

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Telecommunications (Amendment) Bill

Paper No: 92/13

Date: 10 April 2013

Report of: Attorney General/Head of Regulation/Legislative Drafter

1.0 Purpose

The purpose of this paper is to seek Executive Council's approval for a Bill amending the Telecommunications Ordinance to reflect an agreement reached with Cable & Wireless (C&W) in September 2012 under which the previous tariff-based price controls for telecommunications services has been replaced by a retail price-cap mechanism.

2.0 Recommendations

2.1 Executive Council is recommended to approve the publication in the *Gazette* of the Telecommunications (Amendment) Bill. A draft of the Bill is attached to this paper as Annex A.

2.2 Executive Council is also recommended to approve the presentation of the Bill to Legislative Assembly in May 2013.

3.0 Summary of Financial Implications

None

4.0 Background

4.1 During 2011 and 2012 the Falkland Islands Government (FIG) Regulatory Services negotiated a new form of price control regulation with the exclusive telecommunications licence holder Cable & Wireless. Members of Legislative Assembly were kept informed of the negotiations and approved the final arrangements. The Memorandum of Understanding for the Price Control Mechanism was signed by FIG and C&W on 27 September 2012 and will have effect until March 2015.

4.2 This new regulatory function required an amendment to the Telecommunications Ordinance 1988 to enable the Governor's appointed

Regulator to exercise his powers when dealing with matters regarding to the Price Control Mechanism.

4.3 As part of the negotiations C&W agreed to provide assistance with the drafting of an appropriate amendment, this was provided and utilised where possible.

4.4 A draft amendment to the Telecommunications Ordinance was produced by the Legislative Drafter which was then scrutinised by the Attorney General and the Regulator, input was also provided from FIG's expert consultants on Telecommunications. Minor amendments were made and the second draft was provided to C&W locally and in London on 14 December 2012 to provide opportunity for appropriate consultation. C&W provided their comments on the draft amendment on 11 January 2013 and further correspondence took place regarding further amendment. Final amendments were agreed at a meeting between the Attorney General, the Regulator and the Chief Executive of C&W on 25th March 2013.

5.0 Draft legislation

5.1 A copy of the draft Bill is attached as Annex A

5.2 The Objects and Reasons at the end of the draft Bill provide a detailed explanation of its provisions. A shorter commentary on the draft Bill has also been prepared and it is attached as Annex B.

5.3 If the draft Bill becomes law, it would provide a statutory basis for the Memorandum of Understanding dated 27 September 2012 and entered into between the Falkland Islands Government and Cable & Wireless South Atlantic Limited.

5.4 In particular, the draft Bill would provide for regulatory sanctions to be imposed if the retail price-cap is breached:

- Although it is assumed that C&W intend to comply with the retail-price cap, the Bill would allow for proportionate regulatory sanctions to be imposed on an administrative basis if there is a breach
- However, the provisions have been devised so as to promote the provision of remedies to consumers over the imposition of penalties.

5.5 The draft Bill is also intended to have an element of future-proofing built in, by providing for the review of the retail price-cap that will take place during 2014.

5.6 A "Keeling" document (which shows how the relevant extracts from the Telecommunications Ordinance would be amended by the draft Bill) has been prepared and it is attached as Annex C.

6.0 Consultation with Cable & Wireless

6.1 Cable & Wireless were consulted on an earlier draft of the Bill and they made two comments in response:

- One of these concerned an expansion of the remit of the Telecommunications Appeal Panel that took place in 2012.

It is not proposed that this should be changed.

- The other comment related to the legal relationship between the Telecommunications Ordinance and the procedures set out in the Revised Implementation Document (RID), which contains the details of the retail price-cap.

That comment could be dealt with by some additional wording, which has now been included in the draft Bill. It is believed that this addresses the point that C&W had made.

7.0 Financial Implications

7.1 Although the draft Bill provides for the possibility of penalties being collected from C&W, it is not considered that these should be taken into account as financial implications. It is not assumed that C&W would breach the retail price-cap and the aim of the process would be for remedies to be provided directly to consumers instead of a penalty being collected by FIG.

7.2 There might be possible financial implications if a dispute were to arise:

- advice would have to be taken from an expert consultant in relation to the alleged breach and proposals made by C&W; and
- if dispute were to go on and be referred to the Telecommunications Appeals Panel:
 - the Panel members would have to be remunerated; and
 - further advice and assistance expert consultants would be required in making FIG's case to the Panel.

8.0 Legal Implications

The legal implications of this paper are set out elsewhere in this paper.

9.0 Human Resources Implications

9.1 The FIG Regulatory Services now has a full time post of Regulator who will carry out the processes and oversight to ensure that the Price Control Mechanism is carried out in accordance with the RID. Additional FIG resource will be utilised on an ad hoc basis, potentially from FIG Audit or Treasury when dealing

with complex financial data sets. This will negate the need to employ expensive consultants.

ANNEX A

Telecommunications (Amendment) Bill 2013

(No: of 2013)

ARRANGEMENT OF PROVISIONS

Clause

1. Title
2. Commencement
3. Amendment of the Telecommunications Ordinance
4. Section 2 amended – Interpretation
5. Section 2A amended – Regulator)
6. Section 2B amended – Telecommunications Appeals Panel
7. Section 10 amended – Functions and powers of telecommunications utility
8. Section 11C amended – Failure to provide information: penalties
9. Section 45 substituted
10. Section 46 substituted
11. New sections 46A to 46H
12. Schedule 1 repealed

Telecommunications (Amendment) Bill 2013
(No: of 2013)

(assented to: 2013)
(commencement on publication)
(published: 2013)

A BILL

for

AN ORDINANCE

To further amend the Telecommunications Ordinance (Title 70.1).

BE IT ENACTED by the Legislature of the Falkland Islands —

1. Title

This Ordinance is the Telecommunications (Amendment) Ordinance 2013.

2. Commencement

This Ordinance comes into force upon publication in the Gazette.

3. Amendment of the Telecommunications Ordinance

This Ordinance amends the Telecommunications Ordinance.

4. Section 2 amended – Interpretation

(1) This section amends section 2.

(2) The following definition is inserted after the definition of “Panel” —

““price-capped service” has the meaning given to it by section 45(1);”

(3) The following definitions are inserted after “radio communications equipment” —

““retail price-cap” has the meaning given to it by section 45(1);

“RID” has the meaning given to it by section 45(1);”.

5. Section 2A amended – Regulator

Section 2A(5) is amended by —

(a) omitting “or” at the end of paragraph (a); and

(b) inserting the following paragraph after paragraph (a) —

“(aa) the Governor’s power to make subsidiary legislation under section 46B; or”

6. Section 2B amended – Telecommunications Appeals Panel

Section 2B(3)(a) is amended by omitting “section 11D” and substituting “sections 11D and 46G”.

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7. Section 10 amended – Functions and powers of telecommunications utility

Sections 10(2) and 10(3) are repealed.

8. Section 11C amended – Failure to provide information: penalties

Section 11C(5) is repealed.

9. Section 45 substituted

Section 45 is repealed and the following section substituted —

“45. Retail price-cap: definitions, etc

(1) In sections 46 to section 46F —

“price-capped service” means a service that is subject to the retail price-cap;”

““retail price-cap” means the retail price control mechanism set out in chapter 2 of the RID; and

“RID” means the Revised Implementation Document dated 26 September 2012, referred to in a Memorandum of Understanding dated 27 September 2012 and entered into between the Falkland Islands Government and Cable & Wireless South Atlantic Limited.

(2) A telecommunications utility is entitled (and is to be treated as if it had been since 1 April 2011) to make payments for the provision of support services to a head office or parent company which is outside the Falkland Islands and those payments may be up to 8% of the utility’s net revenue within the Falkland Islands.

(3) None of the following will be included as a cost of a telecommunications utility for the purposes of assessing compliance with the retail price-cap or when the retail price-cap is being reviewed —

(a) penalties imposed under section 11C(2);

(b) penalties imposed under section 46F(2);

(c) the cost of complying with undertakings under section 46E(2)(b), 46G(4)(c) or 46G(4)(d).”

10. Section 46 substituted

Section 46 is repealed and the following section substituted —

“46. Retail price-cap: period of operation

The retail price-cap is to be treated as if it has had effect since 1 April 2011 and continue to apply until at least 31 March 2015.

11. New sections 46A to 46H

The following sections are inserted after section 46 —

“46A. Retail price-cap: review

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(1) The retail price-cap will be reviewed and changes may be made to it (but changes may only take effect from or after 1 April 2015).

(2) Changes to the retail price-cap —

- (a) must take account of conditions expected at and beyond April 2015;
- (b) may not penalise a telecommunications utility for efficiency gains that have arisen from the operation of the retail price-cap; and
- (c) must ensure that a telecommunications utility is able to operate and maintain national and international telecommunications systems and services in the Falkland Islands —
 - (i) on an economic basis; and
 - (ii) with a reasonable return on its investment (taking into account the utility's expected cost of capital).

(3) Before changes are made to the retail price-cap —

- (a) the telecommunications utility affected must be —
 - (i) consulted; and
 - (ii) given a reasonable period within which to make representations; and
- (b) the Government must have regard to representations made by the utility within that period.

46B. Retail price-cap: power to make subsidiary legislation following review

(1) The Governor may make subsidiary legislation (which may amend this Ordinance) to implement changes to the retail price-cap made under section 46A.

(2) The Governor may not exercise that power before 1 April 2014.

(3) Before exercising that power, the Governor must —

- (a) consult a telecommunications utility if it would be affected by the amendments;
- (b) allow the utility a reasonable period within which to make representations; and
- (c) have regard to representations made by the utility within that period.

(4) Subsidiary legislation made under this section may only come into force before 1 April 2015 to the extent necessary for the purpose of bringing it into operation from that date.

46C. Price list and recovery of charges

(1) A telecommunications utility must publish (and keep up to date) a price list for the price-capped services that it provides.

(2) The utility is entitled to make changes to its price list without seeking the prior approval of the Governor, the Government or the Regulator (but the utility is responsible for ensuring that it complies with the retail price-cap).

(3) When a utility provides price-capped services to a person, the utility is entitled to demand (and receive) payment from that person on the basis of its price list.

(4) When a utility provides other services (that are not subject to the retail price-cap) to a person, the utility is entitled to demand (and receive) payment from that person on the basis of whatever agreement had been reached with that person for the provision of the service.

46D. Compliance with retail price-cap

(1) A telecommunications utility is under a duty to ensure that it complies with the retail price-cap in relation to the prices of the price-capped services it provides.

(2) A utility must demonstrate compliance with the retail price-cap on an annual basis in accordance with the RID.

46E. Failure to comply with retail price-cap

(1) If the Government considers in accordance with the RID that there are grounds for believing that a telecommunications utility has failed to comply with the retail price-cap, the Government may give a notice in writing to the utility —

- (a) setting out the alleged failure to comply;
- (b) giving the utility a reasonable period to make representations to the Government.

(2) The utility's representations may include details of proposals to remedy the failure to comply by—

- (a) providing compensation to the customers affected by the failure; and
- (b) alternative remedies (other than the imposition of a penalty) that would benefit the utility's customers to at least an equivalent extent.

(3) The Government must consider —

- (a) representations made under subsection (1)(b); and
- (b) proposals made under subsection (2).

(3) If a utility is or has been in serious or repeated breach of the retail price-cap, the utility's licence may be revoked under Part 7.

46F. Failure to comply with retail price cap: penalties, etc

- (1) The rest of this section applies if the Government —
 - (a) has given a notice to a utility under section 46E(1);
 - (b) has considered representations and proposals made by the utility under section 46E(1)(b) and 46E(2); and
 - (c) is satisfied that the utility has failed to comply with the retail price-cap.
- (2) If this subsection applies, the Government may —
 - (a) impose a penalty on the utility that it determines to be both —
 - (i) appropriate; and
 - (ii) proportionate to the breach; or
 - (b) accept a binding undertaking from the utility to implement the proposals that it made under section 46E(2).
- (3) A penalty imposed under subsection (2)(a) must be expressed in terms of two elements —
 - (a) a compensatory element, the amount of which may not exceed the amount by which the Government considers the utility's revenues were in excess of the retail price-cap; and
 - (b) a punitive element (expressed as a percentage of the compensatory amount) of up to 100% of the compensatory element.
- (4) If the Government imposes a penalty on a utility under subsection (2)(a), it must notify the utility about —
 - (a) the Government's decision to impose a penalty;
 - (b) the Government's decision not to accept the proposals that the utility made under section 46E(2).
 - (c) the Government's decision about the amount of each element of the penalty;
 - (d) the reasons for each of those decisions;
 - (e) the total amount of the penalty; and
 - (f) the period within which the utility must pay that amount to the Government.

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46G. Failure to comply with retail price-cap: appeals against penalties

(1) A telecommunications utility may appeal to the Panel against one or more of the following —

- (a) the Government's decision to impose a penalty under section 46F(2)(a);
- (b) the Government's decision not to accept the proposals that the utility made under section 46E(2).
- (c) the amount of either or both elements of the penalty;

(2) Notice of an appeal under subsection (1) must be given within 20 business days of the date of the notice under section 46F(4).

(3) The notice of appeal must set out the full grounds of the appeal, including (in particular) whether it is contended that —

(a) the decision appealed against is —

- (i) based on an error of fact;
- (ii) wrong in law; or
- (iii) both; or

(b) the penalty imposed is disproportionate.

(4) The Panel may —

(a) uphold both the imposition of a penalty on the utility and the amount of the penalty imposed;

(b) uphold the imposition of a penalty on the utility but substitute a lower penalty for the one imposed;

(c) uphold the imposition of a penalty on the utility but substitute a lower penalty for the one imposed in return for a binding undertaking from the utility to implement the proposals it made under section 46E(2);

(d) overturn the decision to impose a penalty on the utility in return for a binding undertaking from the utility either—

- (i) to implement the proposals it made under section 46E(2); or
- (ii) to implement improved proposals;

(e) overturn the decision to impose a penalty on the utility entirely.

(5) The decision of the Panel under subsection (4) is final (subject to the possibility of challenge by way of judicial review).

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46H. Failure to comply with retail price-cap: payment of penalties

(1) A penalty imposed under section 46F(2) must be paid by the telecommunications utility within the period specified under 46F(4)(f).

(2) Subsection (1) does not apply if the utility appeals to the Panel under section 46G(1).

(3) If the Panel upholds the imposition of a penalty on the utility's appeal, the following become payable immediately —

(a) either —

(i) the penalty imposed under section 46F(2); or

(ii) if the Panel substituted a lower penalty under section 46G(4)(b) or section 46G(4)(c), that lower penalty; and

(b) interest on that amount from the day after the end of the period specified under section 46F(4)(f) until the day on which the Panel gives its decision.

(4) If an amount due under either subsection (1) or subsection (3) (or part of it) remains unpaid —

(a) it may be enforced as a statutory debt;

(b) interest (or further interest) must be added to the unpaid amount from the date by which it was to have been paid or the date on which it became payable until the date on which it is paid.

(5) The rate of interest that applies for the purposes of this section is the statutory interest rate fixed under section 7 of the Interest on Debts Ordinance (No 13 of 2002)."

12. Schedule 1 repealed

Schedule 1 is repealed.

OBJECTS AND REASONS

This Bill would amend the Telecommunications Ordinance (Title 70.1) to reflect an agreement reached between the Falkland Islands Government and Cable & Wireless to replace tariff-based price controls with a retail price-cap mechanism.

Clause 4 would insert new definitions into section 2 of the Ordinance cross-referring to the definitions in new section 45(1) – a new version of section 45 would be substituted by *clause 9*.

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Clause 5 would amend section 2A(5) to exclude the Governor's proposed new power to make subsidiary legislation (under new section 46B, which would be inserted by *clause 11*) from the role of the Regulator. However, the Government's proposed new functions could (and, in practice, would) be carried out by the Regulator.

Similarly, although the legislation would continue to refer to an unnamed telecommunications utility, Cable & Wireless currently hold an exclusive licence to provide telecommunications services in the Falkland Islands. This means that, in practice, whenever "telecommunications utility" or "utility" are used, they are referring to Cable & Wireless.

Clause 6 would amend section 2B(3) to allow the Telecommunications Appeals Panel to deal with appeals relating to penalties for failure to comply with the retail price-cap.

Clause 7 would repeal sections 10(2) and section 10(3):

- For services in respect of which a maximum price is currently fixed in Schedule 1 (which would be repealed by *clause 12*), section 10(2) (which would be repealed by *clause 7*) currently makes it unlawful for a telecommunications utility to demand or receive payment for more than the maximum price. That provision would no longer apply at all under the new retail price-cap regime. However, the utility would be under a duty under new section 46D (which would be inserted by *clause 11*) to comply with the retail price-cap and to demonstrate that on an annual basis.
- For other services, section 10(3) (which would be repealed by *clause 7*) currently allows a telecommunications utility to recover agreed charges for the service. That provision would be re-enacted as new section 46C(4) (which would be inserted by *clause 11*).

Clause 8 would repeal section 11C(5), which provides that penalties imposed on a telecommunications utility for failure to provide information do not count as a cost of the utility for the purposes of section 46(3) (which would be repealed by *clause 10* and currently relates to arbitration over proposals to change Schedule 1, which would itself be repealed by *clause 12*). Similar provision would be made by new section 45(3)(a) (which would be inserted by *clause 9*).

Clause 9 would replace the existing version of section 45 (Subscriber to pay tariff and other listed charges) with a new version (Retail price-cap: definitions, etc).

The new version of section 45 would define three key terms ("price-capped services", "retail price-cap" and "RID") used in new sections 46 to 46H. It would also deal with two other aspects of the retail price-cap regime:

- Under new section 45(2) (which would be substituted by *clause 9* and the effect of which would be back-dated to 1 April 2011), the proportion of its net revenue that a telecommunications utility is entitled to remit to its head office or parent for support services would increase from 5% to 8% – the old rate of 5% is currently provided for in section 46(3).

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- New section 45(3) would provide that penalties imposed on a utility for failure to provide information or for failing to comply with the retail price-cap will not be included for the purposes of the retail price-cap. It would also provide for the same to apply to compensation or benefits provided to customers instead of part or all of a penalty for failing to comply with the retail price-cap.

In the existing version of section 45 (which would be replaced by the new version under *clause 9*):

- Section 45(1) deals with the statutory tariff in Schedule 1 (which would be repealed by *clause 12*) and other charges or fees. The statutory tariff would be replaced by a price list for price-capped services and agreed charges for other services and these would be dealt with in new section 46C (which would be inserted by *clause 11*).
- The remainder deals with changes to the statutory tariff (which would no longer exist) and amendments to Schedule 1 (which would be repealed by *clause 12*).

Clause 10 would replace the existing version of section 46 (Arbitration as to tariff) with a new version (Retail price-cap: period of operation).

The new version of section 46 would provide for the retail price-cap to have back-dated effect from 1 April 2011 and for it to continue to operate until at least 31 March 2015.

The existing version of section 46 (which would be replaced by the new version under *clause 10*) deals with arbitration in relation to disputes about changes to the statutory tariff (which would no longer apply). However, the provisions of section 46(3) are replicated to some extent in new section 46A(2)(c) (which would be inserted by *clause 11*) and the maximum payment for support services would be increased from 5% of net revenues to 8% of net revenues by new section 45(2) (which would be inserted by *clause 9*).

Clause 11 would insert eight new sections (new sections 46A to 46H):

- New section 46A would provide for the retail price-cap to be reviewed. It would also allow for changes to be made to the retail price-cap and new section 46B would deal with the subsidiary legislation implementing those changes:
 - Under section 46A(1), the retail price-cap could be reviewed and changes made but no changes could be made until April 2015 at the earliest.
 - New section 46A(2) would provide for the basis on which changes would have to be made – this incorporates what is currently section 46(3) (which would be substituted by *clause 11*).

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- New section 46A(3) would provide for a process of consultation with the telecommunications utility about the changes to be made.
- New section 46B(1) would give allow the Governor to make subsidiary legislation to implement the changes and that subsidiary legislation could be used to make amendments to the Ordinance without the need for a further Bill. The amendment to section 2A (which would be made by *clause 5*) would mean that this power could not be exercised by the Regulator.
 - Under new section 46B(2), the subsidiary legislation could not be made until 1 April 2014 at the earliest and new section 46B(4) would mean that, apart from preparatory steps, it could not come into force until 1 April 2015 at the earliest.
 - New section 46B(3) would provide for further consultation with the telecommunications utility on the implementing legislation (separately from the consultation on the substantive changes).
- New section 46C would deal with prices and charges for the services provided by a telecommunication utility:
 - New section 46C(1) would replace the current statutory tariff in Schedule 1 (which would be repealed by *clause 12*) with a requirement for a telecommunications utility to have (and keep up to date) a published price list for its price-capped services.
 - New section 46C(2) would allow a telecommunications utility to change the prices of its price-capped services without having to seek regulatory approval in advance. However, the utility would have to make sure that its prices for price-capped services were set and maintained in such a way that the retail price-cap is complied with.
 - New section 46C(3) would allow a utility to charge for its price-capped services (and obtain payment for them) on the basis of the price list. This would replace the existing provision in section 45(1) (which would be repealed by *clause 9*).
 - New section 46C(4) would allow a utility to agree its charges with customers for services that are not covered by the retail price-cap. This would replace the existing provision in section 10(3) (which would be repealed by *clause 7*).
- New section 46D would deal with the obligation on a telecommunications utility to comply with the retail price-cap and to demonstrate compliance annually to the Government (in practice, to the Regulator):
 - New section 46D(1) would impose a statutory duty on the utility of complying with the retail price-cap.

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- Under new section 46D(2), the utility would be required each year to demonstrate to the Government (in practice, the Regulator) that it is complying with the retail price-cap. That would be carried out using a process set out in a Revised Implementation Document that was agreed between the Falkland Islands Government and Cable & Wireless. (The term “RID” refers to the Revised Implementation Document and would be defined in new section 45(1), which would be substituted by *clause 9*.)
- New sections 46E and 46F would deal with the process for dealing with a situation in which a telecommunications utility fails to comply with the retail price-cap:
 - Under new section 46E(1), the first step would be for the Government (in practice, the Regulator) to serve a notice on the utility, describing the alleged failure and telling the utility how soon it must respond.
 - The effect of new section 46E(2) would be that, as well as being able to make representations about the alleged failure itself, the utility could respond to the notice with proposals about how to compensate customers either directly or indirectly.
 - Under new section 46E(3), the Government (in practice, the Regulator) would have to give consideration to those representations and/or proposals.
 - New section 46E(4) makes it clear that serious or repeated breaches of the retail price-cap could result in the utility’s licence being brought to an end – Part 7 of the Ordinance (which is not being amended) deals with the procedure that would apply in those circumstances.
 - New section 46F(1) provides for further steps to be taken if the Government (in practice, the Regulator) is satisfied, even after considering the utility’s representations, that the utility has indeed failed to comply with the retail price-cap.
 - Under new section 46F(2), the Government (in practice, the Regulator) would have a choice about what further steps to take:
 - it could accept the utility’s proposals (on the basis of a binding undertaking); or
 - it could impose a financial penalty.
 - New section 46F(3) would provide for the amount of a penalty to be calculated in two parts:
 - a compensatory element, which could be up to the amount by which the utility’s revenues from price-capped services of the retail price-cap;

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- a punitive element would be discretionary but which could be up to the same amount as the compensatory element on top of it – the percentage level of the punitive element would have to be based on an assessment by the Government (in practice, the Regulator) of the seriousness of the failure to comply and the reasons why it occurred.
- Under new section 46F(4), the utility would have to be given a notice about a penalty (if one is imposed) setting out: the decisions that have been taken, the reasons why they have been taken, the total amount of the penalty; and when it has to be paid.
- However, new section 46G would give a telecommunications utility the right to appeal against a penalty to the Telecommunications Appeal Panel (established under Part 1B of the Ordinance):
 - Under new section 46G(1), the utility could appeal against: a decision to impose a penalty at all; a decision to impose a penalty rather than accept proposals made by the utility to compensate customers (directly or indirectly) in some other way; and the amount of a penalty.
 - New section 46G(2) would give the utility 20 business days (effectively, 4 weeks) in which to bring an appeal.
 - Under new section 46G(3), the utility would have to spell out the grounds of its appeal and the outcome it would be seeking.
 - New section 46G(4) would give the Panel flexible powers in relation to the outcome of appeals. It could not increase the penalty but it could uphold it, reduce it or quash it. However, the Panel would also have two other alternative courses of action open to it:
 - it could decide to commute some or all of the penalty in return for a binding undertaking from the utility to implement its original compensation proposals; or
 - if the utility makes improved compensation proposals at the appeal stage, the Panel could commute the entire penalty in return for a binding undertaking to implement those improved proposals.
 - Under new section 46G(5), there would be no appeal (by either side) from the Panel's decision. The decision could still be challenged by means of a Judicial Review application to the Supreme Court (but the scope of judicial review is more limited than that of an appeal).
- New section 46H would deal with the payment of penalties imposed for failure to comply with the retail price-cap:

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- In the absence of an appeal, a penalty would be payable under new section 46H(1) within the period specified in the notice about the decision to impose a penalty.
- However, the effect of new section 46H(2) would be to suspend the obligation to pay while an appeal is being dealt with. (However, the effect of new section 46H(3)(b) would be that interest might accrue during that time.)
- Under new section 46H(3), a penalty would become payable immediately after an appeal if the Panel were to uphold it but, if the Panel reduces a penalty, only the reduced amount would be payable. Interest would be payable from when the penalty would originally have been due to be paid.
- New section 46H(4) would allow for unpaid penalties to be enforced and for interest to be payable on them.
- New section 46H(5), the interest rate on penalties would be the same as for unpaid debts under the Interest on Debts Ordinance (No 13 of 2002), which is 8% over the Bank of England's base lending rate. That is currently 0.5% per annum, so interest would currently be calculated at a rate of 8.5% per annum.

Clause 12 would repeal Schedule 1, which sets out the statutory tariff being replaced by the new retail price-cap regime.

ANNEX B

Commentary on the draft Telecommunications (Amendment) Bill – 14.12.2012

Although the Bill has a detailed set of Objects and Reasons that contain a clause by clause explanation of the draft Bill, it may be helpful to summarise the draft in a more thematic way:

(1) The provisions relating to the retail price-cap would be concentrated in sections 45 to 46H. However, there are a number of consequential amendments elsewhere in the Ordinance.

(2) The start date for the operation of the retail price-cap is backdated to 1 April 2011, as is the increase in the maximum remittance for support services from 5% to 8%.

(3) The mechanism of the retail price-cap and the process of Cable & Wireless demonstrating compliance with it will both operate on the basis of the Revised Implementation Document.

(4) Subsidiary legislation to implement changes to the retail price-cap could be made from April 2014 onwards and that subsidiary legislation could be used to amend the Ordinance without the need for a further Bill. Instead of a provision preventing subsidiary legislation from coming into effect at all before 1 April 2015, the Bill contains a provision that would allow the regulations to come into force to a limited extent to enable preparatory steps to be taken in advance. However, changes to the retail price-cap itself could still only take effect from 1 April 2015.

(5) There is a consequential amendment to section 2A to make it clear that the subsidiary legislation must actually be made by the Governor and cannot be made by the Regulator under delegated authority.

(6) Although it is assumed that Cable & Wireless intend to comply with retail-price cap, the Bill would allow for proportionate regulatory sanctions to be imposed on an administrative basis if the retail price-cap is breached. The provisions have been adapted from the ones already in place to deal with failures to provide information and allow for an appropriate process and a right of appeal to the Telecommunications Appeals Panel (TAP).

(7) However, although the process could result in a penalty being imposed (based on the amount by which the retail price-cap is breached plus a further penalty on a sliding scale of up to the same amount again), the process is also intended to give ample opportunity for alternative remedies to be identified instead, benefitting customers (to compensate them for excess charges and foregone consumer surplus) rather than FIG:

(a) There would be more than one opportunity (in negotiations before the formal process is initiated; and in response to a formal notice from FIG) for Cable & Wireless to deal with a breach of the retail price-cap by providing compensation and/or additional benefits to customers instead of receiving a penalty.

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(b) Even if a penalty is imposed, it would still be possible for proposals to be improved again and for the TAP to commute some or all of the penalty in return for alternative remedies being implemented.

(8) Consequential amendments are included:

(a) to repeal the existing provisions about the statutory tariff (including the provision under which prices in excess of the statutory tariff are unenforceable, which would be replaced by the new sanctions);

(b) to give the Telecommunications Appeals Panel jurisdiction to deal with appeals against penalties; and

(c) to provide that penalties under the existing penalty regime and the proposed new one are excluded from retail price-cap calculations, as are alternative remedies for breaches of the retail price-cap.

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Extracts from the Telecommunications Ordinance showing effect of amendments in draft Bill

(NB: Ellipses (ie “...”) denote omitted text, not repealed text.

...

2 Interpretation

In this Ordinance, unless the context otherwise requires —

...

“Panel” means the Telecommunications Appeals Panel established by Part 1B;

“price-capped service” has the meaning given to it by section 45(1);

“public system” means the public telecommunications system;

“radio” means the transmission or reception over any distance without connecting wires of images and other visual matter and of sounds, signs or signals by electrical means;

“radio communications equipment” means any apparatus or article, or any part thereof, intended for or capable of transmitting or receiving images, signs, signals or visual matter by radio;

“retail price-cap” has the meaning given to it by section 45(1);

“RID” has the meaning given to it by section 45(1);

“sender”, in relation to a telegram, means the person from whom that telegram purports to have come, unless such person proves that he is not the sender thereof;

...

2A. Regulator

(1) The Governor may, in writing, appoint a person as the Regulator for the purposes of this Ordinance.

(2) The Governor may, in writing, appoint one or more persons to act on behalf of the Regulator.

(3) A person appointed as the Regulator or to act on the Regulator’s behalf may exercise functions vested by or under this Ordinance in the Government or the Governor.

(4) Subsection (3) only allows a person to exercise functions on behalf of the Government or the Governor to the extent that person’s appointment allows.

(5) Subsection (3) does not allow a person to exercise —

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- (a) a function of the Government under section 13;
- (aa) the Governor's power to make subsidiary legislation under section 46B; or
- (b) a function of the Governor under a provision in-
 - (i) Part 1B;
 - (ii) Part 7;
 - (iii) Part 8; or
 - (iv) Part 9.

2B. Telecommunications Appeals Panel

- (1) This Part establishes a Telecommunications Appeals Panel.
- (2) The Panel will have 3 members to be appointed by the Governor in accordance with sections 2C and 2D.
- (3) The Panel's role is-
 - (a) to deal with appeals under sections 11D and 46G;
 - (b) to resolve disputes referred to it by (or under) an agreement between the Government and a utility; and
 - (c) to be consulted before certain decisions relating to telecommunications are taken.
- (4) The Governor may by order amend subsection (3) to extend the role of the Panel.
- (5) Before making an order under subsection (4), the Governor must-
 - (a) consult each telecommunications utility; and
 - (b) consult users of telecommunications services in the Falkland Islands in whatever way the Governor thinks appropriate.

...

10. Functions and powers of telecommunications utility

- (1) Any telecommunications utility may provide all public telecommunications services, both internal and external, for the Falkland Islands, and may carry on such other activities as may reasonably be carried on in conjunction with the provision of public telecommunications services, not being activities which are prohibited by or require a licence under any law other than this Ordinance.

- (2) *[Repealed]*

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(3) [*Repealed*]

...

11C. Failure to provide information: penalties

(1) Subsection (2) applies if the Government —

- (a) has given a notice to a utility under section 11B(1);
- (b) has considered any representations made under section 11B(1)(b)(ii); and
- (c) is satisfied that the utility is in breach of one or more requirements imposed under section 11.

(2) If this subsection applies, the Government may impose a penalty on the utility that it determines to be both-

- (a) appropriate; and
- (b) proportionate to the breach.

(3) A penalty imposed under subsection (2) may not exceed £20,000.

(4) If the Government imposes a penalty on a utility under subsection (2), it must notify the utility within 10 business days of-

- (a) the decision that has been made;
- (b) the reasons for it; and
- (c) the period for payment.

(5) [*Repealed*]

...

45. Retail price-cap: definitions, etc

(1) In sections 46 to section 46F —

“price-capped service” means a service that is subject to the retail price-cap;”

““retail price-cap” means the retail price control mechanism set out in chapter 2 of the RID; and

“RID” means the Revised Implementation Document dated 26 September 2012, referred to in a Memorandum of Understanding dated 27 September 2012 and entered into between the Falkland Islands Government and Cable & Wireless South Atlantic Limited.

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(2) A telecommunications utility is entitled (and is to be treated as if it had been since 1 April 2011) to make payments for the provision of support services to a head office or parent company which is outside the Falkland Islands and those payments may be up to 8% of the utility's net revenue within the Falkland Islands.

(3) None of the following will be included as a cost of a telecommunications utility for the purposes of assessing compliance with the retail price-cap or when the retail price-cap is being reviewed —

- (a) penalties imposed under section 11C(2);
- (b) penalties imposed under section 46F(2);
- (c) the cost of complying with undertakings under section 46E(2)(b), 46G(4)(c) or 46G(4)(d)."

46. Retail price-cap: period of operation

The retail price-cap is to be treated as if it has had effect since 1 April 2011 and continue to apply until at least 31 March 2015.

46A. Retail price-cap: review

(1) The retail price-cap will be reviewed and changes may be made to it (but changes may only take effect from or after 1 April 2015).

(2) Changes to the retail price-cap —

- (a) must take account of conditions expected at and beyond April 2015;
- (b) may not penalise a telecommunications utility for efficiency gains that have arisen from the operation of the retail price-cap; and
- (c) must ensure that a telecommunications utility is able to operate and maintain national and international telecommunications systems and services in the Falkland Islands —
 - (i) on an economic basis; and
 - (ii) with a reasonable return on its investment (taking into account the utility's expected cost of capital).

(3) Before changes are made to the retail price-cap —

- (a) the telecommunications utility affected must be —
 - (i) consulted; and
 - (ii) given a reasonable period within which to make representations; and
- (b) the Government must have regard to representations made by the utility within that period.

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46B. Retail price-cap: power to make subsidiary legislation following review

(1) The Governor may make subsidiary legislation (which may amend this Ordinance) to implement changes to the retail price-cap made under section 46A.

(2) The Governor may not exercise that power before 1 April 2014.

(3) Before exercising that power, the Governor must —

(a) consult a telecommunications utility if it would be affected by the amendments;

(b) allow the utility a reasonable period within which to make representations; and

(c) have regard to representations made by the utility within that period.

(4) Subsidiary legislation made under this section may only come into force before 1 April 2015 to the extent necessary for the purpose of bringing it into operation from that date.

46C. Price list and recovery of charges

(1) A telecommunications utility must publish (and keep up to date) a price list for the price-capped services that it provides.

(2) The utility is entitled to make changes to its price list without seeking the prior approval of the Governor, the Government or the Regulator (but the utility is responsible for ensuring that it complies with the retail price-cap).

(3) When a utility provides price-capped services to a person, the utility is entitled to demand (and receive) payment from that person on the basis of its price list.

(4) When a utility provides other services (that are not subject to the retail price-cap) to a person, the utility is entitled to demand (and receive) payment from that person on the basis of whatever agreement had been reached with that person for the provision of the service.

46D. Compliance with retail price-cap

(1) A telecommunications utility is under a duty to ensure that it complies with the retail price-cap in relation to the prices of the price-capped services it provides.

(2) A utility must demonstrate compliance with the retail price-cap on an annual basis in accordance with the RID.

46E. Failure to comply with retail price-cap

(1) If the Government considers in accordance with the RID that there are grounds for believing that a telecommunications utility has failed to comply with the retail price-cap, the Government may give a notice in writing to the utility —

(a) setting out the alleged failure to comply;

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(b) giving the utility a reasonable period to make representations to the Government.

(2) The utility's representations may include details of proposals to remedy the failure to comply by—

(a) providing compensation to the customers affected by the failure; and

(b) alternative remedies (other than the imposition of a penalty) that would benefit the utility's customers to at least an equivalent extent.

(3) The Government must consider —

(a) representations made under subsection (1)(b); and

(b) proposals made under subsection (2).

(3) If a utility is or has been in serious or repeated breach of the retail price-cap, the utility's licence may be revoked under Part 7.

46F. Failure to comply with retail price cap: penalties, etc

(1) The rest of this section applies if the Government —

(a) has given a notice to a utility under section 46E(1);

(b) has considered representations and proposals made by the utility under section 46E(1)(b) and 46E(2); and

(c) is satisfied that the utility has failed to comply with the retail price-cap.

(2) If this subsection applies, the Government may —

(a) impose a penalty on the utility that it determines to be both —

(i) appropriate; and

(ii) proportionate to the breach; or

(b) accept a binding undertaking from the utility to implement the proposals that it made under section 46E(2).

(3) A penalty imposed under subsection (2)(a) must be expressed in terms of two elements —

(a) a compensatory element, the amount of which may not exceed the amount by which the Government considers the utility's revenues were in excess of the retail price-cap; and

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(b) a punitive element (expressed as a percentage of the compensatory amount) of up to 100% of the compensatory element.

(4) If the Government imposes a penalty on a utility under subsection (2)(a), it must notify the utility about —

- (a) the Government's decision to impose a penalty;
- (b) the Government's decision not to accept the proposals that the utility made under section 46E(2).
- (c) the Government's decision about the amount of each element of the penalty;
- (d) the reasons for each of those decisions;
- (e) the total amount of the penalty; and
- (f) the period within which the utility must pay that amount to the Government.

46G. Failure to comply with retail price-cap: appeals against penalties

(1) A telecommunications utility may appeal to the Panel against one or more of the following —

- (a) the Government's decision to impose a penalty under section 46F(2)(a);
- (b) the Government's decision not to accept the proposals that the utility made under section 46E(2).
- (c) the amount of either or both elements of the penalty;

(2) Notice of an appeal under subsection (1) must be given within 20 business days of the date of the notice under section 46F(4).

(3) The notice of appeal must set out the full grounds of the appeal, including (in particular) whether it is contended that —

- (a) the decision appealed against is —
 - (i) based on an error of fact;
 - (ii) wrong in law; or
 - (iii) both; or
- (b) the penalty imposed is disproportionate.

(4) The Panel may —

- (a) uphold both the imposition of a penalty on the utility and the amount of the penalty imposed;

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(b) uphold the imposition of a penalty on the utility but substitute a lower penalty for the one imposed;

(c) uphold the imposition of a penalty on the utility but substitute a lower penalty for the one imposed in return for a binding undertaking from the utility to implement the proposals it made under section 46E(2);

(d) overturn the decision to impose a penalty on the utility in return for a binding undertaking from the utility either—

(i) to implement the proposals it made under section 46E(2); or

(ii) to implement improved proposals;

(e) overturn the decision to impose a penalty on the utility entirely.

(5) The decision of the Panel under subsection (4) is final (subject to the possibility of challenge by way of judicial review).

46H. Failure to comply with retail price-cap: payment of penalties

(1) A penalty imposed under section 46F(2) must be paid by the telecommunications utility within the period specified under 46F(4)(f).

(2) Subsection (1) does not apply if the utility appeals to the Panel under section 46G(1).

(3) If the Panel upholds the imposition of a penalty on the utility's appeal, the following become payable immediately —

(a) either —

(i) the penalty imposed under section 46F(2); or

(ii) if the Panel substituted a lower penalty under section 46G(4)(b) or section 46G(4)(c), that lower penalty; and

(b) interest on that amount from the day after the end of the period specified under section 46F(4)(f) until the day on which the Panel gives its decision.

(4) If an amount due under either subsection (1) or subsection (3) (or part of it) remains unpaid —

(a) it may be enforced as a statutory debt;

(b) interest (or further interest) must be added to the unpaid amount from the date by which it was to have been paid or the date on which it became payable until the date on which it is paid.

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(5) The rate of interest that applies for the purposes of this section is the statutory interest rate fixed under section 7 of the Interest on Debts Ordinance (No 13 of 2002).

...

SCHEDULE 1

[Repealed]

...