Office of Utilities Regulation

Competitive Safeguards – Draft Rules For Telecommunication Voice Services

OFFICE OF UTILITIES REGULATION

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DOCUMENT TITLE: Draft Rules For Competitive Safeguards For Voice Services

1. PURPOSE OF DOCUMENT

This document contains the draft rules on competitive safeguards for Voice Services.

ANTECEDENT DOCUMENTS

Document Number	Description	Date
Tel 2006/6	Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers – NPRM	June 2, 2006
Tel 2006/7	Competitive Safeguards Draft Rules – Notice of Proposed Rule Making	November 30, 2006

APPROVAL

This document is approved by the Office of Utilities Regulation and becomes effective **September 28, 2007.**

On behalf of the Office:

……..
J Paul Morgan
Director General

September 28, 2007
Date

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ABSTRACT

This document lists the proposed drafting instructions for competitive safeguards as provided for under Sections 35 and 71 of the Telecommunications Act 2000 (the Act). The Notice of Proposed Rule Making (NPRM) for Competitive Safeguards to address anti-competitive behaviour was first published on June 2, 2006. Responses were received from Cable & Wireless Jamaica Limited, Mossel Jamaica Limited (Digicel), Reliant Enterprise Communications Ltd., and Columbus Communications Jamaica (Flow). The Office issued a second consultative document in which it responded to the comments from the four companies as well as the draft rules for consideration. This was issued on November 30, 2006. The Office received responses to this and comments on the responses on January 26th and February 16th respectively. In this document, the Office responds to the concerns raised and issue the Draft Rules for Parliament.

CHAPTER 1: BACKGROUND

1.1 Section 3 of the OUR Act provides for the Office in performance of its functions to undertake such measures as it considers necessary or desirable to *(a) encourage competition in the provision of prescribed utility services.* The Telecommunications Act 2000 (the Act) set out generally in Section 71 and specifically in Section 35, the Office's authority to develop rules to enable competition in the telecommunications market.

1.2 Since liberalization, the country has seen significant improvements in telecommunications service in Jamaica. Certainly, the mobile market has seen great growth since the introduction of competition and particularly since 2001, with the entry of Digicel and its dynamic marketing strategies.

1.3 However, with liberalization and the consequent arrival of new entrants into the telecommunications markets, the OUR has a responsibility to ensure that competition is not stifled seeing that ultimately, it is the consumer who will be affected.

1.4 Section 35 of the Telecommunications Act, gives the Office of Utilities Regulation the power to establish competitive safeguard rules and guidelines to identify or prevent uncompetitive practice by dominant public voice carriers.

1.5 The OUR's consultation on competitive safeguard rules for the telecommunications industry commenced in June 2006. At that time, the intent was to issue safeguard rules for both voice and data. Both Cable & Wireless Jamaica Limited (C&WJ) and Digicel in their responses objected to the making for rules for the data markets.

1.6 On reviewing the responses, the OUR took the decision to consult separately on voice and on data. Subsequently, on November 30, 2006 a second consultative document was issued which contained the draft safeguard rules for dominant public voice carriers and in addition the OUR's responses to comments made by the respondents to the first NPRM. The OUR reiterated in that document that data services are specified services under the telecommunications Act and are thus subject to regulation by the Office. The OUR will therefore consult on safeguard rules for data at a later date.

1.7 There were four responses to this document. These were from:

- Cable & wireless Jamaica Limited
- Mossel Jamaica Limited (Digicel)
- Reliant Enterprise Communications Limited
- Columbus Communications Jamaica Limited (Flow)

1.8 The Office took due note of the responses and will in this document, respond to the points raised. The Office still believes that it is necessary to introduce competitive safeguard rules and will issue the drafting instructions to be considered by Parliament.

CHAPTER 2: COMMENTS ON RESPONSES

2.1 Throughout this consultation, the overall emphasis from both Cable & Wireless Jamaica Limited (C&WJ) and Digicel was in relation to the OUR's interpretation of the Telecommunication Act, specifically, Sections 4, 35 (3) and 71 (1). It is their opinion that the OUR does not have the jurisdiction under these sections of the Act to issue competitive safeguard rules.

Interpretation of the Act

2.2 The Office stated in the draft rules, its interpretation of the particular sections of the Act. Both C&WJ and Digicel have responded with their interpretation of these sections of the Act. Reliant and Flow have agreed with some aspects of the Office's interpretation. Some of these responses are highlighted below.

2.3 In Paragraph 1.3 on page 2 of its response, C&WJ states " The gravamen of C&WJ's response is that the OUR does not have jurisdiction under sections 4 and 35 of the Telecommunications Act to issue competitive safeguard rules in relation to essential facilities. The draft rules are therefore *ultra vires* the Act."

2.4 In response to the OUR's intent to regulate the data market, C&WJ in paragraph 2.1 reiterate the argument made in its first response to the first NPRM that "the OUR does not have jurisdiction under the Telecommunications Act to regulate the data market." In their interpretation, "Section 35 of the Act speaks specifically to public voice carriers and the "sweeping up words" of section 71 cannot be used to impute powers not given in substantive legislation to the OUR".

2.5 It is C&WJ's opinion that "the purpose of Section 35 is to empower the Office to write detailed competitive safeguard rules on the keeping of regulatory accounts". The rules, in their opinion, "must be related to the separation of accounts, the keeping of accounts ….. and such other provisions as the Office considers reasonable and necessary for the purposes of the competitive safeguard rules".

2.6 Digicel, on Page 6, Para 1.2.2 of their response, argues that "the legal basis for the proposed safeguards and the draft rules appear very weak"……. "Part V of the Act, explicitly concerns interconnection, while Section 35 concerns rules affecting dominant public voice carriers and the development of guidelines as to the types of uncompetitive practices to which the competitive safeguard rules apply".

2.7 Digicel also raised the point in Para 1.2.2 that " the electronic communications sector has not been excluded from the scope of the existing competition rules found in the Fair Competition Act. Indeed, international best practice and comparable legislative frameworks in other countries the applicability of general

competition rules to a specific sector has clearly fallen within the scope of the national competition authority and not the national regulatory authority".

2.8 Digicel, in Para 1.3.4 stated that it is also of the opinion that the OUR is bound by the structure of Section 35(1) of the Act that limits regulatory interventions exclusively to dominant voice carriers. It is their view "that Parliament has limited section 35(1) of the Act to dominant public voice carriers and therefore the OUR can not widen the scope of this section through rule making".

2.9 The OUR, as stated in the second consultative document issued on November 30, 2006 (Tel. 2006/7), will consult separately on data markets. However, as a brief response to the statements above, the OUR's position is as follows:

The Office has been given the regulatory mandate to regulate utility industries in general as well as the telecommunications industry in particular, by virtue of the Telecommunications Act (2000). **Section 4 (1)** of the Act, gives the Office the power to regulate "specified services and facilities"

Section 2, the "interpretation" section of the Act defines "data services" as "a specified service other than a voice service". "Specified service" is defined as "… a telecommunications service or such other service as may be prescribed." It is therefore the Office's position that the assertion that the Office "does not have jurisdiction under the Telecommunications Act to regulate the data market is incorrect, seeing that the Office is empowered to regulate "specified services and facilities" and data has indeed been defined in the Act as a specified service.

2.10 On Page 5 (Note 3) of Flow's comments to the responses, Flow states, "Contrary to other responses, Flow agrees that the OUR has jurisdiction to enforce competitive safeguard rules to promote a balanced environment to develop competitive telecommunications services….. Flow believes that given the FTC's limited enforcement capacity, the OUR indeed must assert its relevant jurisdiction not only in cooperation with the FTC but independently within its own jurisdiction and competency as theTelecommunications Industry Regulator. Such OUR proposed industry competitive safeguards indeed should be structured as preventative, clear and immediately enforceable rules with timeframes, sanctions and enforcement mechanisms which mean to stop in its tracks those C&WJ predatory and anti-competitive practices currently devised to frustrate and quash continued investment and competition in telecommunications services development in the country of Jamaica ."

2.11 The OUR intends to enforce these safeguard rules to ensure all operators are able to compete fairly in the telecoms market.

Essential Facilities

2.12 Para 3.4 of C&WJ's response states, "While C&WJ has focused on the jurisdiction of the Office to make rules on essential facilities, the Company wishes to state unequivocally that we do not believe the methodology the OUR has proposed for determining whether a network will be deemed to be an essential facility is in line with current best practice and established (European) jurisprudence. In particular, paragraph 4.4 of the NPRM makes no mention of the need to demonstrate that access to a facility is indispensable to competition (as established in Oscar Bronner) and that any refusal to supply will not be an abuse unless it would lead to the total elimination of all competition in the relevant downstream market".

2.13 C&WJ in Para 3.5 states " the presence of Section 54 in the Act, supports C&WJ's argument that it was not the intention of Parliament for sections 4 and 35 to be used as the basis for including the essential facilities doctrine under the Act, as it has provided for parties who are denied access to land or the facilities of another carrier under sections 54 to 55".

2.14 It was also argued by C&WJ in Para 3.7 of their response that "the OUR does not have jurisdiction under the Act to issue rules for competitive safeguard in relation to essential facilities…… C&WJ notes that the provisions at Paragraphs 4.5 to 4.13 flow from the determination of an essential facility and therefore fall outside the OUR's legal purview".

2.15 C&WJ stated in Para 4.4.2 to 4.8 that the OUR in Section 4 of the Act subsection 5 is specifically given a mandate to prescribe a system of regulatory accounts. They are of the view that the OUR's interpretation of its mandate seems much wider than is intended. The argument is that the OUR has used the general mandate given in Subsections 4(1) and 4(3) as the basis for writing competitive safeguard rules on essential facilities, where within the same section of the Act, the competitive safeguard rules are specifically restricted to a system of regulatory accounts. It is their opinion that the OUR's approach does not follow established legal principles for statutory interpretation.

2.16 Digicel considers that any use of the "Essential Facilities" concept should be tied to the technical economic concept of "natural monopoly," since this is an instance of monopoly power where regulatory intervention may be justified. They are of the view that the OUR should base its decision on robust numerical analysis as the alternative of a decision based on highly subjective impressions of whether a particular asset is important or capable of replication, which they argue may lead to a grossly over-inclusive and uncertain approach.

2.17 Reliant Enterprise, in their response to the OUR's draft rules, state that mobile markets are to be included in the Determination of Essential Facilities given their market power, ability to manipulate pricing/access, lack of economic alternative for competitors and supply/demand issues".

2.18 The OUR responds as follows:

It is submitted that the OUR is mandated under Section 4 (1) (a) of the Act to:

"(a) regulate specified services and facilities;" and "facilities" are described in Section 2 of the Act as:

"facility" means any physical component of a telecommunications network (other than customer equipment) including

(a) wires, lines, poles, ducts, sites, towers, satellite earth stations or any other apparatus using the radio spectrum;

(b) submarine cables and other tangible resources used in the provision of a specified service;

In light of the fact that the Act does not define "essential facilities", it has become necessary for the Office, under its general legislative mandate under Section 4 (1) of the Act, to make rules regarding essential facilities.

Essential Facility, for the purpose of this document, is defined using four main points.

- A facility that is controlled by a dominant firm
- Competing firms must lack a realistic ability to reproduce the facility
- Access to the facility is necessary in order to compete in the related market
- It must be feasible to provide access to the facility.

The OUR does not intend to act unless through thorough analysis it has come to the position that:

- The dominant firm and the firm seeking access are really competitors
- Access to the facility is crucial for the competitor to survive
- Refusal of access constitutes a barrier to entry
- The facility is incapable of being duplicated or highly prohibitive and as such the competitor seeking access **MUST** have no other reasonable alternative.

The OUR will also take due note of the feasibility of the incumbent granting access to the competitor. The feasibility test will consider whether granting access to the essential facility will enhance or hinder competition in the relevant market.

Nascent and Innovative markets

2.19 Digicel argues that regulatory intervention with nascent and innovative markets needs to be avoided, particularly given the need to encourage investment and ultimately consumer benefits. Digicel however, encourages the OUR to intervene in the marketplace where an entity leverages its dominant position in one market to an emerging or neighbouring market.

2.20 In paragraph 1.3.4., Digicel pointed to the Data market being a nascent market and new comers if regulated could hinder the development of a competitive market. Digicel pointed out that Section 4(1) (f) only summarises other functions of the OUR and does not per se confer any function on the OUR not otherwise conferred by the Act.

2.21 Flow, in commenting on the responses, says " It is in the best interests of Jamaica to promote and protect competition and supports OUR efforts to immediately implement competitive safeguard rules to address current anti-competitive practices continually being wielded by incumbent monopolist C&WJ against nascent industry competitive new entrants and investors to the country."

2.22 The OUR will respond to these comments in the consultation for data markets.

The OUR and the Fair Trading Commission (FTC)

2.23 Digicel is unclear of the added value of these competitive safeguard rules. It is their view that these proposed rules deal with many of the issues that are already covered by general competition law, which in their opinion falls to the Fair Trading Commission ("FTC") to enforce. In effect, they argue, the OUR seems to be creating a parallel competition law charter to be enforced by the OUR.

2.24 The suggestion from Digicel is that the OUR develop in conjunction and close cooperation with the FTC and the telecommunications industry, a set of general guidelines to deal with anti-competitive conduct in the telecommunications sector. These general guidelines would set specific rules that would apply to the telecommunications sector.

2.25 The Office reiterates its position that the FTC and the OUR have different roles in the regulation of competition. The FTC's role *is to address anti-competitive behaviour*. The FTC will therefore respond to an act that has already been committed The OUR, on the other hand has the responsibility of ensuring that *the behaviour does not occur.* The OUR will therefore issue rules that will ensure that there is a level playing field among all the operators.

2.26 It is the Office's belief that with this document, it is doing exactly what Digicel suggested in that the OUR after consulting with the FTC now issue these draft rules to the Minister to be set as specific rules to be applied to the telecommunication sector.

Dominance

2.27 Digicel, in Para 1.4 of its response describes dominance as a special form of market power. "The concept of dominance or significant market power is following a well established worldwide regulatory practice whereby important assessments of market power and corresponding regulatory interventions are left to a specially constituted regulator. The concept of dominance has its origins in the competition (anti-trust) law, including merger control laws of the European Union (EU). "

2.28 In Para 1.4.2 of the same response, Digicel says "Making a determination of dominance or SMP in any case involves a very detailed appraisal of market specifics. A typical determination of dominance would at least require an identification of a specific market, an assessment of market shares, an analysis of barriers to entry, a consideration of effects of historic incumbency, an analysis of pricing data and a forward looking projection of how the market is likely to evolve, taking account of all of the factors as they were identified by the European Commission…… A firm may have a large market share, but if other firms can enter the market quite easily and/or others have countervailing bargaining power, then the finding of dominance or SMP may not be warranted".

2.29 While the OUR is aware of the European Commission's position in relation to the assessment of significant market power, the OUR must primarily be guided by the existing legislative framework in Jamaica. Based on the Telecommunications Act 2000, "dominant public voice carrier" means a public voice carrier that holds a dominant position in the telecommunications market in Jamaica within the meaning of section 19 of the Fair Competition Act (FCA). Section 19 of the FCA

states that, "…. An enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors." It should be noted that this definition and the related market definition process and assessment are not considered to be at variance with those of most national regulatory authorities.

Experiences of Anti-Competitive Practices stated by Some Providers in their responses to the draft rules.

Interconnection

Digicel

2.30 Digicel made reference to the fact that for over four years they have tried to obtain direct interconnection between Digicel's mobile network and the Cable & Wireless Jamaica mobile network. Digicel states that they have been unsuccessful in their attempts and states that C&WJ has de facto refused direct interconnection (through constructive refusal) to its mobile network. Digicel filed a pre-contractual dispute requesting that the OUR deal with this refusal to interconnect by Cable & Wireless.

Reliant

2.31 Currently, says Reliant, "there is no "insight' or regulation of cost based pricing for termination of mobile calls which has an impact on incoming/outgoing call rates locally and domestically. Regulators in Canada, Europe and the US are uniformly of the opinion that mobile termination rates are too high and "gouging" consumers. Steps are being taken to review rates and in some manner have them reduced to provide the consumer with better cost benefits".

2.32 "Since the mobile market is so large in Jamaica, the operators have the ability to engage in anti-competitive pricing practices to limit competition. We are seeing instances of this on the Arbinet exchange where at least one mobile carrier per minute rate is significantly below cost charged to local carriers who compete in the International termination market. We feel the OUR must develop a process within the Competitive Safeguards to allow for review, complaint process and penalties for anti-competitive practices by mobile carriers".

Flow

2. 33 Flow in their comments, states, "C&WJ continues to deny such access with its refusal to provide access to facilities, fair pricing and often times its refusal to supply services at fair prices. C&WJ also at conveniently timed moments uses technical infractions as a basis to refuse to supply services thereby frustrating competitor's ability to provide alternative competitive services."

2.34 In response to Paragraph 4.5 of the draft rules, Flow is strongly urging the OUR "to promulgate additional associated clear and specific penalties and sanctions to be immediately levied on C&WJ on a daily basis to prevent such targeted harmful anti-competitive actions under this section until C&WJ ceases and desists from such illegal activity".

2.35 "The OUR, says Flow, "should implement any and all such other additional alternative immediate remedies preventing new entrants from needing to constantly go to the Court to prevent C&WJ anti-competitive practices. This practice will bleed new entrant's limited resources against the army of litigation resources which C&WJ has at its disposal and to which it can conveniently and is known throughout the region to use to stall and bombard fledgling new entrants and allow inaction to keep the status quo in tact with respect to regulatory reform supporting competition. To force new entrants to get relief only by resorting to the courts just serves to discourage further investment, divert valuable resources away from the development and deployment of competitive consumer services in the Jamaican marketplace and frustrates national telecommunications policies and goals".

2.36 "C&WJ is charging Flow and other new entrants higher interconnection rates for wholesale services than it does to its retail customers. This practice means to squeeze out new entrant competitors in the market place wanting to provide alternative diverse services at competitive prices. ……unnoticed by the regulator…… The allowance of such C&WJ predatory pricing practices hardly promotes the competitive environment Jamaica requires for the serious development of the country's telecommunications and ICT infrastructure."

2.37 With regards to 1-800 Services Pricing, Flow states that "currently, C&WJ in controlling all 1-800 number services levies exorbitantly high charges on new entrant competitors who need these services for their customer base development. C&WJ's anti-competitive pricing practices for these services ratchet up costs for new entrant competitors to structure and compete with cost-effective and innovative services in the marketplace, such as pre-paid calling card alternatives".

2.38 The OUR notes that these and other alleged anti-competitive behaviours will be addressed within the framework and rules provided by these competitive safeguards. It reiterates however that these are ex ante rules to curtail the instances of anti-competitive practices and that it is the jurisdiction of the FTC to address anti-competitive behaviour.

Draft Competitive Safeguard Rules

2.39 Digicel submits that the level of regulation should be decreasing as competition increases in the markets, "it should be the abuse of dominance of dominant public voice carriers that the OUR increasingly focuses on in case competition increases. The market will make sure that the most efficient carriers will earn their place in the market."

2.40 The Office is in full agreement to this statement from Digicel.

2.41 On the issue of Reference Interconnection Offer, Digicel points out that "In accordance with the Act, the Reference Interconnection Offer only applies as a *reference offer* mandatory for the dominant public voice carrier (section 32 (2)) of the Act. In accordance with the basic principles of contract law, the other party to an interconnection agreement can only be bound after a valid offer by the dominant public voice carrier (based on the reference interconnection offer as is scrutinized and approved by the OUR), negotiated between the dominant public voice carrier and the requestor-non dominant public voice carrier and a subsequent acceptance of an offer. …. this action by the requestor is necessary to make any section from a reference offer binding upon the non-dominant public voice carrier ".

2.42 The Reference Interconnect Offer requirement now in place applies to a dominant public voice carrier. However, as stated in the first consultative document, The Office may require a Reference Interconnection Offer for the Data market should it find an operator dominant in the data market.

2.43 Digicel, commenting on Reliant's response to the consultation on Competitive safeguards- Draft rules states "Digicel supports fairness in the marketplace and reminds the OUR that it is market mechanics that ensures fairness in the marketplace. It is only where there are obstacles in the market place and regulation is used to address and prevent market failure. In keeping with accepted norms on the regulation of (the abuse of) dominance in a market, Digicel asserts that it is the consumer who is to be protected from the abuse of dominance by

dominant firms, not companies that are inefficient and consequently not competitive. Companies that cannot withstand normal market pressures have no raison d'etre to be in the market. It is not the business of the regulator to artificially preserve the existence of companies that are not viable and/or efficient."

2.44 Digicel says that it "is currently successfully operating in the now highly competitive mobile market and as a result of competition, Jamaican consumers in large numbers have experienced and continue to experience the prices for mobile communications consistently falling since the introduction of competition over the past five years".

2.45 The Office agrees that since liberalization of the Telecoms Market, per minute charges have fallen in some retail mobile communications market. The Office is therefore firm in its view that competition needs to be sustained in order for consumers to have maximum benefit. This is therefore additional reasons for promulgating these rules.

2.46 C&WJ agrees with Reliant's response to paragraph 3.2.2 of the Draft Rules "that mobile technology plays a significant role in the voice market both for domestic calls, outgoing international calls and incoming international calls. In this respect and in accordance with section 28 (3) of the Telecommunications Act 2000. C&WJ stated in the comments that they submitted to the OUR on January 25th an application for non-dominance classification in all the fixed voice markets in which the OUR had previously classified C&WJ as dominant ".

2.47 This says C&WJ "is on the basis that these markets are now wider and should include substitutable services provided over the mobile networks in addition to the services provided over the fixed network. By way of example, as at December 2006, C&WJ's fixed network carried less than 10% of all international outgoing traffic from Jamaica".

2.48 The Office will not seek to address the C&WJ's application for a declaration of non-dominance in this document.

2.49 In response to Digicel's proposed amended language at paragraph 4.3 of its response in relation to safeguarding proprietary information. C&WJ says "it exercises the utmost propriety in safeguarding information supplied by competitors in accordance with paragraph 6.1 of "*Cable & Wireless Jamaica's Reference Interconnect Offer", published in February 2001"*.

2.50 Flow, in its comments on the responses, says "it reiterates its belief that it is in the best interests of Jamaica to promote and protect competition and supports

OUR's efforts to immediately implement competitive safeguard rules to address current anti-competitive practices continually being wielded by incumbent monopolist Cable and Wireless Jamaica (C&WJ) against nascent industry competitive new entrants and investors to the country. Flow applauds OUR efforts in this regard but respectfully submits that OUR must go further, faster and enforce clearer safeguards to prevent the continuing stalling and obstruction by monopolist C&WJ in its insidious practices in attempting to drown competition within its economic and facilities domination in the market ".

2.51 In concluding, The Office shares the views proffered by Flow which states. "Prompt implementation of revised competitive safeguard rules will have a positive impact on the development of competition in the Jamaican telecommunications sector".

The Rules

2.52 Digicel has put forward some suggestions for changes in the wording in some paragraphs of the draft rules. The Office thanks Digicel and has accepted some of these changes.

CHAPTER 3 - TELECOMMUNICATIONS COMPETITIVE SAFEGUARD (VOICE SERVICES) RULES, 2007

3.1 Introduction

In exercise of the power conferred on the Office of Utilities Regulation by Section 35 of the Telecommunication Act including any future amendments and enactments that may be put in force from time to time and of every other power hereunto enabling, the following rules are hereby made:-

3.2 Citation

These rules may be cited as the Telecommunications Competitive Safeguard (Voice Services) Rules, 2006 and shall apply to dominant public voice carriers.

3.3 Interpretation

In these Rules,

"access" means the making available of facilities and/or services, by an undertaking to another undertaking, under defined conditions, for the purpose of providing electronic or non-electronic telecommunications services.

"accounting separation" means the provision of financial accounts at a much greater level of desegregation and detail than the usually published annual financial accounts.

"anti-competitive conduct" is where a dominant carrier or service provider takes advantage of its market power with the effect or likely effect of substantially lessening competition in the telecommunication market.

"carrier" means a person who is granted a carrier licence pursuant to section 13 of the Telecommunications Act.

"competing carrier" – a carrier that is competing in the same telecommunications market as other carriers.

"confidential information" means any information classified as such and includes information that a reasonable person would regard as confidential having regard to the nature of the information.

"customer facing division" is defined for purposes herein as any part of a public voice carrier's organization that interfaces with subscribers and/or retail customers of this public voice carrier's organization or parts thereof.

"dominant public voice carrier" means a public voice carrier that holds a dominant position in the telecommunications market in Jamaica within the meaning of section 19 of the Fair Competition Act and has been so classified by the Office pursuant to Section 28 of the Telecommunications Act 2000.

"essential facilities" essential facilities are physical network facilities and non-physical features, functions and services of a public telecommunications network or service that:

(a) are exclusively or predominantly provided by a dominant operator; and
(b) are required by competitors of the dominant operator in order to provide a service in competition with the dominant operator; and
(c) cannot feasibly be economically or technically substituted in order to provide a service.

"reference interconnection offer" means an offer document setting out matters relating to the price and terms and conditions under which a public carrier will permit interconnection to its public telecommunications network.

"regulatory accounts" are Financial Statements and information, prepared by the methodology mandated by the Office, and include such notes to each Regulatory Financial Statement as relates to different businesses run by the same company or group of companies, so that the costs, revenues, assets, liabilities associated with each business and where applicable the service categories of that business (and transfer charges between them) can be appropriately and transparently identified and properly allocated.

"service provider" means a person who is the holder of a service provider licence issued under section 13 of the Telecommunications Act 2000.

"voice service" means a particular service as defined as a voice service pursuant to Section 2 of the Telecommunications Act as well as any service determined by the Office to be a voice service within the provisions of section 52 of the Telecommunications Act, and includes voice services over the internet and voice over IP.

"wholesale business unit" a section, division or branch of the operator that deals with service provisioning to other carriers and service providers

3.4 Determination of an Essential Facility

1. The following represents the guidelines for essential facilities:

   Essential facilities are physical network facilities and non-physical features, functions and services of a public telecommunications network or service that:

a) are exclusively or predominantly provided by a dominant operator; and

b) are required by competitors of the dominant operator in order to provide a service in competition with the dominant operator; and

c) cannot feasibly be economically or technically substituted in order to provide a service.

2. The Office shall determine which physical network facilities and physical features, functions and services of a public telecommunications network or service are to be classified as essential facilities. The determination of any particular essential facility may include the terms and conditions under which that essential facility is to be provided, including those relating to prices, quality and availability.

3. The market must be reasonably defined taking into account supply and demand side substitutes. An incorrect market definition may result in an erroneous declaration e.g. declaring a facility essential when that may not be the case. In determination of the network that will be deemed an essential facility, The Office shall;

(a) Define the downstream market in order to establish whether the dominant firm and the firm seeking access are competitors or potential competitors.

(b) Define the upstream market, i.e. the market in which the essential facility lies.

4. The concept also implies that the firm operating in both markets must be dominant in the upstream market in which the competitor is seeking access and that barriers to entry in this market exist.

3.4.1 Prohibited Actions

The essential facilities owner/operators shall not

a. refuse to deal without having reasonable grounds
b. refuse to supply unless it is not technically feasible or not economically reasonable to do so
c. unfairly discriminate amongst the access seekers/operators using the facility.

3.4.2 Exception to the Enforcement of Essential Facilities Doctrine

Notwithstanding the above terms and conditions of operation, the following exceptions apply:

1. Section 54(3) of Telecommunications Act which states:

   The requesting carrier shall not be permitted to enter on any land or facility owned or controlled by the providing carrier if such entry-

   a) would threaten the integrity of the providing carrier's network;

   b) is not technically feasible for the providing carrier; or

   c) would prevent the providing carrier from fulfilling its reasonably anticipated requirements for use of the land or facility, including, but not limited to, requirements for permitting entry to other persons with whom the providing carrier has contracted to provide such entry.

2. Capacity constraints.

   Where there are capacity constraints, that is, due to the nature or technical characteristics of the market there is no spare capacity and no additional capacity can be created.

3. Non-feasibility Option

   Where the facility is already being used by a number of competitors and whereby introducing another competitor into that market may hamper competition resulting in each competitor having to produce below its capacity to allow the entrant into the market.

NB: *In respect to (3) above, where the facility is being fully utilized, the Office will determine whether the facility is being efficiently used, whether it can be used more efficiently by introducing another competitor into that market, or whether there are long term contracts that render that facility unavailable to new entrants.*

3.5 Enforcement of Access

In the furtherance of its business in the telecommunication industry pursuant to the provisions at Section 55 of the Telecommunication Act, no carrier shall be unreasonably denied access to land.

(2) An application under subsection (1) shall –

a) identify the land to which the application relates;
b) identify the owner or occupier of such land;
c) state the means by which entry is to be effected, the purposes and the approximate dates and the period for which such entry is required;
d) specify-

   i. the date of any prior notice given to the owner or occupier of the land; and
   ii. the amount of compensation offered to such owner or occupier

e) state that all reasonable attempts to seek permission for entry have failed; and
f) in the case of land owned or controlled by another carrier, state that all reasonable alternatives to entry on land have been exhausted.

(3) The court may grant an order under this section if it is satisfied that the applicant has complied with the requirements of sections 53 and 54 of the Telecommunications Act.

The Office shall make rules governing the sharing of essential facilities providing that Section 54 is already satisfied. The terms and conditions of these services shall not in any way, prohibit competition or put unnecessary pressure on the operators that share such facilities.

3.6 Safeguarding of Proprietary Information

The organizational arrangements, information flows and responsibilities set out below are to provide safeguards for the handling of proprietary information supplied by competing carriers.

a) All communications between competitive carriers and a dominant public voice carrier shall flow through a separate division. This division will be referred to herein as, the wholesale business unit, or WBU.

b) The WBU shall be organizationally separate from other units in the company, and shall report directly to a corporate officer.

c) The WBU unit shall not share offices with any customer-facing division of a dominant public voice carrier. Separate buildings are not required, but the offices must be clearly separated from the others.

d) All employees of the WBU shall receive training materials informing them of their responsibilities for the handling of confidential information, and shall certify that they understand and agree to meet these responsibilities.

e) The WBU shall not at any time share employees with any other unit of a dominant public voice carrier.

f) All communications and information received from competitive carriers, including but not limited to customer identification and location, traffic forecasts, and service plans and parameters shall be received only by the WBU. The WBU shall mark all information and communications received as "Confidential" and these shall not be shared with any customer facing division.

g) Where an employee is promoted or transferred out of the wholesale business unit, the company shall ensure that any confidential information that is acquired while that employee was a member of the wholesale business unit is not used in the customer facing department of the dominant public voice carrier, directly or indirectly, to the detriment of the company supplying that information or to gain a competitive advantage in the market.

h) Communications from operating divisions to customer facing divisions, including, but not limited to, network traffic loads, service quality results and construction plans, shall not contain any confidential information originating from competitive carriers, except insofar as it is aggregated with other information and not separately identified.

i) A public voice carrier that has been classified dominant shall each calendar year perform an internal audit of its compliance with these rules and the handling of Confidential Information as referred to in this section of the rules. The dominant public voice carrier shall submit the results of the annual internal audit to the OUR as soon as the audit is complete and the result becomes available, but in any event within two (2) calendar months after the year on which the internal audit is performed, has expired.

In the event that it is the first time that a public voice carrier is classified as a dominant public voice carrier, the audit shall be performed and ultimately submitted within six (6) calendar months after the date the carrier's classification as a dominant public voice carrier by the Office or such longer time period after the moment of classification, as the Office may prescribe.

j) Audits shall certify that the dominant public voice carrier operates and has operated in compliance with the Safeguard Rules for Dominant public voice carriers and the principles of the Act.

3.7 Provisioning of Service

1. Service shall be provided in a timely manner and the basis on which such service is provided shall not put the buyer of such service in a more detrimental position than any other customer buying a similar service, such including internal customers, i.e. other business units, or operating companies owned in whole or in part by the dominant public voice carrier that the Wholesale Business Unit belongs to or has a majority control over."

2. The WBU shall ensure that all applications for the provision of service including those from the Retail Business Unit are date and time-stamped, and that provisioning is done on a first in first out basis except where it is not technically feasible to do.

3. The dominant public voice carrier shall immediately notify all interconnecting carriers of a decision concerning changes in its network that will affect the interconnecting carriers.

4. The WBU shall notify interconnecting carriers and service providers of any new products and/or services at the same time as it notifies its Retail Business Unit.

3.8 Discrimination

The dominant public voice carrier

a) shall not charge its wholesale customers a higher charge for the underlying service than it charges its own retail customers for the retail version of the service; and

b) shall not discriminate, in price nor in action (or the lack thereof), between any of its wholesale customers, if they are requesting the same or similar service.

3.9.0 Unfair Cross-subsidy

Broadly speaking, the idea of cross-subsidy relates to a firms ability to apply prejudicial pricing (based on market power in at least one of the markets in which it operates) by transferring revenues from that market to make up for losses in a market in which it has no or limited market power. Dominant public voice carrier shall not use any of the revenues it has earned or earns in markets in which it has market power and/or has been declared dominant to offset losses in another market. That is, subject to paragraphs 3.9.1 to 3.93, under these rules, a dominant carrier may not offer service in any market at prices that are below cost (including the cost of capital).

3.9.1 A service is said to be cross-subsidized if one of the following two cases obtains:

(a) where market power is used to engage in predatory pricing (that is, the practice of utilizing profits from a market in which the carrier is dominant to unfairly lower prices in competitive markets in order to increase market share.

(b) a situation in which market power is used to overcharge some consumers (that is, charge prices above cost), in favour of subsidizing others.

3.9.2 The rules in relation to cross-subsidy will not be applied on a per se basis. That is, a finding of cross-subsidy will not, by itself, be treated as a breach of the rules, if it is demonstrated that the cross-subsidy:

(a) Contributes to the improving the production or distribution of goods and services; or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit; and

(b) Does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

3.9.3 In assessing cross-subsidy, when measuring costs and analyzing prices, the standards of stand-alone cost and service incremental cost will be used as the respective maximum and minimum bounds in determining "cross-subsidy-free prices". Importantly, these tests apply to both individual services and groups or bundles of services.

3.9.4 Prices shall be established between the total long run incremental cost of providing the service and the stand alone cost of providing the service, so, however, that the prices shall be so calculated as to avoid placing a disproportionate burden of recovery of common costs on any services.

3.10 Enforcement of Competitive Safeguard Rules

1. The Office shall either on its own initiative and/or on the complaint of any affected party investigates any alleged breach of these rules.

2. The dominant public carrier against whom an investigation is commenced shall be given the opportunity to respond. This response shall be in writing and shall be copied to any affected party who has complained.

3. The complainant and/or the defendant may at any time prior to a determination by the Office request an oral hearing of the matter. The Office will within its sole discretion determine whether to grant an oral hearing or to allow written submissions only.

4. If on completion of the investigation the Office determines that there has been a breach of these rules then the Office shall inform the parties of its conclusion and may afford the carrier the opportunity to take such remedial measures as the Office may specify and to do so within such period as the Office may determine.

5. If the carrier shall fail to comply and/or if the Office is satisfied that remedial measures are not possible or appropriate the Office shall initiate proceedings for prosecution before a Resident Magistrate's Court pursuant to Section 71 of the Telecommunications Act 2000.

6. A person who is found guilty of a breach of these rules shall be liable on summary conviction in a Resident Magistrates's Court to a fine not exceeding $500,000.00 or to imprisonment for a short term not exceeding twelve (12) months or to both such fine and imprisonment.

3.11 Complaints Procedure

1. For any alleged breach of the Rules, the complaints procedure shall be as follows:

   i. The aggrieved party shall file a detailed complaint with the Office This is to be supported by all necessary documentation.

   ii. The Office shall review the complaint and the supporting documentation and inform the complainant in writing within fourteen (14) calendar days of receipt of the complaint, as to the proposed course of action

   2 The Office may:

   a) request additional information; and/or

   b) accept the request and commence the investigation

3. The dominant public voice carrier against whom the complaint is directed shall be given the opportunity to respond to the allegations. This response shall be in writing and shall be copied to the complainant. If necessary the Office, the complainant and/or the defendant may request face-to-face meetings.