
Office of Utilities Regulation

Competitive Safeguards – Draft Rules

Notice of Proposed Rule Making



OFFICE OF UTILITIES REGULATION

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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. Responses were received from Cable & Wireless Jamaica Limited, Mossel Jamaica Limited (Digicel) , Reliant Enterprise Communications Ltd., and Columbus Communications Jamaica (Flow). The Office has taken all responses into account and now provides its comments on the issues raised in these responses.

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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Responses are requested by **January 25, 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 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).

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 **February 16, 2007**.

Competitive Safeguard Determination.

The Office will conclude this process for competitive safeguard rules by issuing its Competitive Safeguard Determination on **March 16, 2007**. This determination will include 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 tabling in Parliament.

Arrangements for Viewing Responses

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

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

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The OUR's office is located at

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36 Trafalgar Road,
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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 has been revised and summarized in the table below.

Summary of timetable for consultation

<i>Event</i>	<i>Date/Deadline</i>
Second NPRM document	November 30, 2006
Responses to second NPRM document	January 25, 2007
Comments on responses	February 16, 2007
Competitive Safeguard Determinations (includes OUR Guidelines and Rules sent to the Minister)	March 16, 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 met in parts with resistance by both C&WJ and Digicel. In both responses, the companies objected to the drafting of rules for data. C&WJ is of the opinion that the OUR has no legal basis to issue rules for data. They both 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 Given the number of complaints of alleged anti-competitive behaviour, the Office in the interest of facilitating competition in the market has decided to separate the rules for voice from that of data. This will deal with any uncertainties in the voice market while the issues in the data market are consulted on separately.

Consultation with the FTC

- 1.5 Before making a determination with respect to competitive safeguard rules or guidelines, the Office is not only required to invite submissions from members of the public but also to consult with and take account of recommendations made by the Fair Trading Commission (FTC) pursuant to Section 35(1) and 35 (2) of the Act.

Purpose of Document

- 1.6 This second NPRM document includes competitive safeguard rules for dominant public voice carriers. The document also addresses the responses to the first NPRM.

- 1.7 These rules are to be sent to the Minister with responsibility for telecommunications. The process will culminate with the approval and publication of the competitive safeguard rules pursuant to Section 35 of the Telecommunications Act 2000 Act.

Structure of Document

- 1.7 The rest of the document is organized as follows: Chapter 2 addresses the responses to the first NPRM; Chapter 3 looks at some anti-competitive practices and initiatives taken to provide some measure of safeguard to these practices. The document concludes with the rules in Chapter 4.

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)

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 data. 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 voice and essential services.

2.1 Summary of C&WJ's Response to NPRM

C&WJ's response in Para 12 states: *"On reading the Act, it is clear that rules as to competitive safeguards, are applicable to dominant public voice carriers only....."*

Office's Response to C&WJ

The Office deduces from C&WJ's response in Paragraph 12 of its submission that they are in agreement with the issuance of competitive safeguard rules for the voice market.

2.2 C&WJ's Response to NPRM

C&WJ in response to the Office's intent 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 is..... *The OUR does not have a basis in lawto regulate essential facilities.....*

Office's Response to C&WJ

With respect to essential facilities, the Office has interpreted Section 4 (1) of the Act as providing legal basis to regulate essential facilities. According to Section 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 and in Section 4 (3) (c): In exercise of its functions under this Act, the Office may have regard to the following matters...(c) whether the specified services are likely to promote or inhibit competition.*

The Office also has powers under section 35 (1) (d) of the Act to prescribe for dominant public voice carriers such other provisions as the Office considers reasonable and necessary for the purposes of the competitive safeguard rules. The Office considers that it is reasonable and necessary that provisions be made in relation to essential facilities to prevent the unfair use of bottleneck facilities to inhibit or lessen competition.

The Office has, for purposes of this document, defined essential facilities as physical network facilities and non-physical features, functions and services of a public telecommunications network or service that:

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

If the denial of reasonable access to any physical network or to non-physical features, functions and services of a public telecommunication network will have adverse effects on competition and ultimately the consumer, then the Office can make rules to ensure the relevant market remains competitive and cost efficient.

2.3 Summary of Mossel Jamaica Ltd's (Digicel's) Response to NPRM

Digicel, in Para 2.2 states that the OUR should indicate and explain where alleged problems of anti-competitive behaviour have occurred.

Digicel in Para 2.3, says it is unclear as to what added value these competitive safeguards are meant to achieve as in their opinion these rules are covered by general competition law which falls to the FTC to enforce. They then in Para 2.4 offered the following suggestion: *“Digicel as an alternative would like to respectfully suggest that the OUR develop in conjunction and close cooperation with the FTC and the telecommunications industry, a set of general guidelines to deal with anti-competitive conduct in the*

telecommunications sector. These general guidelines would set specific rules that would apply to the telecommunications sector”.

Office’s Response to Digicel

The Office has received a number of complaints of alleged anti-competitive behaviour on the part of Cable & Wireless Jamaica, one of which formed a part of Digicel’s response to the consultations. It is for this very reason that the Office is seeking to have in place rules that would facilitate speedy resolution of such issues when they arise. With respect to Para 2.4 of Digicel’s response, the Office agrees and would like to believe that this consultation is doing just what has been suggested. The OUR has consulted with the FTC and is now consulting with the wider public on the general draft rules that have been developed to deal with anti-competitive behaviour in the telecommunications sector.

It should also 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-anti* rules with a view to setting the stage and environment for a level playfield and thus discourage anti-competitive behaviour in the first place.

2.4 Summary of Reliant’s Response to NPRM

Reliant Enterprise is of the opinion that there are few if any safeguards in existence and for those few that do exist there has been little or no enforcement in the past six years. Reliant therefore welcomes the proposed rules for competitive safeguards.

Office’s Response to Reliant

The Office agrees that without the competitive safeguard rules and with the FTC not able to fully exercise its quasi-judicial powers, the Office is somewhat handicapped in its ability to react. It is therefore imperative that these rules be finalized and become effective at the earliest possible time. The Office therefore accepts the recommendation of Reliant to work with the Ministry to introduce new telecommunications legislation that reflects current market “landscape” conditions.

2.5 Summary of Columbus Communications Jamaica’s (Flow’s) Response to NPRM

In general, Flow believes that it is in the best interests of Jamaica to promote and protect competition in data services, as the importance of data services will continue to increase over time.

Office's Response to Flow

The Office welcomes the views of Columbus Communications Jamaica .The Office, as stated before will proceed with the development of rules for public voice carriers which are outlined in Chapter 4 of this document. Consultation on the data market will be done separately.

CHAPTER 3 COMPETITIVE SAFEGUARDS

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 new entrants to compete fairly with incumbents and/or dominant carriers. Incumbents are apt to engage in anti-competitive behaviour or to abuse their dominance of 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.

A major responsibility of the regulator in this liberalized telecommunications market is to ensure that dominant operators do not abuse their position with respect to existing and potential competitors. A dominant operator has the ability to control essential facilities and without the necessary safeguards in place can choose to deny or delay interconnection and other network facilities.

There are several ways in which dominant operators can engage in anti-competitive behaviour. Some examples are: Predatory pricing, price discrimination, anti-competitive bundling and tie-in sales, discriminatory provisioning of network facilities, overpricing of essential facilities, refusal to deal with or to supply without reasonable grounds. It is therefore necessary that rules are in place to enable the regulator to curtail anti-competitive practices.

3.2 Initiatives Taken

3.2.1 Dominance in fixed telephony services

Following an extensive consultation process, in August 2003, the Office issued a determination, Document No: TEL 2003/07, which declared C&WJ as a (the only) dominant carrier in the markets for fixed telephony services. This determination was based on the provisions of 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.”

3.2.2 Dominance in mobile call termination services

After undertaking a consultation process the Office, in Document No: TEL 2004/10, 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.

3.2.3 Reference Interconnection Offer

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.

Taking into 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.

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.

3.2.4 Separation of Accounts/keeping of records

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.

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 dominant public voice carrier “*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).

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

On March 29, 2006 the Office issued the “Regulatory Accounting Guidelines for Cable and Wireless Jamaica” Document No: TEL 2006/04 Vol. 2. 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.

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.”

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 that is 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.”

Also on March 29, 2006 the Office published “Accounting Separation for Cable and Wireless Jamaica” Document No: TEL 2006/04 Vol.1. In this Determination Notice, the Office summarised the comments received on the previous consultation documents and presented 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.

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.”

CHAPTER 4 TELECOMMUNICATIONS COMPETITIVE SAFEGUARD (VOICE SERVICES) RULES, 2006

4.1 Introduction

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

4.2 Citation

These rules may be cited as the Telecommunications Competitive Safeguard (Voice Services) Rules, 2006 and shall apply to dominant public voice 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 where a dominant carrier or service provider takes advantage of its market power with the effect or likely effect of substantially lessening competition in the telecommunication market.

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

“competitive carrier” – A carrier that is competing in the same telecommunications market as other carriers.

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

“customer facing division” is defined for purposes herein to include the units responsible for the wireless and wireline services operations, and the marketing and customer services units for all retail telecommunications services.

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

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

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

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

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

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

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

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

4.4 Determination of an Essential Facility

1. The following represents the guidelines for essential facilities:

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

- a) are exclusively or predominantly provided by a dominant operator; and
 - b) are required by competitors of the dominant operator in order to provide a service in competition with the dominant operator; and
 - c) cannot feasibly be economically or technically substituted in order to provide a service.
2. The Office shall determine which physical network facilities and physical features, functions and services of a public telecommunications network or service are to be classified as essential facilities. The determination of any particular essential facility may include the terms and conditions under which that essential facility is to be provided, including those relating to prices, quality and availability.
 3. The market must be reasonably defined taking into account supply and demand side substitutes. An incorrect market definition may result in an erroneous declaration e.g. declaring a facility essential when that may not be the case. In determination of the network that will be deemed an essential facility, The Office shall;
 - (a) Define the downstream market in order to establish whether the dominant firm and the firm seeking access are competitors or potential competitors.
 - (b) Define the upstream market, i.e. the market in which the essential facility lies.
 4. The concept also implies that the firm operating in both markets must be dominant in the upstream market in which the competitor is seeking access and that barriers to entry in this market exist.

4.4.1 Prohibited Actions

The essential facilities owner/operators shall not

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

4.4.2 Exception to the Enforcement of Essential Facilities Doctrine

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

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

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

- a) would threaten the integrity of the providing carrier's network;
- b) is not technically feasible for the providing carrier; or
- c) would prevent the providing carrier from fulfilling its reasonably anticipated requirements for use of the land or facility, including, but not limited to, requirements for permitting entry to other persons with whom the providing carrier has contracted to provide such entry.

2. Capacity constraints.

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

3. Non-feasibility Option

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

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

4.5 Enforcement of Access

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

- (2) An application under subsection (1) shall –
- a) identify the land to which the application relates;
 - b) identify the owner or occupier of such land;
 - c) state the means by which entry is to be effected, the purposes and the approximate dates and the period for which such entry is required;
 - d) specify-
 - i. the date of any prior notice given to the owner or occupier of the land;
and
 - ii. the amount of compensation offered to such owner or occupier
 - e) state that all reasonable attempts to seek permission for entry have failed;
and
 - f) in the case of land owned or controlled by another carrier, state that all reasonable alternatives to entry on land have been exhausted.
- (3) The court may grant an order under this section if it is satisfied that the applicant has complied with the requirements of sections 53 and 54 of the Telecommunications Act.

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

4.6 Safeguarding of Proprietary Information

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

- a) All communications between competitive carriers and a dominant public voice carrier shall flow through a separate division. This division will be referred to herein as, the wholesale business unit, or WBU.
- b) The WBU shall be organizationally separate from other units in the company, and shall report directly to a corporate officer.
- c) The WBU unit shall not share offices with any customer-facing division of a dominant public voice carrier. Separate buildings are not required, but the offices must be clearly separated from the others.
- d) All employees of the WBU shall receive training materials informing them of their responsibilities for the handling of confidential information, and shall certify that they understand and agree to meet these responsibilities.
- e) The WBU shall not at any time share employees with any other unit of a dominant public voice carrier.
- f) All communications and information received from competitive carriers, including but not limited to customer identification and location, traffic forecasts, and service plans and parameters shall be received only by the WBU. The WBU shall mark all information and communications received as “Confidential” and these shall not be shared with any customer facing division.
- g) Where an employee is promoted or transferred out of the wholesale business unit, the company shall ensure that any confidential information that is acquired while that employee was a member of the wholesale business unit is not used 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) Annual internal audits of the handling of confidential information shall be performed by the dominant public voice carrier and submitted to the Office within two months of completion. The first audit shall be submitted within a maximum of six months of the declaration of dominance or within six months of the issuance of these rules or such other time period as may be prescribed by the Office.
- j) Audits should certify that the dominant public voice carrier operates in accordance with rules a-h of this section.

4.7 Provisioning of Service

1. Service shall be provided in a timely manner and the basis on which such service is provided should 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 arm are date and time-stamped, and that provisioning is done on a first in first out basis except where it is not technically feasible to do.
3. The dominant public voice carrier shall immediately notify all interconnecting carriers of a decision concerning changes in its network that will affect the interconnecting carriers.
4. The WBU shall notify interconnecting carriers and service providers of any new products and/or services at the same time as it notifies its retail arm.

4.8 Unfair price discrimination

The dominant public voice carrier shall not

- a) sell services to its competitors at a higher price than what its retail customers pay for the similar services.
- b) charge different prices to customers in the same customer category
- c) price discriminate such that such action will have a material and adverse effect on the development of sustainable competition.

4.9 Unfair cross-subsidy

A dominant voice carrier shall not use revenues from the markets in which it is dominant to subsidize losses on services in a market where it is not dominant. A service is deemed to be receiving a cross-subsidy if over the lifetime of the service the revenues from the service do not exceed its long run incremental cost.

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 long run incremental cost of the combination.

4.10 Enforcement of Competitive Safeguard Rules

1. The Competitive Safeguard Rules shall become effective pursuant to Section 35 of the Act.
2. If on investigation, the Office is satisfied that the dominant carrier has breached the rules, then the competitive safeguard rules will be enforced pursuant to its powers under statutes.
3. The Office shall investigate all complaints of alleged anti-competitive behaviour
4. As per Section 5 of the Act *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.*

4.11 Complaints Procedure

1. For any alleged breach of the Rules, the complaints procedure shall be as follows:
 - i. The aggrieved party shall file a detailed complaint with the Office
This is to be supported by all necessary documentation.
 - ii. The Office shall review the documentation and inform the complainant within 14 calendar days of receipt 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 carrier against whom the complaint is directed shall be given an opportunity to respond to the allegations. This may be done in writing, face-to-face meetings or other means as necessary.

4.12 Enforcement Procedure

Enforcement of the competitive safeguard rules shall be as follows:

1. In the event that the Office deems the allegation a breach of these rules then the Office shall inform the dominant carrier of the breach and shall afford the operator the opportunity to make changes as per Section 65 (2) of the Telecommunication Act. which states: *Before making an application to the Court under subsection (1), the Office shall-*

- a) *Notify the licensee concerned in writing regarding the nature of the alleged contravention; and*

- b) *Afford to the licensee an opportunity to –*

- i. *Remedy the alleged contravention to the satisfaction of the Office, within such period as the Office shall specify in the notice or on the application of the licensee;*

- ii. *Make submissions to and to be heard by, the Office concerning the matter,*

and where any such hearing is held, the Office shall notify the licensee of its determination in the matter;

- c) *take into consideration any relevant circumstances, including –*

- i. *the resources available to the licensee or to any person or entity affected by the licensee's actions;*

- ii. *the continued economic viability of the licensee or any other person or entity affected as aforesaid; and*

- iii. *the conduct of any such other person or entity or the licensee's competitors.*

4.13 Non-Compliance to Enforcement Order

If the changes specified are not complied with within the time specified, then the Office shall apply to the Court for an enforcement of the rules (Section 65(1); and Section 66(1). Section 66 (1) states: 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.*