CABLE & WIRELESS
JAMAICA

C&WJ's RESPONSE TO OUR's NOTICE OF PROPOSED RULE MAKING on COMPETITIVE SAFEGUARDS TO ADDRESS ANTICOMPETITIVE PRACTICES BY DOMINANT CARRIERS

July 17, 2006

Introduction

In this document, the Office of Utilities Regulation (OUR) has identified that it is seeking to:

1) fill- in any identified gaps in the framework for the promotion and protection of competition in relation to voice services.
2) design and implement a promotion and protection of competition framework in relation to data services.

The Office states that this Notice of Proposed Rule Making (NPRM), will enable the OUR to establish competitive safeguard guidelines and recommend competitive safeguard rules for promulgation by Parliament in respect of voice and data service as contained in 1) and 2) above. Cable & Wireless Jamaica (C&WJ) further understands that the NPRM initiates rather than concludes the consultations on Competitive Safeguards.

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. The OUR has already recognized in earlier proceedings that the law does not empower the OUR to develop a regulatory framework for essential facilities. Moreover the Telecommunications Act 2000 does not treat with the issue of essential facilities and the Office has provided no legal basis for seeking to regulate essential facilities.

C&WJ will respond to the six (6) question asked by the OUR and contained in Appendix 1 of the NPRM.

Legal Framework

1. The OUR, in seeking to regulate the data market, is relying on its general rule making powers under Section 71 of the Telecommunications Act 2000 and the Office's role in promoting competition among carriers and service providers under section 4 (1)(f) of the Act to propose competitive safeguard rules and guidelines in the data market.

2. In relation to the said data market, the OUR states at paragraphs 3.19 –3.21 that *"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. The Office is, therefore, buttressed by the Act in pursuing its regulatory mandate by developing procedures which seek to identify and prevent uncompetitive practices employed by dominant telecommunications carriers licensed pursuant to the Act…The Office intends to undertake a regulatory process to determine dominance in the data market."*

3. The OUR is of the view that accounting separation should also apply to data markets, and stated in the Regulatory Accounting Guidelines document, 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."

4. The OUR intends to issue a Reference Data Access Offer, which will require dominant data carriers to lodge with the Office an offer document setting out matters relating to the price and terms and conditions under which a public data carrier will permit access to its public data network. The OUR also intends to codify the essential facilities concept in the telecommunications regulatory framework.

5. The OUR deals with the "Enforcement of Competitive Safeguards at paragraphs 4.12 to 4.14. The document states, *"If there are complaints of anti-competitive behaviour, the Office will investigate. If the findings of the investigation points to a breach of the guidelines or rules, the Office will act on the findings. If however, the complaint has to do with anti-competitive behaviour, the matter will be referred to the FTC as per Section 5 of the Telecommunications Act…"*

6. Where the Office receives a complaint it will conduct an investigation and act on the findings. Where there is a breach, it will afford the Service Provider the opportunity to become compliant. If this is not done, it will apply to the Court for enforcement.

7. The OUR states that the legal basis of its proposal to establish competitive safeguards in respect of the data markets are Sections 35 and 71 of the Act. Section 35 gives the OUR the power to make competitive safeguard rules subject to affirmative resolution prescribing matters in relation to dominant public voice carriers. As stated earlier, Section 71 allows the OUR to make rules on 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 the Act.

The Issue

8. The fundamental legal issue is whether in the absence of a specific provision on the regulation of data under the Act, the OUR can rely on the general powers given under Section 71 to make rules in relation to the data market.

The Law

9. Section 2 of the Act defines "data services" as "a specified service other than a voice service". "Data" is mentioned in the definition of "telecommunications" in the same section and in the definition of "eligible service" in Section 78(5) which deals with the licenses issued during Phases I, II and III. Save for these references, there is no other mention of data in the Act.

10. Section 35 is very clear in its reference to dominant public voice carriers. The

Section reads in its entirety:

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 [emphasis added] –

(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.

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]

12. On reading the Act, it is clear that rules as to competitive safeguard, 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.

13. Section 71(1) reads in its entirety:

> *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.*

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. As the data market is not mentioned in the Act, this part of the Section is not relevant. 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 on a subject for which the Act does not specifically provide for the making of rules.

15. The law is clear that where delegated legislation goes beyond the expressed or implied legislative power in the enabling legislation it is ultra vires the enabling legislation. *"[Power delegated by an enactment] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specified provision. But such a power will not support attempts to widen purposes of the Act, to add new and different means of carrying them out or to depart from or vary its end."*[2]

16. The law goes further and limits so called "sweeping-up words" intended to confer residual powers to complete powers expressly granted.[3] Two examples can be cited. In decision of the House of Lord in Daymond v. South West Water

[1] F. Bennion, Statutory Interpretation, 4th ed (Butterworths, 2002), p.470.
[2] Utah Construction and Engineering Pty Ltd v. Pataky [1966] 2 WLR 197 at 202.
[3] Bennion, p.209

Authority[4], the plaintiff, whose property was not connected to the main drainage and four hundred yards from the nearest sewer, received from the rating authority, acting on behalf of the water authority, during a transitional period of reorganization of water authorities, a demand for payment of the charges for sewerage disposal services. The plaintiff declined to pay the charges and sought a declaration that the demand was unlawful, on the grounds that inter alia, the water authority was not empowered by Section 30 of the Water Act 1973 to demand charges other than for those services performed, facilities provided or rights made available to him by the authority, and that, in so far as the Water Authorities (Collection of Charges) Order 1974 purported to authorize charges other than for water supply, it was ultra vires. The House of Lords upheld the finding of Phillips J that the Order was ultra vires. The Order was purported to be made under the Water Act and under Section 254 of the Local Government Act 1972 which provides *"the Secretary of State or any appropriate Minister may at any time by order make such incidental, consequential, transitional or supplementary provision as may appear to him (a) to be necessary or proper for the general or any particular purposes of this Act or in consequence of any of the provisions thereof or giving full effect thereto …"* Their Lordships found inter alia that the provisions in the Order did not fall within Section 254 of the Local Government Act as being "*incidental, transitional or supplementary*" and were ultra vires. Viscount Dilhorne explained, referring to Section 254 that *"'supplementary' means … something added to what is in the Act to fill in details or machinery for which the Act itself does not provide – supplementary in the sense that it is required to implement what was in the Act."*

17. In R. v. Customs and Excise Commissioners Ex p. Hedges & Butler[5], the Divisional Court applied the dictum of Viscount Dilhorne in Daymond v. South West Water Authority. The plaintiff, wine and spirit merchants, used their warehouses for various activities which were all carried on together as a whole. The Customs and Excise Commissioners claimed that under the Excise Warehousing Regulations 1982, which empowered them to inspect *"all records relating to the business"* they could inspect all the plaintiff's records, not merely those relating to excisable goods. The Court held that the Regulation was ultra vires the enabling statute, the Customs and Excise Management Act 1979, and there was no power to inspect the records relating to non-excisable aspects of the plaintiff's business.

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.

[4] [1976] AC 609
[5] [1986] 2 All ER 164

19. It is noted that at paragraph 1.8, the OUR states that it has held consultations with The FTC. It should be noted that this consultation, however, does not lend legitimacy to the proposed rules as any such rules would be ultra vires the Act.

20. In the absence of any special provisions in the Telecommunications Act 2000 relating to data markets, any matter of competitive significance must be referred to the Fair Trading Commission.

21. Therefore the OUR would be acting ultra vires in seeking to regulate the data market, howsoever defined which responds to questions 1, 4 and 5 which ask:

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

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

    Question 5 – Should Accounting Separation apply to data markets?

Procedural Guidelines

22. The Office has advised in the NPRM that competitive safeguard rules will apply only if data carriers are found to be dominant and that the Office intends to undertake the regulatory process to determine dominance in the data market.

23. Even if the OUR in fact had the power it asserts, it would be premature for the OUR to mandate the submission of a Reference Data Offer, when it has not defined the data market nor assessed the data market for dominance. Such an approach presupposes dominance, which is procedurally incorrect.

24. C&WJ recommends to the OUR's attention Appendix I of this submission which contains the *"Guidelines for Assessing Dominance in Telecommunications Markets"* which the Office applied in assessing dominance for the provision of voice services and for assessing dominance in mobile call termination.

25. Further, C&WJ also recommends to the OUR, the procedure followed in the case of assessing dominance in the market for mobile call termination where the Office first determined dominance and then there is to be a further proceeding treating with any obligations or safeguards that such a determination of dominance would require.

Essential Facilities

26. There is the presumption that there will be a separate consultation on essential facilities given that the Office has advised at paragraph 4.2 that the Office aims to " *…develop the regulatory framework to define essential facilities, to authorize the Office to determine*

specific essential facilities and to establish the terms and conditions for their provision by dominant operators .."

27. At paragraph 4.11, subsection c, the Office goes further to say that "…*The Office shall determine which physical network facilities and non-physical features, functions and services of a public telecommunications network or service is to be classified as essential facilities*"

28. We understand also that the Fair Trading Commission (FTC) is yet to be engaged on this issue.

29. Even so C&WJ refers the OUR to paragraph 2.40 of its Determination Notice on "*Dominant Public Voice Carriers*", published August 14, 2003 in which the Office states that:

    " …The FTC could intervene in cases where access is denied to essential facilities. Currently the OUR is not able to order carriers to share their facilities or offer co-location since it has no explicit basis in law…." [emphasis added]

30. Therefore the Office is already aware that it has no basis in law to develop a regulatory framework to define and regulate essential facilities which responds to question 6, which ask:

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

Reference Offers

31. The Office has indicated at paragraph 3.24 that in the next review of C&WJ's RIO, it would address the issue of including Service Providers in the application of the RIO as well as expanding the information required.

32. As C&WJ does not know what additional information is being contemplated for inclusion in the RIO, by the Office, it is unable at this time to respond to Question 3, which ask:

    " Should the Office expand the information requirements that dominant operators include in the RIO ?"

Conclusion

32. The OUR does not have a basis in law to regulate the data market, howsoever defined nor does the OUR have a basis in law to regulate essential facilities. Any attempt to regulate in these areas is ultra vires.

CABLE & WIRELESS JAMAICA
July 17, 2006

APPENDIX I

OUR'S GUIDELINES FOR ASSESSING DOMINANCE IN TELECOMMUNICATIONS MARKETS
Extracted from Determination Notice Titled "*Dominant Public Voice Carriers*", Published August 14, 2003