Office of Utilities Regulation

Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers

Notice of Proposed Rule Making

OFFICE OF UTILITIES REGULATION

Office of Utilities Regulation
NPRM for Competitive Safeguard Rules and Guidelines
Document No: TEL. 2006/6
June 2, 2006

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ABSTRACT

The Telecommunications sector liberalization process in Jamaica commenced in March 2000 and concluded in March 2003, with the liberalization of international service. The resulting competitive entry has created competition in mobile cellular retail markets. However, as in many other jurisdictions, such entry has not generally resulted in competitive wholesale markets in Jamaica.

Once competition has been introduced, regulatory authorities are often called to promote and protect such competition. Protection of competition includes the identification and prevention of abuse of a dominant position or any other uncompetitive practice by a dominant carrier.

Section 35 of the Telecommunications Act 2000 (the "Act") gives the Office of Utilities Regulation ("Office") the power to establish competitive safeguard rules and guidelines to identify or prevent uncompetitive practice by dominant public voice carriers. Additionally, Section 71 of the Act gives the Office general powers to propose rules in relation to any matter that it considers necessary or desirable for the effective performance of its functions.

The purpose of this document is to initiate the consultation process with respect to competitive safeguard guidelines and rules in the telecommunications sector in Jamaica. The objective of this consultation process is to assist the Office to establish competitive safeguard guidelines and to recommend competitive safeguard rules to the Minister responsible for telecommunications. The process would culminate with the approval and promulgation of the competitive safeguard rules by the Parliament of Jamaica.

Comments from Interested Parties

Persons who wish to express opinions on this NPRM are invited to submit their comments in writing to the Office. Comments are invited on all of the issues raised in the document. Respondents are especially requested to provide answers to the questions posed by the Office in Appendix 1.

Responses to this Consultative Document should be sent by post, fax or e-mail (this option is preferred) to: -

Maurice Charvis
Director – Research & Analysis
Office of Utilities Regulation
P.O. Box 593
36 Trafalgar Road,
Kingston 10
Jamaica
Fax: 1 (876) 929-3635
E-mail: mcharvis@our.org.jm

Responses to the consultative document are requested by **June 23,** 2006. Any confidential information should be submitted separately and clearly identified as such. In the interest of promoting transparency, respondents are requested to limit as far as possible the use of confidentiality markings. Respondents are encouraged to supply their responses in electronic form using the e-mail address above. Non-confidential responses will be posted on the OUR's website (www.our.org.jm).

In order to facilitate the broadest possible participation in the consultation process, the OUR may arrange appropriate fora where the issues can be discussed.

Comments on Responses

As in all the OUR's consultations, there will be a specific period for respondents to view other (non-confidential) responses and to make comments on them. The comments may take the form of either correcting a factual error or putting forward counter-arguments. Comments on responses are required by **July 18**, 2006.

Second Notice of Proposed Rulemaking

On review of the initial responses and the associated comments the Office intends to prepare and issue a **second** NPRM. The Office expects that this second NPRM will include specific proposed legal text with regard to the competitive safeguard guidelines and to implement the competitive safeguard

rules. The Office expects this second NPRM to be published on **August 30,** 2006.

Comments on Second NPRM
A period of three weeks will be allowed for responses to the second NPRM. Hence, comments from interested parties are expected to be required by **September 22**, 2006.

Comments on Responses
The OUR expects to provide parties to view other (non-confidential) responses and to make comments on them. As such, comments on responses are required by **October 12**, 2006.

Competitive Safeguard Determination.
The Office will conclude this process for competitive safeguard rules by issuing its Competitive Safeguard Determination on **November 10,** 2006. This determination is expected to include competitive safeguard guidelines (referred to in subsection 35(2) of the Act) as well as competitive safeguard rules (referred to in subsections 35(1) and 35(3) of the Act). The competitive safeguard rules, which are subject to affirmative resolution by Parliament, are to be forwarded to the responsible Minister for his/her consideration and subsequent submission to Parliament by the Minister.

Arrangements for Viewing Responses
Those who wish to view the responses received should make an appointment by contacting Lesia Gregory at the OUR by one of the following means:

Telephone: (876) 968 6053 (or 6057-8)
Fax: (876) 929 3635
E-mail: lgregory@our.org.jm

The appointment will be confirmed by a member of the OUR's staff. At the pre-arranged time the individual should visit the OUR's office at:

3rd Floor,
PCJ Resource Centre,
36 Trafalgar Road,
Kingston 10.
Jamaica

The individual may request photocopies of the responses which will be provided at a price which reflects the cost to the OUR for using its photocopying facilities.

Also, copies of this document may be downloaded from the OUR's website at www.our.org.jm.

Timetable
The timetable for the consultation is summarized in the table below.

Summary of timetable for consultation

Event	***Date/Deadline***
First NPRM document	June 2, 2006
Responses to first NPRM document	June 23, 2006
Comments on responses	July 18, 2006
Second NPRM document	August 30, 2006
Responses to Second NPRM document	September 22, 2006
Comments on responses	October 12, 2006
Competitive Safeguard Determinations (includes OUR Guidelines and Rules sent to the Minister)	November 10, 2006

CHAPTER 1: INTRODUCTION

Background

1.0 The Government of Jamaica (GOJ) commenced the liberalization of the telecommunications sector in 2000. Among the objectives of the liberalization process is to promote competition among operators (carriers and service providers) in the telecommunications sector with the aim of promoting innovation, expanding the availability of telecommunications services, lowering overall telecommunications prices and improving quality of service.

1.1 The Office of Utilities Regulation (" the OUR") was established by virtue of the Office of Utilities Regulation Act 1995 and commenced operations in January, 1997[1]. The OUR is charged with the responsibility of regulating the telecommunications sector and other regulated industries. Prior to the commencement of the liberalisation process, the incumbent operator, Cable and Wireless Jamaica (C&WJ), had exclusive rights to build, own and operate telecommunications systems in Jamaica.

1.2 The liberalisation process was divided into three phases starting in March 2000. The first two phases lasted for eighteen months each during which a number of restrictions to competition were removed such as the resale of international and domestic voice minutes and the provision of Internet services. The third (final) phase commenced in March 2003, with all telecommunications services now subject to competition.

1.3 The resulting competitive entry has created vibrant competition in some retail markets. However, as in many other jurisdictions, such entry has not generally resulted in competitive wholesale markets in Jamaica. In retail markets for example, consumers in the mobile market now have the option of choosing among three mobile operators. There are a number of retail Internet service providers providing some degree of choice to both potential and existing customers. However, despite progress in some retail markets, competition in the wholesale markets has lagged behind. The wholesale markets provide valuable inputs to the retail markets and therefore if competition at the wholesale level is not effective, the end consumers could be paying higher prices for products and services offered at the retail level.

[1] The Office of Utilities Regulation Act was passed in Parliament in 1995.

1.4 Once competition has been introduced, regulatory authorities are often called to promote and protect such competition. Protection of competition includes the identification and prevention of abuse of a dominant position or any other uncompetitive practice by a dominant carrier.

1.5 Apart from competition concerns in voice markets, there are also potential problems in data markets. The Act does not speak to a formal declaration of dominance in data markets. However, the Office considers that there are certain advantages to reviewing and assessing competition concerns in data markets in the same manner that it has undertaken in voice markets. This is particularly relevant at this time given the emergence of next generation networks and services such as Voice over Internet Protocol (VoIP), which are based upon data networks. However, only if data carriers are found to be dominant will competitive safeguard rules apply.

1.6 Section 35 of the Act deals with competitive safeguard rules for dominant public voice carriers. However, the Office is of the view that it can also use its general rule making powers, as set out under Section 71 of the Act and its function of promoting competition among carriers and service providers in Section 4(1) (f) of the Act to propose competitive safeguard rules and guidelines in data markets.

1.7 While competitive safeguard rules set out the provisions by which dominant carriers are regulated, they do not specifically address the issue of remedies for uncompetitive practices. However, as will be further discussed in this document, the Office can apply to the court for action to be taken against any carrier who has breached any of the rules (Sections 65 and 66 of the Act). Additionally, the Fair Competition Act ("FCA"), administered by the Fair Trading Commission ("FTC"), provides for action to be taken against both dominant operators who are engaged in and are likely to be engaged in anti-competitive practices.

Consultation with the FTC

1.8 Before making a determination with respect to competitive safeguard rules or guidelines, the Office is required to invite submissions from members of the public, and consult with and take account of recommendations made by the Fair Trading Commission (Section 35(1) and 35 (2) of the Act). In keeping with the requirements, there were consultations with the FTC through a process of meetings and consideration of the written and oral comments submitted by that agency. In addition, the OUR also submitted earlier versions of this NPRM to the FTC and held a consultative meeting to discuss its contents.

Purpose of Document

1.9 The purpose of this document is to initiate the consultation process with respect to competitive safeguard rules and guidelines in the telecommunications sector in Jamaica. The objective of this consultation process is to assist the Office to establish competitive safeguard guidelines and rules. These rules are to be sent to the Minister with responsibility for telecommunications. The process would culminate with the approval and publication of the competitive safeguard rules by the Parliament of Jamaica.

Structure of Document

1.10 The rest of the document is organized as follows: Chapter 2 outlines the legal and regulatory framework. Chapter 3 looks at some anti-competitive practices in the telecommunications industry worldwide, reviews other Office initiatives to give effect to the relevant provisions in the Act with respect to the promotion and protection of competition and concludes with a proposal for the way forward. Chapter 4 develops the competitive safeguards rules/guidelines that were introduced in the previous Chapter as well as develops the essential facilities concept

CHAPTER 2: LEGAL AND REGULATORY FRAMEWORK

Introduction

2.0 The discussion in this chapter will focus on the legal framework as set out in the different statutes with respect to competitive safeguard rules.

Legal Framework

2.1 The Office of Utilities regulation Act, the Telecommunications Act 2000 and the Fair Competition Act ("FCA") are the three main relevant legislations in Jamaica. In addition, Jamaica is a signatory to a number of international agreements, most relevant of which is the World Trade Organization's Agreement on Basic Telecommunications (WTO-ABT).

The Office of Utilities Act (OUR Act)

2.2 Section 4 (3) of the OUR Act states that "In the performance of its functions under this Act the Office shall undertake such measures as it considers necessary or desirable to--- (a) *encourage competition in the provision of prescribed utility services".*

The Telecommunications Act 2000

2.3 **Competitive Safeguard Rules:**

Section 35 of the Act includes the main provisions with respect to competitive safeguards. Subsection (1) identifies the process for making and the types of competitive safeguards rules:

> (*1) The Office may, after consultation with the Fair Trading Commission and such participants in the telecommunications industry as it thinks fit and subject to subsection (3), make rules subject to affirmative resolution (hereinafter referred to as "competitive safeguard rules") prescribing the following matters in relation to dominant public voice carriers -*
>
> *(a) separation of accounts;*
>
> *(b) keeping of records;*

(c) provisions to ensure that information supplied by other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose;

(d) such other provisions, as the Office considers reasonable and necessary for the purposes of the competitive safeguard rules.

2.4 As noted above in relation to dominance processes and in Chapter 4 with respect to certain other guidelines, the Office is well advanced in establishing the regulatory framework with respect to the promotion and protection of competition. Within that context, this particular process is aimed at complementing those earlier and ongoing initiatives. In particular, the Office notes that subsection (1) (d) empowers the Office to include other provisions in the competitive safeguard rules and guidelines as the Office deems reasonable and appropriate. These are discussed and further developed in Chapter 4

2.5 **Competitive Safeguard Guidelines:**

Section 35 (2), states:

The Office may in consultation with the Fair Trading Commission, develop guidelines as to -

(a) the types of uncompetitive practices to which the competitive safeguard rules apply; and

(b) the procedure for determining whether to impose a competitive safeguard in relation to that practice.

2.6 Lastly, Section 35(3) of the Act reads as follows:

"*The Office shall make competitive safeguard rules only if it is satisfied that-*

(a) such rules are necessary for the identification or prevention of abuse of a dominant practice by a dominant public voice carrier or any other uncompetitive practice by that carrier; and

(b) no other means are available to the Office for the provision of an adequate remedy in relation to such abuse or practice.

2.7 As the Office notes the distinction between the competitive rules referred to in subsections (1) and (3) and the corresponding guidelines referred to in subsection (2). The latter relate to the type of practices to which the rules would apply and the corresponding procedure. The distinction between the rules and guidelines is an important one. For instance, according to the Act only the rules require affirmative resolution by Parliament. The guidelines may, however, be established by means of an Office determination. As such, the ultimate objective of this consultation process is to assist the Office to establish competitive safeguard guidelines and to establish competitive safeguard rules for affirmative resolution by Parliament. The guidelines and rules are discussed and further developed in Chapter 4 of this document.

2.8 As discussed above, Section 35 of the Act provides for competitive safeguards with respect to dominant public voice carriers ("DPVCs"). However, as outlined in Section 1, the Office is of the view that other provisions of the Act can be used to establish competitive safeguard rules with respect to dominant carriers in the data markets.

2.9 According to subsection 71 (1) of the Act:

> "T*he Office may make rules subject to affirmative resolution prescribing any matter required by this Act to be prescribed by such rules or any matter that it considers necessary or desirable for the effective performance of its functions under this Act."*

2.10 One such function is the promotion of competition among carriers and service providers [Section 4(1) (f)].

"The Office shall regulate telecommunication in accordance with this Act and for that purpose the Office shall-

[….}

(f) promote competition among carriers and service providers.

The Fair Competition Act

2.11 Anti-competitive practices are addressed in Part III – VII of the FCA. The FCA provides for action to be taken against dominant as well as non-

dominant carriers that have contravened the FCA. However, it is worth noting that a Supreme Court ruling in 2001 has limited the powers of the FTC and currently, the agency is unable to fully exercise its quasi-judicial powers.

2.12 Section 21(1) of the FCA reads:

> *Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall-*
>
> > *(a) notify the enterprise of its finding and;*
> >
> > *(b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.*

2.13 Where a dominant carrier fails to comply with a Directive made by the FTC, the following action can be taken:

- the FTC files an application to the Court for enforcement of the Directive (Section 46 of the FCA);

In response to the FTC's application, the Court can exercise any of the following options (Section 47 of the FCA):

(a) order the offending person to pay the Crown such pecuniary penalty not exceeding one million dollars in the case of an individual and not exceeding five million dollars in the case of a person other than an individual;

(b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 45.

WTO-ABT Commitments

2.14 As a signatory to the WTO-ABT, Jamaica is expected to adhere to the principles outlined in the WTO Reference Paper. In the Telecommunications Act the objects are inter alia to promote and protect the interest of the public by

i promoting fair and open competition in the provision of specified services.

ii promoting access to specified services

Further, Section 3 (a) states that the object is also to facilitate the achievement of the objects above in a manner consistent with Jamaica's international commitments in relation to the liberalization of telecommunications.

The WTO-ABT includes the following specific provisions in the regulatory Reference Paper ("RP"):

1. Competitive Safeguards

1.1 Prevention of anti competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti competitive practices.

1.2 Safeguards

The anti competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis, technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2.15 The Office notes that the anti-competitive practices listed in Section 1.2 of Jamaica's WTO-ABT are illustrative and not exhaustive. This is in effect the interpretation given by the Panel established by the Dispute settlement Body of the WTO in the context of the recently-resolved telecommunications dispute between the USA and Mexico:

"….the term 'anti-competitive practices' in section 1 of Mexico's RP [reference paper] includes practices in addition to those listed in Section 1.2…"

2.16 The WTO-ABT RP also includes the following relevant definitions:

Users mean service consumers and service suppliers

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

2.17 Given the importance of interconnection in the development of competition, the WTO-ABT includes a number of specific interconnection provisions in the RP. In summary, interconnection with a major supplier is to be provided under non- discriminatory terms, in a timely fashion, at cost-oriented rates and sufficiently unbundled:

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components of facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users subject to charges that reflect the cost of construction of necessary additional facilities.

CHAPTER 3: ANTI-COMPETITIVE PRACTICES, INITIATIVES TAKEN AND THE WAY FORWARD

Introduction

3.0 This Chapter seeks to firstly outline some common practices of anti-competitive behaviour found in the telecommunications industry worldwide, then looks at a series of initiatives taken by the Office to promote and protect competition concluding with a discussion for the way forward.

Anti-Competitive Practices

3.1 Some anti-competitive practices that are common to the telecom industry are:

- Refusal to deal/Denial of Access
- Withholding Information
- Delaying Tactics
- Tied Selling/Bundling
- Price and Quality discrimination
- Predatory Pricing
- Price (Margin) Squeezing
- Cross-Subsidization
- Onerous Contract terms and unreasonable requirements

Refusal to Deal/Denial of Access

3.1.1 This is usually in the form of the incumbent refusing to or denying other competing operators access to its network. They may charge excessive rates for interconnection or refuse to build or make available adequate interconnection capacity. Incumbents sometimes refuse to un-bundle network elements or services necessary for efficient interconnection.

Withholding of Information

3.1.2 This occurs where the dominant company refuses to supply critical information to competing operators in the retail market, which is necessary for the continued operation of their business.

Delaying Tactics

3.1.3 Delaying tactics, or delay in the provision of access, occurs where the dominant carrier takes an unusually long period of time to provide the required input to its competitors.

Tied Selling/Bundling

3.1.4 Tied selling *"is the practice by which a supplier obliges its customers to obtain goods or services from it or its affiliates, as a condition for obtaining another good or service that is, by its nature and according to commercial usage, distinct from and unrelated to the first good or service."*[2] As defined in "wikepedia.com*"*, *bundling is a strategy that involves offering several products for sale as one combined product. Tying is normally regarded as an anti-competitive practice in that one or more components of the package are sold individually by other businesses as their primary product, and this tying of goods could hurt their business. It is also implied that the company that is doing the tying or bundling has a significantly large market share so that it would hurt the other companies that sell only single components.*

Price and Quality Discrimination

3.1.5 Price discrimination as defined in "wikipedia.com" exists when sales of identical goods or services are transacted at different prices from the same provider. Price discrimination also occurs when it costs more to supply one operator than it does to supply another and yet the supplier charges both the same price.

3.1.6 Quality discrimination occurs where the dominant carrier provides less quality service to its competitors in an effort to maintain the market share on quality of service.

Predatory Pricing

3.1.7 A dominant carrier is said to be engaging in predatory pricing when it sells a product below average variable costs of production for an extended period, with the objective of preventing others from entering the market or forcing other competing operators to exit the market thus providing the opportunity for the company to increase its market dominance and hence

[2] See "A Guide to Anti-Competitive Practices", published by the Fair Trading Commission.

profits. This policy will benefit consumers in the short-run (because of the lower price) but they will be worse off in the long-run because of a reduction or elimination of competition in the market. At this stage, the company would normally adopt the principles of a monopoly by restricting supply and raising prices.

Price (Margin) Squeeze

3.1.8 A price squeeze occurs where the dominant carrier raises the price of its wholesale input to competitors to a level where it is impossible for them to compete in the downstream market. The objective is to "squeeze" the margin or profit of its competitors. This is common where the dominant firm also sell similar services in the downstream market.

Cross-subsidisation

3.1.9 Cross-subsidization is defined as "the practice of using profits generated from one product or service to support another provided by the same operating entity".

Onerous Contract Terms and Unreasonable Requirements

3.1.10 Dominant carriers sometimes use the terms and conditions of contracts to deter potential operators from entering the market(s) or significantly increase the costs of potential and current operators. These contracts sometimes have long duration and excessive penalties for early termination. Further, dominant carriers could also use the terms and conditions of contracts to stipulate the purpose for which products/services purchased can be used.

INITIATIVES TAKEN

3.2 Starting in 2000, the Office has embarked on a series of initiatives to give effect to the relevant provisions in the Act with respect to the promotion and protection of competition. These are summarized below.

Dominance in fixed telephony services

3.3 Following an extensive consultation process, in August 2003, the Office issued a determination which declared C&WJ as a (the only) dominant carrier in the markets for fixed telephony services. This determination was based on Section 28 of the Act. The following is a summary of that determination:

> *"The relevant markets are for fixed line telephony access and calling services in Jamaica. The relevant markets constitute both wired and wireless fixed line carrier services and calling services. The fixed line telephony access and calling services are separate but closely interrelated markets."*
>
> *[…]*
>
> *"… mobile and fixed telephony access are complements rather than substitutes and Cable and Wireless Jamaica remains dominant in the markets for fixed telephony access and associated domestic calling markets."*

Dominance in mobile call termination services

3.4 After undertaking a consultation process, in September 2004 the Office declared all mobile operators dominant in the respective call termination markets. This determination was based on Sections 28, 29 and 30 of the Act. However, subsequent to the determination, one of the mobile operators (Digicel) requested that the Office reconsider its determination. The Office is currently reviewing the matter and will issue a decision when it is completed. Given that the determination is currently under review, it is currently not in force.

Reference Interconnection Offer

3.5 Section 32 of the Act requires every dominant operator to lodge with the Office a proposed reference interconnection offer "setting out the terms and conditions upon which other carriers may interconnect with the public voice network of that dominant or other carrier, for the provision of voice services." In November 2004 the Office issued the corresponding determination notice in relation to C&WJ's proposed latest version of such an offer, the RIO/5A.

3.6 Taking in to account the liberalization process and the determinations summarized above with respect to dominance, C&WJ is the only operator currently required to prepare and have approved an interconnection offer with respect to voice services.

3.7 As implemented, the current RIO applies only to interconnection between C&WJ and other carriers. Service providers are currently excluded from the application of the RIO.

Separation of Accounts/keeping of records

3.8 These issues are directly related to competitive safeguards, inasmuch they are mentioned in Section 35(1) of the Act. The "separation of accounts" is also referred to as accounting separation. Conceptually, the "keeping of records" is closely related to accounting separation and are typically addressed jointly by regulators. This is the approach adopted by the Office in its initiatives discussed below.

3.9 Accounting separation is a widely used competitive safeguard in the telecommunications sector around the world. In Jamaica, section 30(2) of the Act prescribes that all DPVCs *"shall keep separate accounts"* in order that the Office can assess whether or not they are providing interconnection services according to the principles set out in Section 30(1).

3.10 Based on a consultation process that commenced in 2000, the Office has recently issued two documents related to accounting separation.

3.11 On March 29, 2006 the Office issued the "Regulatory Accounting Guidelines for Cable and Wireless Jamaica" document. The primary objective of those Regulatory Accounting Guidelines is to provide the basis on which C&WJ (a dominant fixed telecommunications operator) is required to prepare its Regulatory Accounts to be submitted to the Office.

That is, the Regulatory Accounting Guidelines are being published by the Office to instruct C&WJ on how to prepare separated Regulatory Accounts.

3.12 As noted by the Office, the preparation and publication of separated accounts that are transparent and audited are essential to the development of truly competitive markets for telecommunications services. Without these accounts, the Office may not be able to properly discharge its duties and functions as provided for in the Act. "The regulatory objectives that separated accounts are intended to support include, ensuring non-discrimination, identifying unfair cross-subsidies, setting or assessing interconnection and other wholesale charges, and retail price control."

3.13 As highlighted in the Regulatory Accounting Guidelines document, "these Guidelines apply specifically to C&WJ and were designed to accommodate that company's network configuration, products and services. However, the principles embodied in this document will be applied to any other carrier/service provider declared dominant in a relevant telecommunications market. In that event, comparable Guidelines will be prepared for any such carrier. As in the case of C&WJ, such Guidelines would be specifically prepared for that carrier/service provider."

3.14 Also on March 29, 2006 the Office published the "Accounting Separation for Cable and Wireless Jamaica" document. In this Determination Notice, the Office summarises the comments received on the previous consultation documents and presents the Office's consideration of those comments. In particular, the document states that C&WJ is required to prepare and publish Regulatory Accounts as set out in the Regulatory Accounting Guidelines document. Clearly, this Determination Notice must be read in conjunction with the Regulatory Accounting Guidelines document.

3.15 The rationale for accounting separation was described in the following manner:

> *Accounting separation can be used to identify market failures and provide the Office with information as to whether dominant carriers are engaged in anti-competitive behaviours such as price squeeze, price discrimination or anti-competitive cross-subsidization.*
>
> *[…]*

"Market distortion by a dominant firm may take various forms, including excessive charges for interconnect services, discrimination in pricing, unfair cross-subsidies, and predatory pricing. These practices are usually aimed at stifling competition and may even prevent market entry. Accounting Separation (AS) is a common tool used to address these anti-competitive concerns.

[…]

Accounting separation provides a useful technique for investigating allegations about anti-competitive behaviour by dominant firms. The Office is also aware of the need for robust cost information for future price cap purposes as well as for setting or assessing interconnection charges.

[…]

In the March 2000 consultative document (Regulatory Accounts for a Dominant Carrier or Service Provider) the Office set out four regulatory objectives that separated accounts are intended to support:-

- *ensuring non-discrimination*
- *identifying unfair cross-subsidies*
- *setting or assessing interconnection charges*
- *retail price control.*

It is important to establish not only that the transfer charges from one of the incumbent's businesses to another are calculated in a non-discriminatory manner, but also that these are treated by the dominant carrier/service provider as 'hard' charges and not simply paper accounting transactions. In other words, when the incumbent sets the prices for the retail business that purchases network services, it must treat the transfer charges as real costs that need to be recovered. Otherwise, a price squeeze may occur if the incumbent engages in discriminatory pricing behaviour. The margin between the interconnection charges and the incumbent's retail price, against which the entrant is competing, may be insufficient to allow an efficient competitor to make a profit. This may constitute a distortion of competition.

A widely used technique to ensure that such price squeezes are not occurring is the 'imputation test'. The imputation test is conducted by comparing the retail price charged by the incumbent with the 'stack' of costs incurred to provide each service which is subject to

competition. These costs comprise the transfer interconnection or wholesale charges for that service plus its retail costs (and any other relevant costs). The interconnection charges for the relevant service are calculated using the same charges as paid by interconnecting operators, and depend on the particular interconnection services that it uses as inputs."

Discussion and Way Forward

3.16 The Act provides a number of different avenues for the Office to promote and protect competition in the telecommunications sector. However, the Office notes that the emphasis in the Act is in relation to dominant carriers in voice services. As noted above, the Office has been giving effect to many of the relevant provisions with respect to dominant voice carriers. Further, the Office is cognizant of the growing absolute and relative importance of data services and that competition in these markets also deserve promotion and protection.

3.17 With the current document, therefore, the Office would like to explore the appropriateness of complementing these recent initiatives in the dominant voice market in the following manner:

- Fill-in any identified gaps in the framework for the promotion and protection of competition in relation to voice services.
- Design and implement a promotion and protection of competition framework in relation to data services.

3.18 The rest of this chapter addresses how these objectives may be addressed in principle, based on the same order of presentation of the initiatives above. The subsequent Chapter develop the corresponding initiatives.

Dominance in Data Markets

3.19 The overriding objective of the Act is *inter alia*, the regulation of telecommunications services including data and other means by which intelligence is transmitted. Additionally, the objects of the Act as stated at Section 3, include the promotion and protection of the interest of the public by promoting fair and open competition in the *provision of specified services and telecommunications equipment.*

3.20 The Office is, therefore, buttressed by the Act in pursuing its regulatory mandate by developing procedures which seek to identify and prevent uncompetitive practices employed by dominant telecommunications carriers licensed pursuant to the Act.

3.21 Given the views expressed in the preceding two paragraphs. The Office intends to undertake a regulatory process to determine dominance in the data market.

Reference Offers

3.22 It was noted above that the current C&WJ RIO relates to voice services primarily and that only carriers have the rights under it.

3.23 Consistent with the objectives set out above, the Office therefore proposes to implement the following:

- Modify the existing RIO framework so that service providers and particularly Internet Service Providers, are included in the application of the RIO.
- Expand the information requirements that dominant operators include in the RIO
- Develop the regulatory framework to require dominant data carriers to lodge with the Office an offer document setting out matters relating to the price and terms and conditions under which a public data carrier will permit access to its public data network.

3.24 With respect to the first two bullets above, the Office intends to raise the issue of the rights of service providers in the next scheduled regulatory proceeding to review C&WJ's RIO.

3.25 With respect to the third bullet above, the Office will develop guidelines relating to the Reference Data Access Offer in Chapter 4 of this document.

Accounting Separation

3.26 As noted above, accounting separation for C&WJ has already been addressed. Therefore, the regulatory objectives included in section 35(1) (a) and (b) have been met with respect to C&WJ. The Office also issued the Regulatory Accounting Rules for Telecommunications on May 24, 2006.

3.27 Given the growing absolute and relative importance of data services, the Office is of the view that accounting separation should also apply to data markets. In the Regulatory Accounting Guidelines document, the Office noted that "the principles embodied in this document will be applied to any other carrier/service provider declared dominant in a relevant telecommunications market. In that event, comparable Guidelines will be prepared for any such carrier. As in the case of C&WJ, such Guidelines would be specifically prepared for that carrier/service provider."

3.28 In making such Guidelines, the Office would likely use its general rule making powers, as set out under Section 71 of the Act, and its function of promoting competition among carriers and service providers in Section 4(1) (f) of the Act.

3.29 As noted in the March 29, 2006 documents, together with the Regulatory Accounting Guidelines for C&WJ, such other new Guidelines would, once implemented, assist the Office to identify and prevent the following types of uncompetitive practices

- price discrimination;
- anti competitive cross-subsidization;
- excessive interconnection and retail charges; and,
- margin squeeze,

3.30 Consistent with the objectives set out above, the Office therefore intends to prepare in the future, on an "as required" basis, new Regulatory Accounting Guidelines for operators other than C&WJ.

CHAPTER 4: COMPETITVE SAFEGUARDS

Introduction

4.0 This Chapter develops the competitive safeguard guidelines that were introduced in the previous Chapter related to data markets. These may be summarized in the following manner:

- **Reference Data Access Offer:** Develop the regulatory framework to require dominant data carriers to lodge with the Office an offer document setting out matters relating to the price and terms and conditions under which a public data carrier will permit access to its public data network.

4.1 Further, consistent with Jamaica's WTO-ABT RP, the Office is of the view that the essential facilities concept should be codified in the telecommunications regulatory framework. As such, this Chapter will develop competitive safeguard rules/guidelines with respect to the definition and treatment of essential facilities. These may be summarized in the following manner:

- **Essential Facilities:** Develop the regulatory framework to define essential facilities, to authorize the Office to determine specific essential facilities and to establish the terms and conditions for their provision by dominant operators.

4.2 The Chapter concludes with a discussion related to the enforcement of competitive safeguard rules/guidelines.

Reference Data Access Offer

4.3 Subject to the discussion above on the RIO framework, the Office is of the opinion that the RIO has proven to be a relatively effective mechanism to promote and protect competition in voice markets. Given the growing absolute and relative importance of data services, the Office is of the view that the reference offer mechanism should also be applied to data markets.

4.4 Therefore, the Office is proposing the following guidelines:

> Every dominant data carrier shall lodge with the Office a proposed reference data access offer setting out the terms and conditions upon which other carriers and service providers may interconnect

with the public data network of that dominant carrier, for the provision of data services.

Each dominant data carrier who is required under these guidelines to provide access in relation to data services shall submit a reference data access offer to the Office –

(a) Within ninety days after the date of determination of dominance pursuant to section 28 (1) and as discussed in Paras 3.19 and 3.20 in Chapter 3; or

(b) at least ninety days before the date of expiry of an existing reference data access offer

A reference data access offer shall contain such particulars as may be prescribed by the Office.

A reference data access offer or any part thereof shall take effect upon approval by the Office in the prescribed manner.

Essential Facilities

4.5 The concept of essential facilities is important to the application of competition principles, policy and law in the telecommunications industry. The concept of an essential facility has been used as an instrument to help develop and give effect to competitive safeguards in a number of jurisdictions.

4.6 The essential facilities concept requires that designated operators be mandated, by law and/or regulation, to provide non-discriminatory access to certain designated services or facilities, based on terms and conditions as stipulated by law and/or regulation.

4.7 Control of essential facilities can give dominant operators numerous advantages over other operators, including new entrants. For example, a dominant operator can use its control over essential facilities to increase a competitor's costs, and make its services less attractive to customers. The competitors' costs can be increased by increased prices of essential facilities. The dominant operator may be able to shield its own customers from the impacts of such higher essential facility prices, either by not "charging itself" those price increases, or offsetting them with cross-subsidies from its monopoly or less-competitive services.

4.8 A dominant operator can also discriminate in the provision of essential facilities to make its competitors' services less attractive to end-customers. It can also discriminate by providing inferior quality essential facilities to competitors, as compared to itself. Anti-competitive discrimination in the provisioning of essential facilities can take many forms, some of which are difficult to detect.

4.9 A dominant operator that controls an essential facility often has both the incentive and the means to limit access to the facility by competitors. It becomes a matter of public interest to ensure that essential facilities are available to competitors on reasonable terms. Without such access, competition will suffer, and the sector will operate less efficiently than it could.

4.10 The Office therefore aims to develop the regulatory framework to define essential facilities, to authorize the Office to determine specific essential facilities and to establish the terms and conditions for their provision by dominant operators.

4.11 The Office is proposing the following guideline:

> Essential facilities are physical network facilities and non-physical features, functions and services of a public telecommunications (voice and/or data) network or service that:
>
> (a) are exclusively or predominantly provided by a dominant operator;
>
> (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.
>
> The Office shall determine which physical network facilities and non-physical features, functions and services of a public telecommunications network or service is to be classified as essential facilities.
>
> Before making a determination, the Office shall –
> (a) invite submissions from members of the public on the matter; and

(b) consult with the Fair Trading Commission and take account of any recommendations made by that Commission.

The determination of any particular essential facility may include the terms and conditions under which that essential facility is to be provided, including with respect to prices, quality and availability.

Enforcement of Competitive Safeguards

4.12 The Competitive Safeguard Guidelines, once implemented, together with the Regulatory Accounting Guidelines, will assist the Office to prevent some anti-competitive practices. If there are complaints of anti-competitive behaviour, the Office will investigate. If the findings of the investigation points to a breach of the guidelines or rules, the Office will act on the findings. If, however, the complaint has to do with anti-competitive behaviour, the matter will be referred to the FTC as per Section 5 of the Telecommunications Act which states:

Where after consultation with the Fair Trading Commission the Office determines that a matter or any aspect thereof relating to the provision of specified services-

(a) is of substantial competitive significance to the provision of specified services; and

(b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,

the Office shall refer the matter to the Fair Trading Commission.

4.13 For breach of the Rules, the complaints procedure would take the following format:

- The aggrieved party files a complaint with the Office detailing the problems supported by all necessary documentation.
- The Office reviews the documents and informs the complainant within two weeks as to the proposed course of action. Generally the Office may:

  (a) request additional information; or

(b) accept the request and commence the investigation.

The dominant carrier would be given an opportunity to respond to the allegations in writing, face-to-face meetings or other channels, if necessary.

- The Office conducts an investigation and act on the findings. If the dominant carrier is found to be in breach of any rules, the competitive safeguard rules will be enforced.

4.14 Enforcement of the competitive safeguard guidelines/rules will take the following format:

- The Office informs the dominant carrier of the breach and affords the operator the opportunity to make changes [Section 65(2)]. If this is not done within the time specified by the Office then;

- The Office can apply to the Court for an enforcement of the rules (Section 65(1);

According to Section 66(1), the Court may:

(a) order the offending licensee to pay to the Crown such pecuniary penalty not exceeding five hundred thousand dollars in the case of an individual and not exceeding three million dollars in the case of any other person;

(b) grant an injunction restraining the offending licensee from engaging in conduct described in subsection (1) (a) or (b) of section 65; or

(c) *make such order as the Court thinks fit in respect of each contravention or failure specified in that subsection.*

APPENDIX 1: QUESTIONS ON COMPETITIVE SAFEGUARDS

Question 1: Do you agree that the Office should seek to design and implement a framework to promote and protect competition in relation to data services?

Question 2: Should the Office seek to modify the existing C&WJ RIO framework so that Service Providers are included in the application of the RIO?

Question 3: Should the Office expand the information requirements that dominant operators include in the RIO?

Question 4: Should dominant Data Carriers be required to lodge with the Office an Offer document setting out matters relating to price and terms of condition under which a public data carrier will permit access to its public data network?

Question 5: Should Accounting Separation apply to data markets?

Question 6: Should the Office develop the regulatory framework to define *Essential Facilities*, to authorize the Office to determine specific essential facilities and to establish the terms and conditions for their provision by dominant operators?