



CABLE & WIRELESS
JAMAICA

C&WJ'S RESPONSE

TO THE

OUR'S CONSULTATIVE DOCUMENT

'INDIRECT ACCESS: THE COST-BENEFIT ANALYSIS FOR TWO-STAGE

DIALING'

August 31st, 2007

Introduction

Cable & Wireless Jamaica (C&WJ) welcomes the opportunity presented by this third consultative document on Indirect Access (IA), to address a number of issues peculiar to the issue of Two-Stage Dialing (2SD).

In Consultative Document No. 2, published February 24, 2006 the Office introduced the nomenclature of 2SD, asserting that 2SD is not IA although ‘...it could potentially have a similar effect on the market as Indirect Access...’. It has also stated on other occasions that, as 2SD is not a form of IA, the Office was not required to mandate C&WJ to provide the service. The Office’s position in the current consultation is that ¹‘... Operators...are being obstructed from using 2SD via DELs to provide outgoing international services due to the terms and conditions of C&WJ’s service contracts’. At paragraph 1.5, it concluded that ‘...rather than be detained on the point of whether or not 2SD is Indirect Access it will, without prejudice, treat it as such in order to promote competition in the markets for retail telephony services from fixed lines’.

The Office describes 2SD as involving “the use by a service provider of standard retail service to allow customers to access its services and may be implemented by using either DELs or toll-free lines. The service provider would use and pay for the DEL or toll-free service just like any other customer using these services and no special wholesale arrangements.”

C&WJ has consistently asserted and continues to assert its position that 2SD is a form of Indirect Access and that in order to mandate IA the OUR is obliged to follow to statutory procedure set out in the Telecommunications Act 2000 at section 4 and 36 which states as follows:

Section 4(2) of the Telecommunications Act provides that :

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

- (a) *consult in good faith with persons who are or are likely to be affected by the decisions;*
- (b) *give to such persons an opportunity to make submissions to and to be heard by the Office.*
- (c) *have regard to the evidence adduced at any such hearing and to the matters contained in any such submissions.*
- (d) *give reasons in writing for each decision.*
- (e) *Give notice of each decision in the prescribed manner.*

Section 36:

- (1) *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*

¹ Paragraph 1.4, ‘Indirect Access: The Cost/Benefit Analysis for Two Stage Dialing’, July 14, 2007

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.*

Moreover, the Office had requested that C&WJ present its position in regard to allegations of anti-competitive provisions in the terms and conditions set out for the use of DELs. C&WJ responded and also submitted to the Office a legal opinion from the British law firm, Charles Russell dated June 5, 2006, which disputed that C&WJ's relevant terms were anticompetitive. The opinion stated, *inter alia*:

*'...we understand that C&WJ has, in the absence of any obligation to provide indirect access following a determination of the OUR made under section 36 of the Telecommunications Act, provided to its competitors a wholesale DEL access product, based upon cost price for the access (DEL) service, i.e. including the access deficit charge per line as identified by the OUR in the Determination. These competitors/wholesale customers are then able to set their own international or domestic retail services' tariffs in competition to C&WJ for international or domestic retail service....C&WJ's competitors have sufficient margin in which to provide attractive competing services. The latter is borne out by the fact that subscribers to C&WJ's LA product routinely charge rates 40 % - 50% below C&WJ's published rates...in no case has the existence of the relevant termination or suspension right or the actual enforcement of its rights in the relevant terms and conditions of supply substantially lessened competition; in each case carriers or telecommunications services providers had or have the ability to use C&WJ's wholesale access service to provide a competing international retail services product.'*²

In the context of facts including these described in the excerpt above, C&WJ was driven to apply to the Office for a review of the voice Market.

Review of the Voice Market

In January 2007 consistent with section 28 (3) of the Act, C&WJ applied to the Office for a declaration of non-dominance in all the markets in which C&WJ was previously declared dominant by the Office³. The market review to assess non-dominance will, *inter alia*, assess whether C&WJ is dominant in the market for international outgoing calls. It will also assess whether there is in fact one technology neutral call origination market. The OUR commenced consultation on C&WJ's by way of **Document No.:Tel 2007/06 Application By Cable & Wireless Jamaica Limited To Be Declared Non-Dominant In The Provision Of Public Voice Telephony, June 11th, 2007** (the Voice Market Review).

² Pg. 4, Legal Opinion, Charles Russell, June 5, 2006

³ Application To Be Classified As Non-Dominant In The Provision Of Public Voice Telephony, January 25, 2007.

The OUR had previously conceded in the Determination Notice, Dominant Public Voice Carriers, issued on August 14, 2003 that it ⁴ ‘*considers that C&WJ’s dominant position in the markets for international transit and switching facilities and the associated markets for international voice minutes could be the first markets where C&WJ’s dominant market position is likely to be eroded significantly...*’. Furthermore, at footnote 4, page 28 of the Determination Notice ‘*Accounting Separation for Cable and Wireless Jamaica*’, published March 29, 2006, the OUR stated that ‘*International Outgoing Calls should be removed, as there now exists effective competition for this service. Publication of costing information for this service would place C&WJ at a competitive disadvantage, as other operators would be able to adjust their strategies given this information without C&WJ being privy to any reciprocal information from these operators*’.

In light of the foregoing it is C&WJ’s view that the Office should suspend further consultation on IA and as a corollary 2SD pending the outcome of the voice market review. To do otherwise would be unfair, unreasonable and would prejudice C&WJ and therefore would be in contravention of the statute.

Appeal to the Appeal Tribunal (RIO5)

C&WJ would also like to use this opportunity to raise the issue of the Office’s mandate that “**The words** ‘*or ultimately terminating outside Jamaica*’ in Clauses PSTN Termination Access Service 1.1.4 and PLMN Access Service 1.1.4 are to be removed.” This request, made in the OUR’s Determination 4.11 dated November 2004 ‘*Assessment of RIO5A and Tariff Schedule RIO/5A*’, is currently the subject of an appeal before the Telecommunications Appeal Tribunal.

In its Application for Reconsideration of the said Determination, C&WJ advocated that the Office’s removal of the words in question would be tantamount to mandating C&WJ to offer a form of IA and would therefore constitute a material error of law. Further that Section 36 of the Act sets out a particular guideline for the imposition of Indirect Access on a dominant public voice carrier and, accordingly, the Office was at the time of the decision engaged in public consultation on Indirect Access it could not impose this requirement without satisfying itself on reasonable grounds of its necessity. The Company argued in the alternative that if the Office found that the removal of the words did not create indirect access, this in itself, would constitute a material error of law and fact as Section 36 (2) of the Act defines Indirect Access as “*the method whereby customers are able to select the services of any service provider who uses a public voice carrier’s network to provide specified services*”. Since with the removal of the words, C&WJ’s customers would be able to select the international service of another provider via dialing a particular number, this would in effect be a form of Indirect Access more commonly known as Carrier Selection.

The Office contends that “*rather than imposing an obligation on C&WJ, is simply insisting that C&WJ cannot use the terms and conditions of its RIO to control activities on the network of interconnection*

⁴ pg. 25

seekers. The Office therefore refutes the assertion that it has committed either a material error of law or of fact with respect to Determination 4.11 and therefore reaffirms the decision. The Office also notes that the Act does not preclude Indirect Access but only allows the Office to mandate particular forms and therefore where it occurs naturally the Office has no need to mandate it.” C&WJ maintains its position that the removal of words would mandate a form of Indirect Access, and further, that in removing the words IA would be mandated in the absence of the procedure clearly set out in the Act. C&WJ has raised this matter to the Office on several occasions outlining that the removal of the words result in 2SD.

C&WJ and the Office are now before the Telecommunications Appeal Tribunal, where C&WJ will apply to the Tribunal for a stay of the OUR Determination which would allow 2SD by removing the words *‘or ultimately terminating outside Jamaica’*. A principal ground for C&WJ’s application will be based on the fact that the Office is currently consulting on the subject of the Reconsideration.

C&WJ urges the Office to suspend all further work on Indirect Access until the Appeal Tribunal has made a decision and the market review is complete. Given that the Office expects to publish a Draft Determination in relation to the market review by October 2, 2007, the period for which this consultation would be suspended would not be inordinate, and the cost, if any, of such suspension, would certainly be outweighed by the cost of making a premature and/ or ill-informed Determination.

Cost / Benefit Analysis

In paragraph 4.0 the Office asserts that “based on the above cost-benefit analysis, the Office considers that the results clearly indicate that the incremental benefits will outweigh the likely costs to society of requiring C&WJ to allow 2SD services via DELS”. C&WJ is concerned that at this stage of the consultation, the OUR has expressed such strong conviction about the outcome of a cost benefit analysis based merely on a proposed methodology. More particularly, the above position of the Office appears to be based solely on a high level analysis of existing tariffs within the market, which is insufficient for the conduct of a proper cost-benefit analysis. The Office’s positioning strongly suggests that the Office has already determined that that 2SD will result in a net benefit to society and accordingly, that this consultation is merely a formality.

A review of the relevant statutory provisions indicate that the Office is obliged at this stage to determine a methodology for the conduct of the cost-analysis rather than prejudicing C&WJ’s position by making conjectures in regard to the outcome of the analysis.

It is C&WJ view that the Office’s proposed approach to the conduct of the cost-benefit analysis is overly simplistic. For instance in its methodology, the Office suggests that consumers of international calls using 2SD via DELs will benefit from reduction in the price of international calls as well as increased volumes of calls. The Office, however, has not explained how it will develop a demand function to estimate the demand for international calls. The estimation of a demand function is necessary to determine the projected change in

volumes from a price reduction. The demand function is also necessary to estimate the total incremental benefit at the new equilibrium price for international calls. It is clear that this deficiency is of substantial importance to the performance of an accurate analysis.

Furthermore, C&WJ reminds the Office that a satisfactory cost-benefit analysis looks at all the costs and benefits that would accrue from the introduction of a new service. The Office's analysis has omitted some potential costs that consumers will face from the introduction of 2SD, including an estimation of the likely costs resulting from an increase in CWJ access rates to cover lost revenues from 2SD. More particularly, C&WJ is able to recover the cost of the access line from IAOs from the current commercial 2SD arrangement, hence the company is able to continue to subsidize access for its customers. If 2SD via DELs is mandated by the Office however, C&WJ will have no option but to increase access rates to cover lost revenue. As consumers in general will therefore face increased charges as a direct result of these tariff adjustments, the Office is obliged to offset these costs against the projected benefits of 2SD.

Given the additional costs outlined above, C&WJ submits that it is inappropriate for the Office to use a per minute approach to conduct the cost benefit analysis, as not all costs can be assessed on a per minute basis. In order to satisfactorily complete its analysis, the Office should therefore a) make projections on the volume of calls that will be passed via 2SD to determine if the benefits outweigh the costs; b) elucidate on its plans to estimate the cost savings that will be passed on to customers and c) indicate the time period over which the benefits of these cost savings will be estimated. The Office also needs to ensure that it accounts for reduction in prices that will naturally occur as a result of increased competitive forces in the market.

In addition to the concerns set out above, C&WJ notes the OUR's statement that '*while consumers will now be faced with having to pay a local call charge of up to J\$0.9 per minute (now J\$0.99), if LAO pass on their cost savings in the form of reduced tariffs, consumers can still expect to make additional savings on 2SD of up to J\$1.9 on a per minute basis....*'. The Office does not reflect any consideration of the fact that currently, customers do not pay when they access a toll-free number to complete a two-stage call. In the Office's proposed 2SD service using DELs, customers would have to pay as much as J\$0.99 per minute, whereas with 2SD using toll free service, customers pay J\$0.00. The OUR also argues that consumers will benefit from the reduction in cost to the IAO which will then be passed on to the consumer in the form of reduced rates. It does not, however, explain how it plans to estimate how much of this cost reduction will be passed on to consumers. C&WJ urges the Office to consider the fact that there is no guarantee that the cost reduction will be passed on to consumers.

Unfair Burden

The Office states that C&WJ is not prevented from increasing its access price under the price cap regime and has speculated that C&WJ's Cost of Capital should be less than 26.7%. As the OUR is aware, C&WJ has traditionally carried a Universal Service Obligation and has

subsidized and continues to subsidise access for its customers. C&W, will not, however, be in a position to continue subsidising access for its competitors who should properly pay the true cost for the service they wish to provide. C&WJ also believes it is inappropriate for the OUR to speculate that C&WJ's Cost of Capital is actually less than 26.7%, without providing justification.

It is important to note once more that the imposition of an unfair burden on C&WJ would undoubtedly result if the OUR were to mandate any form of IA while engaged in the process of reviewing the voice market. The OUR remains aware that as at December 2006, C&WJ carried less than 10% of all international outgoing calls from Jamaica and that this clearly indicates that C&WJ is not dominant in that market. As dominance is the premise for mandating any form of IA, to proceed to mandate IA through this consultation prior to completion of its market review would be no less than premature.

END DOCUMENT