Office of Utilities Regulation

Competitive Safeguards – Data Market

Notice of Proposed Rule Making

OFFICE OF UTILITIES REGULATION

Office of Utilities Regulation
NPRM for Competitive Safeguard Rules - Data
Document No: Tel. 2007/14
September 28, 2007

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ABSTRACT

This document sets out draft rules 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. At that time, the Office's intent was to consult jointly on competitive safeguard rules for public voice and data markets. Responses from Cable & Wireless Jamaica Limited and Mossel Jamaica Limited (Digicel) were not in agreement with the OUR's interpretation of the Act, specifically to the interpretation of Sections 4, 35 and 71 of the Act. Both companies argued that the OUR has no basis in law to set rules for the data services. The OUR took the decision to consult separately on voice and on data services. Draft Rules have now been developed for Voice and the OUR now provides its clarifications in relation to its proposed rulemaking for the data service markets.

Comments from Interested Parties

Persons who wish to express opinions on this second draft of 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.

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

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Office of Utilities Regulation
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Kingston 10
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Responses are requested by **November 9, 2007.** 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 respond in electronic form using the e-mail address above. Non-confidential responses will be posted on the OUR's website (www.our.org.jm).

Comments on Responses

The OUR expects parties to view other (non-confidential) responses and to make comments on them. As such, comments on responses are required by **November 30, 2007.**

Competitive Safeguard Determination.

The Office will conclude this process for competitive safeguard rules by issuing its Competitive Safeguard Determination on **December 21, 2007.** The competitive safeguard rules, which are subject to affirmative resolution by Parliament, are to be forwarded to the responsible Minister for tabling in Parliament.

Arrangements for Viewing Responses

Those who wish to view the responses received should make an appointment by contacting **Gillian Henderson** at the OUR by one of the following means:

Telephone: (876) 968 6053 (or 6057-8)

Fax: (876) 929 3635

E-mail: ghenderson@our.org.jm

The OUR's office is located at

3rd Floor,

PCJ Resource Centre,

36 Trafalgar Road,

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Individuals 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 has been revised and summarized in the table below.

Summary of timetable for consultation

Event	***Date/Deadline***
Second NPRM document	September 28, 2007
Responses to second NPRM document	November 9, 2007
Comments on responses	November 30, 2007
Competitive Safeguard Determinations (includes OUR Guidelines and Rules sent to the Minister)	December 21, 2007

CHAPTER 1: INTRODUCTION

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 The Office has already issued a first NPRM which signalled the intent to issue safeguard rules for both voice and data. The intent though welcomed by both Flow (a new entrant) and Reliant was challenged by both C&WJ and Digicel. C&WJ is of the opinion that the OUR has no legal basis to issue rules for data markets. Both C&WJ and Digicel have suggested that Section 35 of the Act is specific to dominant public voice carriers.

1.3 The Office still holds the view that data services are specified services under the Telecommunications Act and are thus subject to regulation by the Office. In regulating specified services the Office will have regard for its function to promote competition

1.4 The Office issued draft rules for Public Voice Carriers on November 30, 2006. C&WJ and Digicel again argued that the Office has no basis in law to regulate either the data markets or essential facilities.

Purpose of Document

1.5 This second NPRM document includes competitive safeguard rules for the data market. The document also addresses the responses to the first NPRM.

Structure of Document

1.6 The rest of the document is organized as follows: Chapter 2 addresses the responses to the first NPRM; Chapter 3 looks at some initiatives taken to provide some measure of safeguard to probable anti-competitive practices and Chapter 4 develops the competitive safeguard rules with regards to the data market.

CHAPTER 2 RESPONSES TO FIRST NPRM

2.1 Introduction

The Office issued the first notice of proposed rulemaking on competitive safeguards on June 2, 2006 and invited comments from operators and the general public.

The Office received responses to the consultative document from the following operators:

1. Cable & Wireless Jamaica Limited (C&WJ)
2. Mossel Jamaica Limited (Digicel)
3. Reliant Enterprise Communications Ltd
4. Columbus Communications Jamaica Limited (Flow)

2.2 Cable & Wireless Jamaica Limited and Digicel in their responses to the Office, stated that it was their position, pursuant to their interpretation of the Act, that the OUR has no legal basis to regulate markets for data services. C&WJ argued that the Office's efforts to regulate data are ultra vires its powers under the Telecommunications Act. Digicel argued that there is no objective justification for regulatory intervention if the retail market is effectively competitive. The other two respondents Reliant and Flow, have for the most part agreed with the OUR's intent. For this document, the Office will focus on aspects of the responses relating to data.

2.3 Issues set out by C&WJ

> *"C&WJ addresses, in this response, that the Office is not empowered by law to develop guidelines nor make rules in relation to the data market, which is yet undefined. …"*

2.4 The Office's Response

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"*.

Section 4. "Functions of Office" of the Telecommunications Act 2000 states:

> *4. (1) The Office shall regulate telecommunications in accordance with this Act and for that purpose the Office shall -*
>
> *(a) regulate specified services and facilities…*
>
> *(c) promote the interests of customers, while having due regard to the interests of carriers and service providers;…*
>
> *(f) promote competition among carriers and service providers;…*
>
> *(i) carry out such other functions as may be prescribed by or pursuant to this Act.*

Section 4(3) of the Telecommunications Act 2000 also states:

> *(3) In exercise of its functions under this Act, the Office may have regard to the following matters*
>
> *(a) the needs of the customers of the specified services;*

(b) whether the specified services are provided efficiently and in a manner designed to -…

*(iii) afford **economical** and reliable service to its customers…*

(c) whether the specified services are likely to promote or inhibit competition.

It is submitted that, in light of the Sections reproduced above, the Office has been given the regulatory mandate, by Parliament, to regulate utility industries in general as well as the telecommunications industry in particular, for our purposes here. By virtue of the relevant sections reproduced above, in particular, **Section 4(1)** of the Telecommunications Act, the Office of Utilities Regulation has been given the mandate to regulate "specified services". **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 submitted therefore that C&WJ is incorrect in its primary assertion that the Office: "… **is not empowered by law to develop guidelines nor make rules in relation to the data market, which is yet undefined"** in light of the fact that the Office is empowered to regulate "specified services and facilities" and data has indeed been defined in the Act as a specified service.

The Act also gives the Office the power to regulate with regards to competition in the industries that fall under its regulatory mandate. As averred before, the OUR Act gives the Office the power to, "*encourage competition in the provision of prescribed utility services"*. Section 35 of the Telecommunications also states in its entirety:

*"**35. Competitive safeguards.***

*35. (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. 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.

(3) 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."

It is submitted that the above Section gives the Office discretionary powers to regulate competition in specified services in the telecommunications industry generally and, by

virtue of the inclusion of “data” in the Act as a “specified service other than a voice service”, it is to be construed that said regulatory oversight of competition is meant to include data services as well. It can be seen from the general tenor of the Act, especially with regards to its provisions allowing for phased liberalization, that it was the intention of the legislative draftsmen that the industry, given its dynamic nature, was to be regulated in a manner that took consideration of the industry’s evolution from one based on purely analog based circuit switched “voice services” (in the classical sense) technology to one that would eventually be more centered on packet switched data protocols such as VOIP and other technologies.

Section 2 of the Act points to this intention in its definition of "telecommunications", "telecommunications network" "telecommunications service" and "voice service"

> *"telecommunications" means the transmission of intelligence by means of guided or unguided electromagnetic, electrochemical or other forms of energy including but not limited to intelligence -*
> *(a) in the form of -*
>
> > *(i) speech, music or other sounds;*
> > *(ii) visual images, whether still or animated;*
> > ***(iii) data or text;***
> > ***(iv) any type of signals;***
>
> ***(b) in any form other than those specified in paragraph (a);***
>
> *(c) in any combination of forms; and*
>
> *(d) transmitted between persons and persons, things and things or persons and things;*

"telecommunications network" ***means a system or any part thereof****, whereby a person or thing can send or receive intelligence to or from any point in Jamaica, in connection with the provision of a specified service to any person;*

"telecommunications service" means a service provided by means of a telecommunications network to any person for the transmission of intelligence from or within Jamaica without change in the content or form ***and includes any two way or interactive service that is provided in connection with a broadcasting service or subscriber television service;…***

"voice service" means -

*(a) the provision to or from any customer of a specified service comprising wholly or partly of real time or near real time audio communications****, and for the purpose of this paragraph, the reference to real time communications is not limited to a circuit switched service;***

2.5 Paragraph 12 of C&WJ's submission reads:

"On reading the Act, it is clear that rules as to competitive safeguards are applicable to dominant public voice carriers only. There is no statement or inference of an application to data carriers, and therefore the OUR has no jurisdiction under Section 35 to regulate the data market."

2.6 It is the view of the Office that that assertion is incorrect in light of the fact that the Act not only speaks to dominant public voice carriers but also the modes of transmission of "intelligence", whether it be voice or data, to be used by said dominant public voice carriers in the furtherance of their business within the "telecommunications" industry as defined by the Act, as well as the appurtenant telecommunications networks and services, including voice and data services. It is

clear that the Act does indeed contain inferences regarding data carriers, given its slant to allow for a technology neutral telecommunications environment, as patently envisioned in the section reproduced above.

2.7 In support of their position, C&WJ states in paragraph 12 of theirs, quoting from F. Bennion, Statutory Interpretation, 4th ed (Butterworths, 2002), p.470.

"11. The basic rule of statutory interpretation is that it is the plain ordinary meaning of the statute that is to be used, where there is no doubt of the meaning of the statute after reading. Various writers refer to this rule by differing names. It is most popularly referred to as the literal meaning. One writer refers to it as the "plain meaning rule" and describes it thus:
It is a rule of law … that where, in relation to the facts of the instant case –

a. the enactment under enquiry is grammatically capable of one meaning only, and

b. on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly.1"

2.8 However, the same volume states further at p. 470:
"….For this purpose, a meaning is 'plain' **only where no relevant interpretive criterion (whether relating to material within or outside the Act or other instrument) points away from that meaning,** As it is put in *Halsbury's Laws of England*: 'If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning"

It can be seen from the excerpts of the "interpretation" section of the Act, Section 2, that there is indeed "interpretive criterion" ensconced within the Act. It is submitted that the Act's definition of telecommunications networks and services, including voice and data services does indeed qualify the meaning of specified services as well as those services offered or capable of being offered by dominant public voice carriers under the Act. In the case of ***Pinner v Everett (1969) 1 WLR 1266 at 1273*** Lord Reid stated as follows:-

"In determining the meaning of any word or phrase in a statute, the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase"

2.9 In this matter, C&WJ's construction of the statute is one that invariably seeks to flout the intention of Parliament, this being the inclusion of data in the Act's definition of "telecommunications", a definition that strikes at the heart of the very industry the Office is mandated to regulate. At p.471, Bennion goes on to state:

"The science or art of statutory interpretation deals in the main with the pathology of the law, when something has gone wrong. Usually nothing does go wrong. Lawyers, like medical practitioners, need to be on guard against losing sight of **the general prevalence of healthy conditions.** Chalmers remarked that 'lawyers see only the pathology of commerce, and not its healthy physiological action…Twining and Miers express similar views: Broken contracts and broken marriages represent only a small proportion of all contracts and marriages, and **the law has at least as important a role to play in the creation, definition, and facilitation of these relationships as in the clearing up of the mess after things have gone wrong**"

2.10 In the instant case, C&WJ is seeking to postulate a construction of the law that is not, in the Office's view, in concurrence with Parliamentary intention as regards the telecommunications industry. It is clear that the intention of Parliament at the time of drafting was for the Office to regulate the telecommunications industry, in light of that Act's definition of telecommunications, as well as to put in place competitive safeguards as it thinks fit, after consultation with the Fair Trading Commission (FTC). It is indeed trite law that the object of the interpretation of a written instrument is to discover the intention of the draftsman as expressed in that instrument. A statute is seen as an expression of the legislative will of Parliament and in the interpretation of a statute, it is the duty of the court to endeavour to give effect to the expressed intention of Parliament as can be gleaned from the language used as well as the apparent policy behind the statute under consideration, as viewed in its proper context. EA Dreidger, in his **Composition of Legislation, 2nd ed., 1976,** states:

"If in reading the words in their grammatical and ordinary sense this results in disharmony, i.e. in some inconsistency, incongruity, repugnance or illogicality within the statute, between that statute and its manifest purpose or object or between that statute and another statute, then the courts will modify the strict grammatical or ordinary meaning so far as it is necessary to produce harmony."

2.11 C&WJ's submission seeks to make use of the "plain meaning rule" without cognizance of the fact that there is in fact relevant interpretative criterion to give voice to the legislative intent within the proper context of the Act. Lord Simmonds, in **Seafood Court Estates Ltd v Asher (1949)** stated that:

"The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but even if they are, the power and duty of the courts to travel outside them on a voyage of discovery are strictly limited"

Whilst the powers of interpretation of words in their ordinary sense are indeed limited, in so far as , to quote Dreidger it is "necessary to produce harmony" it is the view of the Office that, in speaking of the Office's legislative mandate regarding data services and competitive safeguards, an exhaustive "voyage of discovery" is not necessary. The definitions spoken to above bespeak the intention of Parliament in this regard, and it is the Office's view that the legislative voice is clear on the matter.

2.12 C&WJ in their submission, also seek to impugn the Offices powers under Section 71(1) of the Act which states:

71. Office may make rules.

71. (1) The 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.

2.13 At paragraph 14 of theirs, C&WJ states regarding the Office's powers under Section 71:

14. There are two aspects to the Office's power under the Section. First, the Office may make rules subject to affirmative resolution prescribing any matter required by the Act. <u>As the data market is not mentioned in the Act, this part of the Section is not relevant.</u> Second, the Office may make rules subject to affirmative resolution on any matter that it considers necessary or desirable for the effective performance of its functions under the Act. The issue, which is the gravamen of this matter, is whether the Office's general power to make these rules allows it to make rules <u>on a subject for which the Act does not specifically provide for the making of rules</u>.

2.14 Yet again, C&WJ attempts to assert that data and the data market are not mentioned in the Act when "data services" are clearly defined under **Section 2** which states that "data service" means a specified service other than a voice service. Data is also included in the Act's definition of "telecommunications" as reproduced above at page 4. The Act's definition of "voice service" states that it is "…not limited to a circuit switched service;" clearly allowing for technologies other than the analog mode of circuit switching, such other technologies including packet switching technologies as used in the data market for voice transmission.

It is also of note that the said section also defines "transmission" within the telecommunications industry as: **"…the dispatch, conveyance, switching, routing or reception of intelligence, by any means including, but not limited to rendering into packets, digitisation and compression…"** A close reading of this definition clearly elucidates its reference to packets, digitization and compression, generally accepted terms used to refer to data technology. **Newton's Telecom Dictionary, 17th Edition** at p.509 defines "packet" as a:

"Generic **term for a bundle of data**, usually in binary form, organized in a specific way for transmission. **The specific native protocol of the data network** may term the packet as a packet, block, frame or cell. A packet consists of the data to be transmitted and certain control information…"

Digitisation or, to "digitize" is defined in the said volume at p. 210 as:

"Converting an analog or continuous signal into a series of ones and zeros, i.e. into a digital format…"

Compression is defined in same at p. 165 as:

"Reducing the representation of the information…reducing the bandwidth or number of bits needed to encode information or encode a signal…"

2.15 It can be seen from the above that these terms, terms that are generally accepted within the telecommunications industry as referring to modes of transmission, technologies and protocols used in the data industry, are clearly referred to in the Act and that it was clearly part of the legislative intent to include the data market under the aegis and purview of the Telecommunications Act and indeed the Office in its role as regulator of the telecommunications industry. In light of this, it is submitted that the averments made by C&WJ in paragraph 14 of theirs is incorrect. The Act does indeed refer to data, as well as modes of transmission used in the data industry.

2.16 In reference to Section 71 , C&WJ further states in theirs at paragraph 18:

> **"Therefore, the proposed action of the Office of attempting to regulate data services under delegated legislation, where there is no provision for this action under the Act, breaches the general principle that delegated legislation cannot be ultra vires the enabling legislation. Further, even if one uses the words "*considers necessary or desirable for the effective performance of its functions*" of Section 71 (1) as 'sweeping-up words', the proposed use by the OUR is not to complete powers expressly granted, and is therefore also ultra vires the Act."**

2.17 It is submitted that this view is also incorrect. It is the Office's view that, as postulated before, seeing that data services are indeed mentioned in the Act, the Office does not need to "attempt" to do something that the Act has given it the mandate to do, this being the regulation of "specified services and facilities" under Section 4. It has already been shown above that data is defined in the Act as **"a specified service other than a voice service" therefore**, the Office has the power to regulate same. With regards to the issue of "delegated legislation" **Bennion** states at p.207:

"Where an Act confers power on any person or body to make delegated legislation, the power may be either mandatory or discretionary. Where it is merely discretionary, the recipient is nevertheless under a legal duty to exercise the discretion properly"

2.18 **Bennion** also states at p. 209:

"Duty *to consult* Where an enactment conferring power to make delegated legislation requires the delegate to consult interested persons before exercising the power, this duty is mandatory rather than discretionary. It requires (a) the communication of a genuine invitation to give advice and (b) a genuine consideration of that advice when given."

2.19 The Office, by virtue of the consultative process appurtenant to the NPRM is merely adhering to these rules as are mirrored in Section 4(2) of the Act which states:

"(2) In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice, and without prejudice to the generality of the foregoing, the Office shall -

(a) consult in good faith with persons who are or are likely to be affected by the decision;

(b) give to such persons an opportunity to make submissions to and to be heard by the Office;"

2.20 The Office therefore is of the view that the Office's move towards making rules governing Competitive Safeguards, such rules being construed as delegated legislation, is not ultra vires the enabling legislation, which is in this case, the

Telecommunications Act because the said Act gives the Office the power to regulate data services and make such rules as it sees fit in relation to such services. The use of the "sweeping up words" as referred to by C&WJ in theirs these being: ***"any matter that it considers necessary or desirable for the effective performance of its functions under this Act"*** by the OUR is, in the Office's view, proper usage by the Office to facilitate and complete powers expressly granted by the Office under **Section 4** of the Act as part of its mandate to regulate specified services and facilities.

2.21 With regards to the issue of ultra vires delegated legislation, **Bennion** also states at p. 208:

"(1) Any provision of an instrument constituting delegated legislation is ineffective if the provision goes beyond the totality of the legislative power which (expressly or by implication) is conferred on the delegate by the enabling Act. The provision is then said to be ultra vires (beyond the powers). This applies even where the instrument has been sanctioned by a confirming authority. **However the instrument is not to be treated as ineffective in any respect on the ground of ultra vires unless and until declared to be so by a court of competent jurisdiction.**

(2) Except where to do so would produce an instrument the effect of which the delegate would not, or might not, have approved, such a court has power to modify the terms of the instrument so as to remove its ultra vires quality, provided the effect of the modified instrument would not be different in substance from the purported effect of the original."

2.22 It can be seen from the above that, even if the Office's NPRM on Competitive Safeguards was ultra vires (which as submitted above, it is not), such a declaration as to its being ultra vires can only be made and rendered binding by a court of competent jurisdiction.

2.23 It is the Office's view that the assertions held out in C&WJ's response, although bolstered by case law and their view of statutory interpretation, are incorrect and based on erroneous premise that, at its most fundamental level, the Act does not provide for the regulation of data markets. As can be seen from the above, this premise lacks validity and interpretive fortitude.

2.24 **Issues set out by Digicel**

Digicel, at Page 4 of their response said:

"Any Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers ("the Safeguards") adopted by the OUR must have a firm legal basis in order to ensure legal and business certainty. The legal basis for the proposed Safeguards appears very weak."

2.25 The Office argues that the above statement is also erroneous in the same vein as those challenges raised by C&WJ in theirs and that the views expressed above with regards to C&WJ's submissions, adequately address Digicel's statement.

2.26 With regard to their arguments on the FTC being the regulatory body with responsibilities for anti-competitive behaviour, it should be noted that the FTC and the OUR have different roles in the regulation of competition. The FTC's role is largely *ex-post* i.e. it addresses anti-competitive behaviour. The OUR, on the other hand, is entrusted to develop *ex-ante* rules with a view to setting the stage and environment for a level playfield and thus discourage anti-competitive behaviour in the first place.

2.27 The initiatives taken so far by the Office will be discussed briefly in Chapter 3. The Chapter concludes with the way forward as seen by the Office at this time.

CHAPTER 3 COMPETITIVE SAFEGUARDS INITIATIVE TAKEN

3.1 Anti- Competitive Practices

Liberalization of the telecommunications industry has increased competition in the various markets. This requires active regulatory involvement to remove barriers to entry and to ensure a level playing field for all entrants to compete fairly, particularly with incumbents and/or dominant carriers. Incumbents are apt to engage in anti-competitive behaviour or to abuse their market power. Regulators, such as the Office, are given the power to establish *ex ante* guidelines and rules to address likely anti-competitive behaviour. Even though the FTC deals generally with matters of competition under the Fair Competition Act (FCA), the Office has the specific responsibility under Section 35 of the Act to establish rules (in consultation with the FTC) dealing with competitive safeguards to limit anti-competitive practices in the telecommunication sector.

3.2 Starting in 2000, the OUR 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 OUR 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 OUR 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 OUR reconsider its determination. 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 OUR 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 OUR issued the corresponding determination notice with 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 OUR in its initiatives discussed below.

3.9 Section 30(2) of the Act prescribes that all DPVCs *"shall keep separate accounts"* in order that the OUR can assess whether or not they are providing interconnection services according to the principles set out in Section 30(1).

3.10 On March 29, 2006 the OUR issued the "Regulatory Accounting Guidelines for Cable and Wireless Jamaica" document. Also on March 29, 2006 the OUR published the "Accounting Separation for Cable and Wireless Jamaica" document.

3.11 As noted by the OUR, 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 OUR 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."

3.12 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."

Discussion and Way Forward

3.13 The Act provides a number of different avenues for the OUR to promote and protect competition in the telecommunications sector. However, the OUR notes that the emphasis in the Act is in relation to dominant carriers in voice services. As noted in the consultative Document, **Tel.2006/6**, the OUR has been giving effect to many of the relevant provisions with respect to dominant voice carriers. Further, the OUR is cognizant of the growing absolute and relative importance of data services, and that competition in these markets also deserve promotion and protection.

3.14 With the current document, therefore, the OUR would like to explore the appropriateness of complementing these recent initiatives in the dominant voice market by designing and implementing a framework for the promotion and protection of competition in relation to data services.

3.15 The rest of this chapter outlines how these objectives may be addressed in principle, based on the same order of presentation of the initiatives above.

Dominance in Data Markets

3.16 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.*

3.17 The OUR 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.

3.18 Given the views expressed in the preceding two paragraphs. The OUR intends to undertake a regulatory process to determine if there are dominant operators in any market for data services.

Reference Offers

3.19 It was noted above that the current C&WJ RIO relates to voice services primarily and that only carriers have the rights under it. The Office intends to develop the regulatory framework to require dominant data carriers to lodge with the OUR 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.

3.20 The OUR will develop guidelines relating to the Reference Data Access Offer in Chapter 4 of this document.

Accounting Separation

3.21 As noted above, the issue of 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.

3.22 Given the growing absolute and relative importance of data services, the OUR is of the view that accounting separation should also apply to data markets. In the Regulatory Accounting Guidelines document, the OUR 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.

3.23 In making such Guidelines, the OUR shall 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.

3.24. Such new Guidelines would, once implemented, assist the OUR to prevent and identify the following types of uncompetitive practices

- price discrimination;

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

Chapter 4 develops the competitive safeguard rules that were introduced in this Chapter related to data markets.

CHAPTER 4 TELECOMMUNICATIONS COMPETITIVE SAFEGUARD (DATA SERVICES) RULES, 2007

4.1 Introduction

In exercise of the power conferred on the Office of Utilities Regulation by Section 35 and 71 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:-

4.2 Citation

These rules may be cited as the Telecommunications Competitive Safeguard (Data Services) Rules, 2007 and shall apply to dominant public data carriers.

4.3 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

"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 any conduct or activity whereby a dominant carrier or service provider takes advantage of its market power in a manner which has the effect or

is likely to have the effect of substantially lessening competition in the telecommunications 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" means a person who is provided with a specified service by a service provider and includes the end user of that service.

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

"data service" means a specified service other than a voice service.

"reference data offer" means 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.

"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.

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

4.4 Reference Data Access Offer

Subject to the discussion above on the RIO framework, the OUR 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 and the OUR's views as discussed in Paras, 3.16 and 3.17 above, the OUR is of the view that the reference offer mechanism should also be applied to data markets.

4.5 Therefore, the OUR is proposing the following guideline:

> 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 or other carrier, for the provision of data services.
>
> Each dominant data carrier who is required under 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 3.16 and 3.17 above; or

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

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

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

4.8 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 data 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 data 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 data 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 such information and communications 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 company, 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 data 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 data 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 data carrier is classified as a dominant public data carrier, the audit shall be performed and ultimately submitted within six (6) calendar months after the date of the carrier's classification as a dominant public data 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 data carrier operates and has operated in compliance with the Safeguard Rules for Dominant public data carriers and the principles of the Act.

4.9 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.

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 data 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 arm.

4.10 Discrimination

The dominant public data 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.

4.11 Unfair cross-subsidy

A dominant public data carrier shall not use any of the revenues it has earned or earns in markets in which it has been declared dominant and incur losses on and/or subsidize services in – another market where it has not been declared dominant and thus cross-subsidize services in that market.

It may not offer services in the market they have not been declared dominant, at lower rates than would otherwise be economically possible. A service is deemed to be cross-subsidised if over the lifetime of the service, the revenues obtained from the service, do not exceed the outcome between the total long run incremental cost ("LRIC") of providing the service and the stand alone cost ("SAC") 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 services.

Where there is a group of services sharing common costs, a combinatorial test will be applied to examine whether the services between them cover the rate set between LRIC and the SAC of the combination of those services.

4.12 Enforcement of Competitive Safeguard Rules (DATA)

1. The Office shall either on its own initiative and/or on the complaint of any affected party investigate 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.

4.13 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 data 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.