CABLE & WIRELESS
JAMAICA

RESPONSE OF CABLE & WIRELESS JAMAICA LIMITED TO THE OFFICE OF UTILITIES REGULATION COMPETITIVE SAFEGUARDS – DATA MARKET NOTICE OF PROPOSED RULE MAKING DOCUMENT NO: TEL 2007/14

November 9, 2007

1. Executive Summary

1.1 The Office of Utilities Regulation ("OUR") published the "Competitive Safeguards – Data Market – Notice of Proposed Rule Making ("NPRM") on September 28, 2007. Cable & Wireless Jamaica Limited ("C&WJ") is pleased to be given this opportunity to respond to the NPRM.

1.2 The NPRM for Competitive Safeguards to address anti-competitive behaviour was first published by the OUR on June 2, 2006 under the title "Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers – Notice of Proposed Rule Making" ("the First NPRM"). The Office attempted to use its general rulemaking powers in Section 71 of the Telecommunications Act ("the Act") to establish competitive safeguard rules for the data market. Competitive Safeguard Rules are provided for voice services under Section 35 of the Act. C&WJ responded in "C&WJ's Response to OUR's Notice of Proposed Rule Making on Competitive Safeguards to Address Anticompetitive Practices by Dominant Carriers" dated July 17, 2007 ("the First Response") and argued that the Office is not empowered by law to develop guidelines nor make rules in relation to the data market, and so any such action will be *ultra vires* the Act.

1.3 In the NPRM, the OUR has continued its arguments that it is given jurisdiction to issue competitive safeguard for data by relying on Section 4(3)(a) of the OUR Act under which it is empowered to encourage competition in the provision of utility services. The Office also continues to rely on Sections 35 and 71 of the Act, as well as Section 4,which gives the Office authority to regulate specified telecommunications services. The word "data" is contained in the definition of "specified services" in Section 2.

1.4 C&WJ's response to the NPRM maintains that Section 35 of the Act is specific to "dominant public voice carriers" and the general powers given in Section 71, and Section 4 do not empower the OUR to issue competitive safeguard rules for data. To issue competitive safeguard rules for data issued under this Section would be to ignore the specific limitations of the powers granted under Section 35, and will be *ultra vires* the Act. C&WJ will, if the OUR continues along this path, apply to the courts, or other tribunal for this declaration to be made.

1.5 C&WJ's response will follow the format below:

1.5.1 Chapter 2 – Responses to First NPRM – Reliance on the General Powers in Sections 4 and 71.
1.5.2 Chapter 2 – Responses to First NPRM – Parliamentary Intention
1.5.3 Chapters 3 and 4 – Competitive Safeguards Initiative Taken ; Telecommunications Competitive Safeguard (Data Services) Rules, 2007
1.5.4 Conclusion

1.6 Where C&WJ has not commented on a particular paragraph of the NPRM, it is not be taken as an endorsement of the provision. C&WJ reserves the right to provide further information on this response, and to revisit any part of the NPRM.

2. Chapter 2 – Responses to First NPRM – Reliance on the General Powers in Sections 4 and 71.

2.1 The OUR has relied on the statement of its functions in the following sections of the Act as the basis for issuing competitive safeguard rules for data:

- Section 35(1) (d) and Section 35(a) and (b);
- Section 4 particularly Section 4(1) (a) (f) and (i) to regulate specified services and promote competition; and Section 4(3) (a) (iii) and (c) to have regard to whether specified services are competitive and economical to consumers;
- Section 2 including the definition of "specified services" which includes data, and the definitions of "telecommunications", "telecommunications network" "telecommunications service" and "voice service" which can, it argues, be interpreted as being technology neutral and so include data; and
- its general rule making powers under Section 71(1).

2.2 Sections 4(1), 4(3); the relevant definitions in Section 2, Section 71(1) and Section 35 in its entirety are outlined below:

Section 4

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;[1]

(b) receive and process applications for a licence under this Act and make such recommendations to the Minister in relation to the application as the Office considers necessary or desirable;

(c) promote the interests of customers, while having due regard to the interests of carriers and service providers;

(d) carry out, on its own initiative or at the request of any person, investigations in relation to a person's conduct as will enable it to determine whether and to what extent that person is acting in contravention of this Act;

(e) make available to the public, information concerning matters relating to the telecommunications industry;

(f) promote competition among carriers and service providers;

[1] Emphasis in Sections 4, 2, 71 and 35 are from the NPRM.

(g) advise the Minister on such matters relating to the provision of telecommunications services as it thinks fit or as may be requested by the Minister;

(h) determine whether a specified service is a voice service for the purposes of this Act;

(i) carry out such other functions as may be prescribed by or pursuant to this Act.

(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 -

(i) protect the health and well-being of users of the service and such members of the public as would normally be affected by its operation;

(ii) protect and preserve the environment;

(iii) afford economical and reliable service to its customers.

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

Section 2

2 (1) In this Act, unless the context otherwise requires -

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

"specified service" means a telecommunications service or such other service as may be prescribed;

"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;*
>
> *(b) a service determined by the Office to be a voice service within the provisions of section 52,*

and includes services referred to as voice over the internet and voice over IP;

Section 71

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.

Section 35

35. (1) The Office may, after consultation with the Fair Trading Commission and such participants in the telecommunications industry as it things 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.

2.3 C&WJ's argument is simple. The words of Section 35 are clear and unambiguous. The OUR is only empowered to make competitive safeguard rules in relation to dominant public voice carriers. To allow the OUR to do otherwise, by relying on the general statement of its powers in Section 4, or by arguing that the definitions of terms such as telecommunications is technology neutral and includes data is to make nonsense of the Act. Taken to its logical conclusion, few, if any, of the limitations in particular sections of the Act would be effective. The arguments are summarized as follows. Paragraph 2.5 of the NPRM quotes from C&WJ's submissions in the First Response:

> *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.*

The OUR responds at paragraph 2.6 of the NPRM:

> *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.

2.4 The question then becomes one of statutory interpretation. C&WJ argued in the First Response, and continues to argue that the basic rule of statutory interpretation is to be used: the statute is to be read as written, and where there is no doubt as to its meaning, it is to be applied. So, the competitive safeguard rules only apply to dominant public voice carriers. C&WJ submitted at paragraph 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.*[2]

The OUR responds by also quoting from Bennion at paragraph 2.8 of the NPRM: "..For this purpose, a meaning is "plain" only where no relevant interpretative criterion (whether relating to material within or outside the Act or other instrument) points away from that meaning"[3] The OUR concludes its argument at paragraph 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."*

[2] F. Bennion, Statutory Interpretation, 4th ed (Butterworth's, 2002), p.470.
[3] Ibid, p.470

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.

2.5 It is the opinion of C&WJ that the view of the OUR and the company are so divergent, that a tribunal should be asked to give an opinion as what are the powers of the OUR under Section 35 of the Act. C&WJ is however comforted by the fact that previously the OUR was also of the view that its powers under what is now Section 35 on competitive safeguards was limited to voice carriers.

2.6 By letter dated September 30, 1999, the Minister of Commerce and Technology, Phillip Paulwell, sent a copy of the Drafting Instructions approved by Cabinet and issued to the Chief Parliamentary Counsel. A copy is attached at Appendix A. The Telecommunications bill was the subject of much discussion and consultation in 1999. Part V of the Drafting Instructions is titled "Interconnection". The Overview reads:

The Act should contain a series of provisions that set forth that the obligations and rights of carriers to interconnect their telecommunications networks for the purpose of providing voice services in Jamaica. Fundamentally, the Act should require that each carrier permit interconnection of its public voice network with the public voice network of any other carrier for the provision of voice services upon request as specified in the Act and that interconnection shall be provided by a dominant public voice carrier (inter alia) on a non-discriminatory basis.

The Act should require that the terms and conditions of interconnection will be determined, in the first instance, by the provision by each relevant carrier of an OUR-approved reference interconnection offer ("RIO"), which will contain the terms and conditions of that carrier's interconnection offering. Dominant carriers, as determined by the OUR after reference to the FTC and public consultation, shall be required to file RIOs and all mandatory RIOs must be filed with and reviewed by the OUR.

Under the Act, carriers should also be free to enter into voluntary interconnection agreements, which contain terms and conditions other than those provided for in the RIOs, which shall be lodged with the OUR for consideration. The Act should provide that if the OUR is required to determine the prices at which interconnection is to be provided by a dominant carrier, the OUR shall have regard to the certain principles that are specified below to determine that price.

The Act should also provide that if, following interconnection negotiations, carriers are unable to agree as to the terms and conditions of interconnection, then either the interconnection seeker or the interconnection provider may refer that pre-contract interconnection dispute to the OUR for arbitration.

In addition, the Act should provide that the OUR shall have the power to impose competitive safeguard rules on dominant carriers, including accounting separation rules and record-keeping rules. Moreover the OUR shall have the power to adopt rules pertaining to carrier indirect access obligations and number portability.

The "Specific Commitments" which follow include:

33. Interpretation

For the purpose of these Drafting Instructions:

"dominant public voice provider means a public voice carrier that would be considered dominant under the Fair Competition Act.

"public voice carrier" means a carrier who owns and operates a public voice network used to provide a voice service to the public.

41. Competitive safeguards

41.1 The Act should provide that the OUR shall have the power to impose the following competitive safeguard rules that may apply to dominant carriers:
- *accounting separation rules;*
- *record-keeping rules; and*
- *provisions to ensure that information supplied by other operators for the purposes of facilitating interconnection is not used for an anti-competitive purpose;*
- *any other competitive safeguard fuels as it considers reasonable and necessary.*

41.2 The Act should empower the OUR to develop guidelines as to the forms of anti-competitive conduct that it would consider that the safeguards described in section 41.1. above would be designed to address and the process that it will use to determine whether to impose a competitive safeguard.

41.3 The Act should require that the OUR may adopt such rules only if:
- *the rules are necessary to identify and prevent abuse of dominance or an anti-competitive practice; and*
- *no other instrument is available to the OUR that would provide an adequate remedy to that abuse or practice.*

41.1. The Act should require that prior to adopting these competitive safeguard rules, the OUR shall consult with interested parties.

2.7 Mrs. H.E. Lindsay, the Parliamentary Counsel forwarded the preliminary draft of the Telecommunications Bill to the Director General of the Ministry by letter dated November 4, 1999. A copy is attached at Appendix B. In her comments accompanying the bill she writes in relation to competitive safeguard:

Clause 40 – Competitive Safeguards

This reflects paragraph 41 of the instructions. Please note that, consistent with the Fair Competition Act, the term "uncompetitive" is used. You may also wish to consider whether the provision of subsection(2) is necessary in the legislation as it appears that this type of arrangement can be achieved administratively.

Please note also the reference to other interested parties in square brackets in subsection (1). This requires clarification and it may be necessary to define the term if it is retained.

2.8 In a document titled "Comments on Draft Telecommunications Act" dated November 9, 1999, the OUR provides its comments to the bill and the comments of the Parliamentary Counsel. A copy is attached at Appendix C. On clause 40 Competitive Safeguards, the OUR states:

As far as we can see, given the construction of this section and the rest of the draft Act, there are no powers for the OUR to take action against abuse of a dominant position or any uncompetitive practice either in relation to interconnection involving data (not voice services), or retail services. It is essential that a regulatory body has the necessary authority to address these problems. One option would be for the FTC to have the necessary powers, which they would have so long as the relevant Parts of the Fair Competition Act are not disapplied (as the Drafting Instructions suggested that they should be). Another option, which would be consistent with the policy position for the OUR to have the lead role in competition matters in telecoms, would be to ensure that the competitive safeguard owner was entirely general and could be applied to interconnection of data services and also to retail services, e.g. by changing references to (sic) "dominant public voice carriers" to "dominant carriers and service providers" and by moving the section to a different part of the Act, so it is not restricted to interconnection.

If the latter option is adopted, the following provides guidance as to the nature of the power:

The Act should provide that the OUR shall have the power to impose ex post and/or ex ante competitive safeguards that may apply to dominant carriers and service providers. An ex post competitive safeguard is imposed after abuse of dominance or un-competitive practice is observed, in order to prevent such abuse or behaviour from occurring, or to allow it to be identified.

Competitive safeguards may include, but are not limited to:

- *cease and desist orders;*
- *accounting separation rules;*
- *record-keeping rules;*
- *provisions to ensure that information supplied by other operators for the purposes of facilitating interconnection is not used for an anti-competitive purpose;*
- *imputation tests;*
- *obligations to provide identified services on reasonable terms and conditions;*
- *obligations to make available certain technical and commercially relevant information; and*
- *any such obligations as the Office considers reasonable and necessary.*

As a matter of practice, any guidelines, pursuant to 40(2), should be developed by the OUR in consultation with the FTC. But we are inclined to agree with the CPC's suggestion that it is not necessary to include the subsection in the legislation.

2.9 As can be seen from the Act, the OUR's suggestions were not adopted: the section was not removed from Part V Interconnection and is still limited to "public voice carriers".

2.10 It is important to examine and appreciate that the provisions of Sections 27 to 37 of the Act which comprise Part V titled "Interconnection". Section 27 is an interpretation section and all references are to public voice carriers or voice services. It reads:

27. In this Part –

"dominant public voice carrier" means a public voice carrier[4] that holds a dominant position in the telecommunications market in Jamaica within the meaning of section 19 of the Fair Competition Act;

"interconnection provider" means a public voice carrier who has received a request from another public voice carrier for interconnection;

[4] Emphasis C&WJ

"interconnection seeker" means a public voice carrier who makes a request to another public voice carrier for interconnection;

"point of interconnection" means the physical location for hand-over of voice telecommunications services between the interconnection provider and the interconnection seeker;

"public voice carrier" means a carrier who owns and operates a public voice network used to provide a voice service to the public;

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

2.11 Section 28 empowers the Office to determine "which public voice carriers are to be classified as dominant public voice carriers for the purposes of this Act." Section 29 speaks to the obligation to interconnect to the public voice network. Section 30 gives the principles for interconnection to the public voice network of the dominant public voice carrier. Section 31 states the principles to be used to determine the term and condition in relation to the provision of interconnection services. Section 32 provides for the dominant carrier 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." Section 33 states the principles to guide the determination of prices at which interconnection is to be provided by the dominant carrier. Section 34 refers pre-contract disputes to the Office. Section 35 allows the Office to make competitive safeguard rules in relation to dominant public voice carriers. Section 36 allows the Office to make rules imposing on a dominant public voice carrier a particular form of indirect access. Finally, Section 37 allows the Office to make rules imposing on the public voice carrier the responsibility to offer number portability. Thus, all the sections in Part V are specific to the voice market and the public voice carrier. This clearly includes the ability of the Office to make competitive safeguard rules.

2.12 The OUR is attempting to use its general powers in Section 4 and its general rule-making powers in Section 71 to override the specific powers of Section 35 and the intent of Part V to deal with interconnection in respect of voice services . This approach is contrary to the accepted principle of statutory interpretation *generalibus specialia derogant* (special provisions override general ones). Bennion[5] expresses it thus:

Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument,

[5] *Ibid*, p. 998

it is presumed that the situation was intended to be dealt with by the specific provision. This is expressed in the maxim generalibus specialia derogant (special provisions override general ones). Acts very often contain general provisions which, when read literally, cover a situation for which specific provision is made elsewhere in the Act. This maxim gives a rule of thumb for dealing with such a situation: it is presumed that the general words are intended to give way to a particular. This is because the more detailed a provision is, the more likely is it to have been tailored to fit the precise circumstances of a case falling within it.

2.13 The principle was applied in the case of *Vinos v. Marks & Spencer plc*[6]. The case concerned the application of Rules 7.6 (3) and 3.10 of the British Civil Procedure Rule (CPR). Under Rule 7.6(3) where the court could make an order to extend time for serving a claim form "only if" (a) the court had been unable to serve the claim form, or (b) the claimant had taken all reasonable steps to serve the claim form but had been unable to do so, and (c) in either case, the claimant had acted promptly in making the application. Rule 3.10 provides "Where there has been an error of procedure such as a failure to comply with a rule or practice direction – (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error." The claimant, V, suffered injuries in an accident at work. After lengthy negotiations with the defendant's insurers had failed to produce a final settlement, V's solicitors issued proceedings about a week before the expiry of the limitation period. Due to an oversight, they did not serve the claim form until nine days after the expiry of the four-month period prescribed by the CPR. V subsequently applied for an extension of time for serving the claim form. The district judge held he had no discretion to extend time since the case fell outside of Rule 7.6(3). The Court of Appeal dismissed V's appeal, which relied on Rule 3.10, and held that the general words of Rule 3.10 could not extend to enable the court to do what Rule 7.6(3) expressly forbade, nor to extend time when the specific provision of the rules which enable extensions of time specifically did not extend to making that extension of time.

2.14 In relation to Section 71, the OUR, at paragraphs 2.12 to 2.17 of the NPRM attempts to, refutes C&WJ's arguments on the limitation of the general rule making powers of the OUR to sections where there is an express provision under the Act – the delegated authority cannot be *ultra vires* the Act. C&WJ submits in the First Response:

> *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*

[6] [2001] 3 All ER 784

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."[7]

16. *The law goes further and limits so called "sweeping-up words" intended to confer residual powers to complete powers expressly granted.*[8] *Two examples can be cited. In decision of the House of Lord in* Daymond *v.* South West Water Authority[9]*, 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."*

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.*

[7] Utah Construction and Engineering Pty Ltd. v. Pataky [1966] 2 WLR 197 at 202.
[8] Bennion, p.209
[9] [1976] AC 609

2.15 The OUR's response in the NPRM continues its argument that it is empowered under the Act to issue competitive safeguard rules on the data market. Paragraph 2.17 of the NPRM states:

> *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"*

2.16 It is important to appreciate the effect of the OUR's proposal to issue rules on competitive safeguard for data. In Chapter 4 of the NPRM "Telecommunications Competitive Safeguard (Data Services) Rules, 2007" paragraph 4.4 is titled "Reference Data Access Offer". Under that proposed rule the "dominant data carrier" must offer interconnection of data services. The NPRM reads:

> *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.

2.17 The OUR is therefore attempting to provide interconnection of data services by delegated legislation, where it has no power to do so in the enabling legislation. The critical question is could a data provider approach a dominant data provider and demand interconnection under Section 29 of the Act? The answer is a resounding no. The obligation to interconnect is limited to dominant public voice carriers under the Act.

2.18Where the Act empowers the OUR to make rules about specific areas the language is unequivocal. Provisions are made under Section 8(2) for rules on numbering; under Section 36 for rules on indirect access; under Section 37 for rules on number portability; under Section 44 (3) for rules on quality of service standards; under Section 44(4) for rules on the administration and resolution of customer complaints; under Section 50 for international service rules; and under Section 57 for prescribing certification standards in relation to customer equipment, plugs and jacks, wiring connected to the public network and technicians. For example:

2.18.1 Section 8(2) states "*In carrying out its functions under the section the Office shall develop a plan for the numbering of telecommunications services and may make rules pursuant to that plan regarding the assignment and use of numbers by carriers and service providers.*"

2.18.2 Section 36 (1) states "*The Office may make rules subject to affirmative resolution imposing on a dominant public voice carrier, the responsibility to offer a particular form of indirect access to its network to other interconnection providers, if the Office is satisfied on reasonable grounds that such rules are necessary in the interest of customers and that (a) the benefits likely to arise from the requirement to provide a particular form of indirect access outweigh the likely cost of implementing it; and (b) the requirement to provide the particular form of indirect access will not impose an unfair burden on any carrier or service provider.*"

2.18.3 Section 37 (1) states "*Subject to this Act, the Office may make rules subject to affirmative resolution imposing on any public voice carrier, the responsibility to offer number portability if the Office is satisfied on reasonable grounds that – (a) the benefits likely to arise from the requirement to provide a particular form of number portability outweigh the likely cost of implementing it; and (b) the requirement will not impose an unfair burden on any carrier or service provider*."

2.19 The OUR has dedicated a few paragraphs to refererences by C&WJ in the First Response that the data market is not mentioned in the Act, nor is it defined. These

statements are being taken out of context to give the impression that the C&WJ, does not, in the First Response, acknowledge that data is mentioned or defined in the Act. It should be noted that C&WJ begins the document with that acknowledgement:

> *The Law*
>
> 4. *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.*

3. Chapter 2 – Responses to First NPRM – Parliamentary Intention

3.1 The OUR has also indicated that the aim of its approach to interpretation is to give effect to the intention of Parliament. It states at paragraph 2.10 of the NPRM:

> *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.*

3.2 Bennion states that "[l]egislative intention is a 'very slippery phrase'. [10] Like many things which are slippery, it is also dangerous, if not handled properly. It is indeed, trite law, as stated by the OUR above, that the "object of the interpretation of a written instrument is to discover the intention of the draftsman as expressed in that instrument." However, how does one glean legislative will or intention? Is it

[10] Bennion, p. 405, per Lord Watson in Saloman v. Saloman [1897]AC 22 at 38.

acceptable, that where the meaning of the statute is clear and unambiguous, the interpreter is allowed to be creative to come to a meaning which suits its requirements? Therein lies the slippery nature of the phrase. When presented with the first draft of the Act, the OUR was concerned upon reading the provision on competitive safeguards that "there are no powers for the OUR to take action against abuse of a dominant position or any uncompetitive practice either in relation to interconnection involving data (not voice services), or retail services." Now, the OUR has moved away from the clear, unambiguous reading of Section 35, to include empowerment of the OUR to issue rules for data services which is not provided for in the Act. It is only where there is ambiguity that the interpreter needs to look beyond the reading of the Act. The principle is stated thus in the Halsbury's:

> *The basic rule of statutory interpretation has two branches. It is taken to be the legislator's intention (1) that the enactment is to be construed in accordance with the interpretative criteria, which are the general guides to legislative intention laid down by law, and (2) that, where these conflict, the problem is to be resolved by weighing and balancing the factors concerned.*[11]

4. Chapters 3 and 4 – Competitive Safeguards Initiative Taken ; Telecommunications Competitive Safeguard (Data Services) Rules, 2007

4.1 C&WJ's argument is that the OUR does not have jurisdiction under the Act to issue rules for competitive safeguard in relation to data. This document therefore does not examine the proficiency and adequacy of the rules themselves, but examines the legal basis for issuing the rules. Therefore, C&WJ reserves the right to comment on the provisions of the draft rules, if the necessity of so doing arises.

5. Conclusion

5.1 The OUR states at paragraph 2.22 of the NPRM that "…even if the Office's NPRM on Competitive Safeguards was ultra vires … such a declaration as to its being ultra vires can only be made and rendered binding by a court of competent jurisdiction." C&WJ maintains that the competitive safeguard rules on data services are *ultra vires*. In the event that the OUR is not so guided, we agree that the matter is ripe for a judicial pronouncement.

CABLE & WIRELESS JAMAICA LIMITED
November 9, 2007

[11] Halsbury's Laws of England – 4th ed. reissue, (London: Butterworth's, 2000), para 1376 , p.837