



Bermuda Legislates to Attract Submarine Cable Industry

April 2020

As part of the Bermuda Government's FinTech strategy to develop a FinTech ecosystem and for Bermuda to become a technology hub of the future, the Bermuda Government introduced a new legislative framework for submarine cables titled the Submarine Communications Act 2020 (the "Act"), which was passed in the House of Assembly on 14 February 2020 and is expected become operative in the near future. The primary purpose of the Act is to meet the growing demand for increased capacity in underwater cables that carry the internet and telecommunications by providing a regulatory framework for both the establishment of a submarine communications cables industry in Bermuda and provide for the protection of the submarine communications cables.

There is currently no Atlantic interconnection hub and therefore the Bermuda Government alongside the Bermuda Business Development Agency are working to promote Bermuda as an 'Atlantic Digital Hub' due to its prime geographic location. There is currently a three hubs in the Pacific Ocean, in Hawaii, Guam and Fiji.

The Act

The Act creates the requirement to possess a permit to install submarine cables and requires that operators of submarine cables be licensed in Bermuda. The Regulatory Authority (the "Authority") will be responsible for issuing permits to install submarine cables and issuing licenses to operate submarine cables.

The purpose of the Act is to promote the investment in the submarine communications cables sector and in communications reliant industries to stimulate the economy and employment. Additionally, the Act will enhance the protection of submarine cables in Bermuda waters, Bermuda's international submarine communication cables connectivity, lay the groundwork for the further development of the submarine communications cables sector and promote orderly development and encourage the development and maintenance of resilient and fault-tolerant submarine communication cable infrastructure.

The Act establishes protection zones, a list of prohibited activities in protection zones (such as trawling or dredging) restricted activities in protection zones (such as anchoring, fishing and lobster potting) and specifies offences, such as damaging submarine cables or engaging in prohibited or restricted activities.

The Act details the permit application process and offences related to breaching conditions of permits or installing cables in protection zones without a permit. There is a separate licensing regime to operate submarine cables including the grant of the licence, and there are statutory offences related to operating a submarine cable without a licence.



Installation Permit Process

A company incorporated in accordance with the Companies Act 1981 (as amended) or a limited liability company formed in accordance with the Limited Liability Company Act 2016 (as amended) (together a “**Relevant Undertaking**”) may apply to the Authority for a permit to install one or more cables in a protection zone (cables may only be installed in Bermuda waters in a protection zone). The application shall set out the proposed route(s) in Bermuda waters of the proposed cable(s), information about the ownership and control of the cable(s) and any other relevant information.

An application shall include information that relates to the proposed route or routes in Bermuda waters of the submarine cable(s) specified in the application, information about the ownership and control of the submarine cable(s) and any other relevant information that the Authority may request. The ‘control’ of the submarine cables is as a result of or by means of trust, agreements, arrangements, understanding or practices whether or not having legal or equitable force, rights and whether or not capable of being exercised indirectly through one or more interposed companies, partnerships or trusts. Applications will be accompanied by a non-refundable fee as specified by the Authority and may be subject to a consultancy deposit for the purposes of ensuring the payment of the Authority’s consultancy costs actually expended for the purposes of assessing an application and ongoing compliance.

After a consideration of the application and a consultation period with relevant ministers, the Attorney General and any other person the Authority considers relevant, the Authority may grant or refuse a permit. Grants may be subject to conditions and refusals will be accompanied with written reasons for the refusal. A refusal may be appealed by the applicant.

In considering all applications the Authority will have regard to:

- (a) any relevant technical and economic aspects of the installation;
- (b) whether the submarine cable would prove an obstruction to marine traffic in the affected area;
- (c) whether the installation involves co-location with other submarine cables;
- (d) any submissions to the Authority by ministers or relevant persons; and
- (e) any other matters that the Authority considers relevant.

An installation permit will be valid for two (2) years which may be extended by application for up to twelve (12) months. The Authority reserves the right to suspend or revoke any permit if it considers any conditions attached to the permit have been breached.

The applicant is to ensure that all reasonable steps are taken to ensure that the installation causes as little detriment, inconvenience and damage as is practicable and in compliance with industry standards

Licensing an Operation of Cables

A Relevant Undertaking may apply to the Authority for a licence to land and operate a cable at the same time it applies for a permit to install a cable. Applications are to be accompanied by a fee and, if specified by the Authority, a refundable consultancy fee.

The Authority will publish all applications in the official gazette whereupon any person shall have seven (7) days to object. The Authority may grant a licence for a maximum initial period of twenty-five (25) years with renewal periods not exceeding fifteen (15) years.

In granting a licence the Authority shall have regard to the probity of the applicant, its officers and whether the applicant has sufficient financial resources to operate and maintain the cable efficiently. The Authority may attach conditions to a licence as it considers necessary including the restriction of communication traffic to transit or the redundancy of local communication traffic.

The Authority may at any time revoke a licence with thirty (30) days’ notice if it considers the carrier to be bankrupt, no longer operating the cable, where the operator has failed to comply with the Act or in the course of operating the cable, the operator has been convicted of an indictable offence involving dishonesty.



Reporting and Continuing Obligations

Every carrier will have a duty to comply with any applicable conditions, obligations, requirements or limitations set out by the Act and pay on a timely basis all fees to the Authority and Government authorization fees. If a cable ceases to be used the carrier shall notify the Authority as soon as is reasonably practicable. Where an application is pending and the applicant becomes aware of a change of circumstances relating to information set out in the initial application, the applicant shall notify the change to the Authority as soon as practicable. Upon receipt of change of circumstances notification, the Authority shall decide whether or not the change should be treated as a material change and notify the applicant in writing of the Authority's decision within two (2) days from the date of the decision being made by the Authority.

Further Legislative Framework

In support of the Act, the Submarine Cables (Protected Areas) Act 2019 and the Submarine Cables (Protected Areas) Order 2019, are also being reviewed by the House of Assembly, as presented in September 2019. These two pieces of legislation not only provide rules for establishing new protected areas and remedies and offences when a submarine cable is damaged or restricted activity is carried out in the protected areas, but also identifies and coordinates for the cable protection zone represented by a table and illustrated map, and also identified restricted and prohibited activities within the protection zone and the relevant conditions and offences. The submarine cable protection zone is an important step in the marketing of Bermuda in the submarine cable space and represents industry best practice, whilst also demonstrating that Bermuda is working on policy and planning support to promote the industry objectives. When an entity is looking to invest in submarine cable initiatives, the provision for a protection zone creates certainty, which is a very key part of the decision making process for locating and operating a system.

How we can help with any licensing applications

This advisory provides a brief summary of the Act and the regulatory framework for submarine cables. Walkers (Bermuda) Limited has a dedicated team of lawyers who specialize in FinTech and Regulatory & Risk Advisory matters and who would be happy to advise on all aspects of the legislation and anticipated guidance. Walkers has the expertise to assist on all matters relating to the application for a submarine cable license, from the incorporation or formation of a Bermuda company to the preparation and successful application to the Regulatory Authority.

Contact

Please do not hesitate to contact your usual Walkers contact or one of the below members of the Walker (Bermuda) Limited team.



Natalie Neto
Partner
T: +1 441 242 1533
E: natalie.neto@walkersglobal.com



Melanie Fullerton
Senior Associate
T: +1 441 242 1537
E: melanie.fullerton@walkersglobal.com



Rachel Nightingale
Senior Associate
T: +1 441 242 1520
E: rachel.nightingale@walkersglobal.com