators, as well as in the UK's Electronic Communications Act 2003.

7.18 **Section 24** is first amended to give the Authority more direct powers to approve proposed plans of concessionaires which may impact the cumulative national telecommunications infrastructure. The section is also amended to ensure that the relevant provisions of that section which relate to appropriate treatment of the consumer equally apply to subscription broadcast service providers (e.g. CableTV (CATV) and SatelliteTV providers) as they do to telecommunications service providers.

7.19 **Section 25** is also amended to clarify, and in some cases expand, the powers of the Authority in its administration of the interconnection negotiations of concessionaires.

7.20 In subsection (2), the amendments herein proposed strengthen the framework by:

- reaffirming that the Interconnection Regulations may include in its guidelines and standards such matters as outlined in subsection (a)(i) and (a)(ii);
- clarifying the responsibilities of the concessionaire in establishing at least one general point of interconnection at its own costs, and further clarifies where the terms of subsection (b) – regarding the rates reflecting economic costs of additional points – become applicable; and
- empowering the Authority to approve both Reference Interconnect Offers (in subsection (c)), and interconnection agreements (in subsection (f)) before their coming into force.

7.21 **Section 26** is amended to clarify that the obligation of Access to Facilities is also applicable to broadcasting service providers. With regard to challenges associated with the implementation of "local loop unbundling" in its various forms, the amendment of the definition of "facility" is expected to treat with these concerns. While there would be some debate over the relevance of frameworks such as LLU in the context of Next Generation Network rollout for example and the concomitant development of intermodal competition, it is not the intention to pre-empt or limit the strategic approaches of the Authority in fostering as much competition in every aspect of network deployment.

7.22 Section 26 is also amended to clarify procedural issues related to the submission to the Authority of access to facilities agreements for its non-objection/approval.

7.23 A **new Section 26A** is inserted to facilitate the identification of services deemed to become bottlenecks, and provide for the subsequent regulation by the Authority of the "bottleneck services" that concessionaires are now obliged to offer to each other. This is particularly critical in allowing the Authority, where appropriate, to oversee the terms and conditions afforded access to wholesale carrier-to-carrier services such as bandwidth (i.e. the speed of transmission of data), as opposed to merely the availability of the physical copper or fibre facility which affords that bandwidth. Other areas where the development of bottleneck services may emerge would be in the access provided to key content-based services (such as e-government services), value-added services that are either hosted domestically or delivered by some other means which creates a supply constraint, or the context of the proposed model for the deployment of digital broadcasting systems within Trinidad and Tobago. In the latter instance, if not managed effectively, the preferred model could result in the situation where a person becomes a bottleneck supplier of broadcasting services. Without the implementation of the general oversight proposed there is the potential for market power aggregation which would ultimately need to be addressed.

7.24 **Section 28** is amended to broaden the possible contributors or participants to the universal service programme to include broadcasting service providers, along with (voice and data) telecommunications service providers. This is relevant not only with regard to equity of regulatory oversight of networks supporting subscription broadcasting services, but also provides a framework for the Authority to more directly address concerns related to the inequitable coverage provided by free-to-air broadcasters across the geographic bounds of Trinidad and Tobago.

7.25 **Section 29** is amended primarily so that the price regulatory powers of the Authority apply equally to public telecommunications and subscription broadcasting service providers, as the latter treats with consumers in much the same way as the former, and where up to this time, there is still a dominant service provider in that segment.

7.26 It is proposed that Subsection (5) of Section 29 be deleted:

I. Subsection (5) prescribes a particular form of price regulation in a particular market condition. This limits the Authority's option in developing its price regulatory regime, particularly where the form prescribed is not considered the more robust approach. Removing this prescription, will allow the Authority to establish more robust price regulatory regimes, as provided for in subsection (2), to treat with the market condition identified.

II. Subsection (6) provided for the establishment of price floors and caps by the Authority in a particular market condition. This provision did not constrain

the Authority's options, and formed the basis for an approach that was successfully utilized in determining the resolution interconnection dispute between two concessionaires. It is recommended that this section is retained. Instead, it is recommended that its provisions are applied to subscription broadcasting services as well as providers of services on an exclusive basis.

III. Subsection (7) provides the general obligation that a concessionaire's prices are published in accordance with guidelines from the Authority. It is recommended that provision is retained. It is further recommended that the provision is applied to subscription broadcast service providers as well.

IV. Subsections (8) and (9) treat with the determination of relevant markets by the Authority, the determination of concessionaire's dominance by the Authority and the procedure by which a concessionaire may apply to be declared no longer dominant in a market. As the amendments propose the inclusion of Part IVA, which is wholly related to markets, anti-competitive behavior and dominance, it is proposed that these subsections be relocated to that Part as section 44H. **In the event that the inclusion of Part IVA into the Act, is not approved these subsections (8) and (9) should not be deleted from section 29.**

7.27 **Section 30** is first amended to clarify the conditions and process by which a Concession may be terminated or suspended. It reinforces that the Minister is the party who is responsible for the suspension and termination of Concessions. While the Minister may be advised by the Authority in this matter, the ultimate actor in that regard is the Minister. The other major source of amendment is the recognition of instances other than *force majeure* which may require amendment of the concession. These other circumstances under which the Concession can be amended include:

- the passage of Regulations which supersede particular provisions of the Concession; and
- in accordance with procedures established for such amendments in the Concession, with the Minister acting in accordance with the recommendations of the Authority.

7.28 **Section 31** is amended to provide clarity on the process to be undertaken by the Authority upon the receipt of application for renewal of concessions on both the first renewal and subsequent renewals thereafter.

7.29 **Section 32** is amended to reflect the proposed approach,that the party/concessionaire applying to the Authority for such certification shall undertake due diligence measures before approaching the Authority. The suggested amendments to this section are intended to maximize the operational options available to the Authority in implementing this function.

7.30 **Section 33** is amended to ensure that the provisions therein apply also to broadcasting services, and further to this clarifies the responsibility of concessionaires planning to undertake such work to coordinate with other concessionaires to minimize the disruption of normal traffic flows.

7.31 The recommended insertion of subsection 10 would further strengthen the administrative framework in support of such collaboration, recognizing this collaborative requirement as falling under the same rubric of section 26, Access to Facilities.

7.32 **Sections 36** is amended to clarify minor matters in the process associated with the grant of a licence and to allow sufficient completion of application prior to the Authority making its determination.

7.33 **Section 39** is amended to provide clarity in the process related to the amendment, suspension or termination of a licence, regardless of its application. In particular it includes among the reasons for amendment of the licence would be changes to national legislation, regulations and spectrum plans. The amendment also reinforces that the primary State actor with respect to spectrum management and the licensing matters related thereto is the Authority. It also removes the subsections associated with the amendment or renewal of a licence and brings section in line with similar provision applicable to concessions.

7.34 **Sections 41** is amended to define the National Spectrum Plan as a key tool of spectrum allocation and assignment and outlines the procedures contained in the said Plan.

7.35 The proposed revisions seek to (i) deny property access of a licensee to spectrum and (ii) indemnify the Authority from any obligation for compensation due to any losses suffered by its allocation and reallocation of frequency bands.

7.36 **Section 43** is amended to reflect amendments in Sections 41 and 42, as well as to underscore the importance of considering economic value of spectrum in this regard.

7.37 **Section 44** is amended by:

- defining the National Numbering Plan to be developed by the Authority, its applicability to both public telecommunications network operators and service providers and the considerations applicable in its development; and

- providing the Minister with the discretion to delegate the Authority as the administrator/ coordinator of any other form of telecommunications addressing relevant in the global converging telecommunications environment.

7.38 In the latter instance, the general principle behind this amendment is the recognition of the convergence of voice, data and broadcast services and the technological systems by which they are delivered. Accordingly, for equity of regulation across these segments of the telecommunications sector, there needs to be equal consideration of addressing mechanisms across these forms of telecommunications. As numbering is the form of addressing in telephony, Domain Name administration is the addressing scheme associated with websites and web resources, and IP addresses constitute the addressing scheme associated with physical locations of networked resources. The identification of the telecommunications sector regulator as an appropriate fit for Domain Name administration is not without precedent in the wider telecommunications regulatory environment: this practice has precedent regionally (in the OECS NTRC's under the ECTEL umbrella) and even further afield such as in Singapore, where the regulatory agency IDA has statutory responsibility to regulate the registration, administration and management of domain names.

7.39 It must be acknowledged that LACNIC is the sole agency responsible for the assignment of IP addresses in Trinidad and Tobago. However, it should be noted that the amendment proposes TATT undertake the role of 'IP address coordination'. Coordination suggests a role that is based on partnership with stakeholders as opposed to being an arbitrator or gatekeeper to the resource. In this regard, it should be noted that there is an ongoing challenge in the coordinated migration of IP addresses across the global Internet from Internet Protocol Version 4 (IPv4) to Internet Protocol Version 6 (IPv6). In this regard, the opportunity for an agency to act as a central coordinating agency would be advantageous as it would facilitate the transition in a manner that is transparent to the end users within the country

General Competition Powers

7.40 A **new Part IVA** is inserted, with associated clauses 44A through 44M. These clauses provide for the Authority to act as the competition regulator of the telecommunications and broadcast sector. The clauses closely mirror the equivalent sections of the Fair Trading Act with minor adjustments related to sector-specific concerns. **On account of these sector specific concerns and the delay in the establishment of the Fair Trading Commission under the Fair Trading Act, it is recommended that the Authority be declared the competent Competition Regulator of the Telecommunications sector.** It should be noted that this function of competition regulation is already partially required of the Authority in its mandate to establish price regulatory regimes (with the concomitant requirement to determine and declare dominance of particular concessionaires) as well as its role in managing anti-competitive activities as part of ensuring transparency and equity in the implementation of interconnection and Access to Facilities.

7.41 This approach, of including in the responsibilities of the Authority that of sector competition oversight, is not without international precedent, as best practice in the OECD demonstrates the convergence of both sector regulator and competition authority in the function of the UK's OFCOM, the US' FCC, and closer to

home regionally in countries such as Belize, and the OECS countries which have ECTEL as their overarching Regulator. In alignment with best practice demonstrated in the UK (with OFCOM and OFT), US (FCC and SEC) and elsewhere, it is established in this Part that the Authority will consult with the Fair Trading Commission and the Securities Exchange Commission in the consideration of anti-competitive matters.

7.42 This Part and its sections provide for the definition and barring of anti-competitive mergers and agreements, and further provide the Authority with a framework for investigation of such. In conjunction with other amendments herein proposed, the Part also outlines the associated framework which, in addition to the provisions of Part IXB, provides for the Courts having the ultimate oversight with regard to Orders of Divestment.

7.43 **If this Part is not to be included in the Act, subsections 29(2)(8) and (9) shall not be deleted.**

7.44 Of significance in the definition of anti-competitive activity are clauses **44A and 44B** where it is clarified that mergers applicable include those associated with parent companies of a concessionaire to other concessionaires and other firms. This is also applicable in the instance of mergers by virtue of interlocking directorships. In these instances, **clause 44B** also facilitates collaboration with the Fair Trading Commission to approve a merger.

7.45 There are a number of provisions in **clause 44B** which vary from the provisions of the Fair Trading Act. In particular subsection (1) requires **all** mergers related to concessionaires to get prior approval from the Authority. This sector specific provision is critical, particularly in the broadcast sub sector in the context of the overall management of the spectrum resource, and the wider question of media ownership concentration. This provision would thus seek to close avenues through which a corporate entity may gain control of significant blocks of broadcast spectrum as well as the threat associated with the aggregation of significant power to influence public opinion in the hands of a single corporate entity.

7.46 **Clause 44D** clarifies that the Authority itself will not order divestment in the instance where an anti-trust condition is determined in the marketplace. Instead, the Authority applies to the Court for the Order of Divestment which will consider the evidence compiled by the Authority, pursuant to its investigations in making the relevant determination. Further, the clause allows the Authority to forbear in its approach to the Courts subject to the instance where the Authority and the party come to an agreement of a course of action to resolve the anti-trust condition without the need for the intervention of the Courts. However, if the party breaches the agreement with the Authority it will be subject to a fine, and the Authority retains the right to resolve the prevailing situation through the Courts.

7.47 Clauses **44E through 44G** closely align with similar provisions from the Fair Trading Act.

7.48 **Clause 44I** outlines the conditions, and descriptions thereof, which are evidence of an abuse of dominance in a market. These conditions are in conformance with those identified in the Fair Trading Act, ensuring conformity in regulatory standards and thresholds across the business landscape. There is also consideration that a concessionaire gaining controlling interest in value added service providers to be specified by the Authority, may be subject to rulings of breach of dominance. This is suggested to mitigate against any single entity achieving monopolistic control of content suppliers, creating a "bottleneck" to the detriment of the wider competitive framework.

7.49 **Clauses 44K through 44M** also provide a framework for the deferral of matters to the CARICOM Community Competition Commission and outline the powers of Orders of the Commission in that regard. These provisions are again in conformance with the framework established by the Fair Trading Act, and are particularly relevant given the trans-regional nature of a number of providers operating in the domestic telecommunications space.

7.50 Clause **44N** provides for the Minister establishing, on the advice of the Authority, regulations which would give effect to procedures and frameworks to support its work under this Part.

7.51 New **clause 45A** is inserted to provide for the restriction of the import, operation, installation, sale or use of radio-communication equipment which does not comply with technical standards defined by the Authority. This amendment seeks to give the Authority as much flexibility as possible with regard to its approach to the certification of equipment.

7.52 This flexible approach means that the Authority will not have to undertake a process that is lengthy and unwieldy, especially when considering the variety of equipment and systems that are currently manufactured with a latent radio-communication component that comply with FCC Part 15 Rules related to the use of licence-exempt spectrum. As an example of the scale of the exercise demanded, the variety of equipment which would need to be submitted for class certification would include wireless routers, personal communications systems of mobile phones, video game consoles, motor vehicle and home security alarm systems, and laptops. Each of these categories has a range of product suites all of which would need to be individually certified with the approach legislated in the prior section 69. The drafting of the provision provides for the definition of class standards which the person trading in the equipment would be obliged to prove conformance, and only in the instance where such cannot be independently verified, would the Authority be required to undertake an affirmative certification.

7.53 **Section 48** is amended to include radio-transmitting equipment as among those subject to pre-installation testing.

7.54 **Section 50** is amended by first expanding the parties over which the inspector has oversight by including broadcasting service providers under their remit. This is again undertaken to level the regulatory playing field of similarly situated telecommunications and broadcasting service providers.

7.55 The Section is further amended by widening the ambit of locations which the inspector may have access to in order to undertake an investigation or audit. This is important in the technical context, as there may be many instances where the records associated with equipment use or network operation may not be located in the same place as the actual equipment. By granting inspectors the ability to investigate any location in which a concessionaire carries out any part of its business, or any location or business in which any information relating to the concessionaire's business is stored, the Authority will obtain the necessary scope of access necessary to give effect to its variety of roles as sector economic regulator, spectrum management authority well as the sector competition regulator. Further, the amendment recognizes the widened scope of matters for which an investigation may be initiated in the context of the Authority's role as competition regulator.

7.56 **Section 51** is amended by the inclusion of a new subsection (3) which empowers the Courts on application by the Authority, to determine how equipment seized may be disposed.

7.57 **Section 53** is amended to replace the term "Executive Director" wherever it appears with the term "Chief Executive Officer". The section is also amended to provide use by the Authority of its funds to address operational considerations such as accommodation and ancillary facilities. Further to the same and in an effort to provide the Authority with the necessary flexibility and autonomy in financial management within the context of the management of public funds, the section is also amended in new subsection (6A) to allow the Authority to either open additional bank accounts or invest in securities to facilitate the effective management of its operational demands and provide for future expansion, in accordance with IFRS.

7.58 **Sections 55 and 56** amend the definition of "GAAP" to include the term "International Financial Reporting Standards" wherever it appears.

7.59 **Section 60** is amended to ensure consistency of this section with the amendments to sections 7 and 8 above.

7.60 **Sections 61 and 63** are amended to ensure consistency of issues under consideration.

Enforcement

7.61 There is a fundamental change in approach with regard to enforcement under the proposed amendments. Currently, the Act provides a criminal sanction for

certain breaches either of the Act itself or Concession and for certain activities more particularly set out in sections 65(1), 66, 67 and 68. Other than these instances there is a general penalty provision under section 71, which provides for a fine of $25,000 on conviction. It is now thought that this may not be the most effective way to deal with enforcement under the Act.

7.62 Instead, it is proposed to establish a regime where the Authority may levy administrative penalties against concessionaires and licensees deemed to be in breach of the Act. This regime, it is thought, would facilitate more speedy adjudication on matters. To ensure transparency, Concessionaires or Licensees, as the case may be, may appeal to the Courts against an administrative levy.

7.63 **Section 65** is amended to limit what breaches are considered criminal offences. This limitation is undertaken so that there is within the revised Act, two avenues for enforcement – criminal (for the breaches outlined in section 65) and administrative penalties (for all other breaches). This is critical as it allows the Authority flexibility in pursuing those who contravene provisions of their Concession or other regulatory instruments issued by the Authority. The fines are also increased given the size of the annual revenues of the sector.

7.64 **Section 69** is amended to clarify that the clause applies to the damage to networks operated by any agency responsible for national security or emergency services. The fine is also increased.

7.65 A new **Clause 71A** is proposed to treat with the lacuna established where, if for the non-payment of fees (which constitutes a material breach) a concessionaire or licensee's authorization may be revoked by either the Minister or the Authority as the case may be yet there remains no remedy to require the defaulting Concessionaire or Licensee to pay the outstanding fees to the Authority. The proposed amendment permits the Authority to recover the outstanding fees as a civil debt.

Administrative Penalties

7.66 **A new Part, Part IXA**, including new sections 72A to 72F, is inserted to provide for process by which the Authority may notify, consider and ultimately impose an administrative penalty or fine against a person for contravention of the Act, or its regulations, or failure to comply with directions of the Authority in accordance with the Act, regulations or any other written law that the Authority is compelled to enforce. The fines may be up to a maximum of five (5%) of the annual revenue of the relevant business for the relevant period, considering the circumstances of the contravention, and the concessionaire's history in that regard.

7.67 **Clause 72A** identifies the process by which the Authority shall issue a notification of intent to levy the administrative charge to the offending person. The section provides for the period of notification within which the offending party must respond, but also provides for the shortening of that period in the instance of

repeated breaches and notifications served to the same person. **Clause 72B** provides a framework by which the Authority may abandon the process of levying the administrative penalty. It is based upon the person providing such evidence to prove, to the satisfaction of the Authority, that the offensive action has been remedied. In this way, the provision provides for a mediated settlement to the impasse.

7.68 **Clause 72C** provides for the actual imposition of the administrative penalty where the offending entity has not acted to rectify the issue under consideration, while **Clause 72D** provides guidelines and related matters to be considered in determining the quantum of the administrative penalty. **Clause 72E** attempts to pierce the "corporate veil" allowing for executives of corporations to be held accountable for the actions of their commercial entities in this regard. This is recommended so as to provide a further disincentive to those considering breaches. **Clause 72F** also reaffirms the commitment to avoid instances of "double jeopardy" where, in a case which may attract either criminal or administrative sanction, the offending party will only be subject to an administrative fine.

7.69 **A new Part IXB** is inserted, with associated clauses 72G to 72L. These clauses outline the role of the Courts as specifically framed in the context of the Authority's function as competition regulator as established by Part IVA of these amendments.

7.70 **Clause 72G** provides for the jurisdiction of the Court to hear and make determinations on cases of anti-competitive behavior as submitted by the Authority pursuant to the inserted Part IVA. It also provides for the Courts to consider civil damages in addition to any other remedies recommended by the Authority to the Courts.

7.71 **Section 73** is amended by replacing "Executive Director" wherever it appears with "Chief Executive Officer". It is also amended so that the provisions apply equally to "broadcasting services". The section is further amended by deleting sub-paragraphs (1) (b) and (1) (d) as these are contraventions for which the Authority has the discretion to act without reference to the Minister. Finally, the section is to be amended in subsection (3) to clarify that while the Minister may revoke the Concession, the Authority may revoke the licence of the offending party.

7.72 **Section 74** is amended to clarify that the Chief Executive Officer of the Authority is the person whose view is thereby certified.

7.73 **Section 76** is amended by correcting references accordingly.

7.74 **Section 77** is amended to include broadcasting services under the ambit of the clauses effect.

7.75 **Section 78** is amended to increase the penalty for breaches of Regulations by Concessionaires or Licensees. This is deemed necessary considering the revenue

base of the sector (with revenues over TT$4.4 Billion in 2011), and as such there would be need for some provisions in the Regulations which should attract a substantial penalty in the event of breach.

7.76 **Section 79** is amended to clarify that it is the Minister who shall submit the Broadcast Code to Parliament subject to affirmative resolution thereof, and to remove the timeframe associated with the laying of said Code.

7.77 A **new section 80A** is inserted to facilitate the Authority issuing certain notices via publication in the Gazette and no less than two daily newspapers. Further with regard to any documents or subsidiary guidelines of the Authority, such shall be prescribed via publication of a notice of availability of same at its offices or on its website. This section provides for further flexibility in how the Authority shall define particular instances of its regulatory framework. This approach would limit the need for lengthy timeframes in the amendments of ancillary frameworks that have little commercial implication on the operations of concessionaires and licensees.

7.78 **Section 81** is amended so that the drafting correctly reflects the Authority's discretion in forbearance.

7.79 **Section 82** is amended to clarify that in the consideration of a dispute, arbitrators of the dispute on behalf of the Authority have the power to prescribe interim orders.

7.80 **Section 85** is amended to make further consequential amendments to the Tobago House of Assembly Act and the Regulated Industries Commissions Act, to rectify inconsistencies with other laws which were not amended at the time of the passage of the original Act.

7.81 A new **Section 89** is inserted to provide for the amended Act to provide for validation of acts or omissions by the Authority which may have occurred in the period prior to the coming into effect of the amendments.

It is to be noted that the suggested amendments that are attached are illustrative only of the policy positions outlined above and should not be construed as ACTUAL drafting amendments. Following from this consultation process the actual amended legislation shall be prepared by the requisite legislative drafters.