

## INTERIM GOVERNMENT OF THE REPUBLIC OF THE FIJI ISLANDS

COMMERCE (AMENDMENT) PROMULGATION 2008  
(PROMULGATION NO. 2 OF 2008)

IN EXERCISE of the powers conferred upon the Interim Government, and upon the exercise of my own deliberate judgement as President of the Republic of the Fiji Islands as to what is best and good for the people of Fiji, and by the executive authority of the State in accordance with section 85 of the Constitution and such other powers as may appertain, and with the advice of Cabinet, I, Josefa Iloilovatu Uluivuda, make this

PROMULGATION

TO AMEND THE COMMERCE ACT 1998

*Short title and commencement*

1. This Promulgation may be cited as the Commerce (Amendment) Promulgation 2008, and comes into force on the same day as the Telecommunications Promulgation 2008 comes into force.

*New Part inserted*

2. The Commerce Act 1998 is amended by adding the following new Part—

“Part 5A—TELECOMMUNICATIONS SERVICES

*Functions and powers of the Commission*

36A. Nothing in this Part limits the functions or general powers of the Commission under this Act or the Fair Trading Decree.

*Consideration of the burden of regulation*

36C.—(1) The Commission shall, when performing its functions and exercising its powers under this Part, take into account the effect on users and licensees and shall only increase the burden of regulation where the benefits reasonably anticipated to users outweigh the burden reasonably anticipated to be placed on licensees.

(2) The Commission shall regularly consult the Telecommunications Authority on the level of competition in relevant telecommunications market, and each shall forbear from exercising the powers under their respective Acts if the Commission determines that competitive effects of such market are sufficient to achieve the purposes of such powers in their respective Acts.

*Procedural fairness*

36D. In performing its functions and exercising its powers under this Part, each of the Commission must observe the following—

- (a) act transparently and fairly;
- (b) consult in good faith any person who is or is likely to be affected by any action or decision including any Ministry, department, other government entity or any commercial, industrial, consumer and standards body;
- (c) give all such persons the opportunity to make submissions and be heard;
- (d) consider evidence adduced at any such hearing and to the matters contained in any such submissions;
- (e) give reasons in writing for each decision and substantiate such decisions with reference to the objectives in section 3, its functions and powers, and the factors in section 23.

*Control of substantial market power*

36E.—(1) If the Commission has reason to believe that the advancement of the objectives in section 3 of the Telecommunications Promulgation 2008 are not adequately assured by prevailing market conditions, the Commission must—

- (a) identify and review relevant product and service markets for telecommunications services;
- (b) evaluate the level of existing or likely competition in such markets, including taking into account substitution effects of inter-modal competition; and
- (c) determine whether, and the extent to which, an insufficiency of existing or likely competition in such markets is likely to impede the advancement of the objectives in section 3 of the Telecommunications Promulgation 2008.

(2) If the Commission determines that an insufficiency of existing or likely competition in a relevant market reviewed under subsection (1) is reasonably likely to impede the advancement of the objectives in section 3 of the Telecommunications Promulgation 2008, the Commission must identify the telecommunications service licensees having a substantial degree of power in that market.

(3) The term “substantial degree of power” is to be construed in accordance with section 32(3) of the Fair Trading Decree 1992.

(4) Subject to section 36C, if the Commission considers that the imposition, maintenance or amendment of specific regulatory obligations referred to in sections 36F and 36G on licensees having a substantial degree of power in a relevant market reviewed under subsection (1) would be reasonably likely to advance the objectives in section 3 of the Telecommunications Promulgation 2008 it must impose, maintain or amend such obligations accordingly.

(5) The Commission must not impose or maintain the regulatory obligations referred to in sections 36F and 36G, or must remove such obligations as may exist if the Commission considers that such obligations are not reasonably likely to advance the objectives in section 3 of the Telecommunications Promulgation 2008 or if there is sufficient level of existing or likely competition.

*Interconnection principles*

36F.—(1) In performing its functions and exercising its powers under the Commerce Act and Fair Trading Decree with respect to interconnection regimes and interconnection agreements, the Commission must apply the principles contained in subsection (2).

(2) Licensees have a right to be supplied, and when requested by other licensees, an obligation to negotiate in good faith and supply interconnection to any other licensee in accordance with the following principles—

- (a) interconnection must be granted in such manner as to enable customers of each licensee to communicate effectively with customers of another licensee or to obtain services from such other network;
- (b) end to end operability must be maintained in order to facilitate the provisions of services by an interconnecting licensee to the customer notwithstanding that the customer is directly connected to a different network;
- (c) the licensee must provide the service to the interconnecting licensee in a timely manner; and
- (d) the licensee must provide the interconnection service on non discriminatory terms and conditions that are consistent with those terms and conditions on which it provides the service to itself or its affiliates.

- (3) The following factors may be taken into account in applying the principles set out in subsection (2)—
- (a) reasonable technical and operational practicability having regard to the interconnecting licensee's network;
  - (b) network security and safety;
  - (c) existing legal duties on the licensee to provide a defined level of service to users of the service;
  - (d) the inability, or likely inability, of the interconnecting licensee to comply with any reasonable conditions on which the service is supplied, whether for financial, technical or other reasons; and
  - (e) any request for a lesser standard of service from an interconnecting licensee.

(4) If a request for interconnection is refused, the licensee shall give written reasons for refusing the request referring to the factors in subsection (3).

(5) The price that may be charged by the licensee for interconnection is a price that reflects the following factors—

- (a) the direct costs incurred in providing the interconnection service;
- (b) a reasonable contribution to fixed and common costs; and
- (c) a reasonable return on the capital employed in providing the service.

(6) Notwithstanding subsection (5), the price for interconnection in relation to national emergency services may reflect the net cost of providing the service.

*Reference interconnection offer*

36G.—(1) The Commission may require licensees designated as having substantial degree of power under section 36E in an interconnection market to provide a reference interconnection offer to other licensees upon request.

- (2) The Commission may—
- (a) require the draft reference interconnection offers referred to in subsection (1) to be submitted to it for its approval; and
  - (b) specify matters for inclusion in, and may require changes to, such draft reference interconnection offers.

(3) The Commission must include reference interconnection offers in the register of access agreements under section 22 and publish them on its website.

*Indirect access and access to facilities*

36H.—(1) Subject to section 36C, the Minister may, on the recommendation of the Commission, make regulations under this section requiring a licensee having a substantial degree of power in a market to offer a particular form of indirect access or access to facilities to other licensees if—

- (a) there is a reasonable likelihood of consumer demand for alternative telecommunications licensees;
- (b) the regulations are necessary to introduce such competition; and
- (c) the costs for providing such service are fairly distributed among the licensees providing it and those receiving the service.

(2) Before making any recommendation to the Minister under subsection (1), the Commission shall consult—

- (a) any licensee that would, under regulations made in terms of the recommendation, be required to offer access to other licensees; and
- (b) the owner of any telecommunications network or facilities that would be used in connection with the provision of such access.

*Determination of access deficit charge*

36I. The Commission shall determine the access deficit and access deficit charge which shall be payable in accordance with Schedule 2.

*Right of appeal*

36J. An appeal against any decision made by the Commission under this Part may be made to the Telecommunications Appeal Tribunal.

*Interpretation*

36K. In this Part, unless the context otherwise requires—

- “indirect access” means the method of access to facilities whereby customers are able to select or pre-select the services of an interconnected licensee’s telecommunications services;
- “interconnection” means a specific type of access to facilities involving the physical or logical linking of two networks for communication between customers of one with the other or for transit of communications from the customers of one network across the network of the other, irrespective of the type of signals or information conveyed;
- “licence” means a telecommunications service licence issued under the Telecommunications Promulgation 2008;
- “licensee” means a holder of a telecommunications service licence, or a provider of any telecommunications service;
- “reference interconnection offer” means a publicly available document required to be published by a licensee defining a full set of technical and commercial terms by which the licensee offers interconnection services to other licensees, and forming the basis of a transparent offer by the licensee to contract with another party through an interconnection agreement;
- “Telecommunications Appeal Tribunal” means the Telecommunications Appeal Tribunal established under the Telecommunications Promulgation 2008;
- “Telecommunications Authority” means the Telecommunications Authority of Fiji established under the Telecommunications Promulgation 2008.”.

*New Schedule inserted*

3. The Commerce Act 1998 is amended by adding the following Schedule—

“SCHEDULE 2  
(Section 36I)

ACCESS DEFICIT

*Determination of an Access Deficit*

1.—(1) Where a licensee’s retail revenue from connection and line rental charges for fixed lines falls short of the costs of providing connection and access lines due to regulatory constraints on retail prices, such shortfall is referred to as an “Access Deficit”.

(2) A licensee claiming the existence of an Access Deficit shall provide financial information about its revenues and costs to the Commission in accordance with the prescribed procedures, in order for the Commission to determine the existence and amount of any Access Deficit.

(3) When the Commission has received all relevant information about a claim under subparagraph (2), the Commission must within three months determine the amount of the Access Deficit and must notify the Authority, Minister and concerned licensee thereof.

(4) The Minister may, after consulting the Commission, make regulations relating to the Access Deficit including reporting obligations of the relevant licensee, costing principles and any other matter required to determine the Access Deficit.

*Access Deficit Charge*

2.—(1) Subject to subparagraph (6), a licensee found to have an Access Deficit pursuant to paragraph 1(2) is entitled to charge all other licensees an Access Deficit Charge in accordance with subparagraph (2).

(2) All licensees, including the licensee claiming the Access Deficit, are liable to contribute to the Access Deficit in proportion to their respective gross revenues in the previous fiscal year, calculated net of settlements on a value added basis (the "Access Deficit Charge") or otherwise as prescribed by regulations.

(3) All licensees must file with the Commission such information as it may require to calculate their gross revenues for the purpose of paragraph (2) in accordance with such methodology as may be prescribed.

(4) The Commission shall determine and publish on an annual basis:

- (a) the percentage each licensee's gross revenues bears to the total gross revenues of all licensees; and
- (b) the Access Deficit Charge due from each licensee.

(5) A licensee claiming an Access Deficit shall be entitled to invoice each other licensee directly for the Access Deficit Charge determined and published by the Commission pursuant to paragraph (4), and to collect such sum from such licensee, and the Access Deficit Charge shall constitute a debt recoverable in a court

(6) No licensee shall be entitled to any Access Deficit Charge in respect of any period commencing after the third anniversary of the commencement of this Act.

*Access Deficit and Price Controls*

3.—(1) The Commission shall take into account the amount of the Access Deficit and existence of the Access Deficit Charge in its determinations regarding price controls under Part 5 of this Act.

(2) The Commission shall revise its price controls with a view to eliminating the Access Deficit progressively."

Given under my hand this 18th day of January 2008.

J. I. ULUIVUDA  
President of the Republic of Fiji

## COMMERCE (AMENDMENT) PROMULGATION 2008

### EXPLANATORY NOTE

*(This note is not part of the Promulgation and is intended only to indicate its general effect)*

#### 1.0 BACKGROUND

The Promulgation seeks to amend the Commerce Act 1998, as a consequential amendment to the Telecommunications Promulgation 2008. The objective of the Promulgation is to clearly specify the powers of the Commission in relation to the telecommunications industry, in particular the regulation of competition, market power, interconnection and access arrangements.

#### 2.0 CLAUSES

Clause 1 provides for the short title and the commencement provision which is synchronized with the commencement of the Telecommunications Act 2008.

Clause 2 adds a new Part that will deal specifically with the telecommunications services. The new Part will cover the following areas –

(a) *Control of market power*

The Commission will be responsible for identifying whether a licensee has substantial market power in the product or services provided. If there is someone with such substantial market power, then the Commission may impose conditions or vary the obligations in the licence to ensure that the person with such market power does not continue in that position.

(b) *Interconnection*

It also deals with interconnection matters whereby telecommunications networks are connected to each other so that users can call users of other networks. Existing owners of telecommunications networks must allow others to use their networks subject to charges by the owners and other terms and conditions to be agreed between the parties in accordance with the interconnection principles.

(c) *Indirect access*

Indirect access will allow customer to access the services of another service provider, e.g. that the customer can select which international service provider to use, using either permanent pre-selection or call-by-call selection of service provider. Access to facility means that a service provider has the possibility to use facilities of another service provider at a charge. This is important to avoid unnecessary road and street digging and investments in antenna towers, space for cables under streets, and other similar facilities.

(d) *Access deficit*

The Commission will also determine the access deficit and access deficit charge, which are based on the connection and rental charges fixed line charged by the operator of telephony system on all licensees, for the purposes of lowering the rates. It is intended that the price regulation on the telecommunications services will eventually remove the access deficit system.

3.0 MINISTERIAL RESPONSIBILITY

3.1 The Promulgation comes under the responsibility of the Minister for Commerce and Industry.

A. S. KHAIYUM  
Attorney General and Minister for Justice  
Electoral Reform, Public Enterprises and Anti-Corruption