CABLE & WIRELESS
JAMAICA

RESPONSE OF CABLE & WIRELESS JAMAICA LIMITED TO THE OFFICE OF UTILITIES REGULATION COMPETITIVE SAFEGUARDS – DRAFT RULES NOTICE OF PROPOSED RULE MAKING

January 25, 2007

1. EXECUTIVE SUMMARY

1.1 The Office of Utilities Regulation ("OUR") published the "*Competitive Safeguards – Draft Rules – Notice of Proposed Rule Making* ("NPRM") on November 30, 2006. Cable & Wireless Jamaica Limited ("C&WJ") is pleased to be given this opportunity to respond to the NPRM.

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

- 1.2.1 The NPRM – Chapter 1 Introduction & Chapter 2 Responses to First NPRM
- 1.2.2 The NPRM – Chapter 3 Competitive Safeguards
- 1.2.3 The Legal Basis of the OUR's Telecommunications Competitive Safeguard (Voice Services) Rules 2006
- 1.2.4 Conclusion

1.3 The gravamen of C&WJ's Response is that the OUR does not have jurisdiction under Sections 4 and 35 under the Telecommunications Act to issue competitive safeguard rules in relation to essential facilities. The Draft Rules are therefore *ultra vires* the Act.

2. THE NPRM - CHAPTER 1 INTRODUCTION & CHAPTER 2 RESPONSES TO FIRST NPRM

2.1 In paragraphs 1.3 and 1.4 of the NPRM the OUR addresses the argument made by C&WJ in its response to the first NPRM. The OUR states as follows:

> *"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. 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."*

C&WJ wishes to reiterate the argument made in its response to the first NPRM that the OUR does not have jurisdiction under the Telecommunications Act to regulate the data market. Section 35 of the Act speaks specifically to public voice carriers and the "sweeping up words" of Section 71 cannot be used to impute powers not given in substantive legislation to the OUR[1] .

2.2 Further in relation to the Office's statement on the "number of complaints of alleged anticompetitive behaviour..." C&WJ makes reference to its letter to the

[1] See paragraphs 9-21 of C&WJ's Response to OUR's Notice of Proposed Rule Making on Competitive Safeguards to Address Anticompetitive Practices by Dominant Carriers dated July 6, 2006

OUR dated March 31, 2006 in which C&WJ responded to and demonstrated that the allegations were baseless and concluded by stating that "*…it is C&WJ's view that the Office's comments in regard to C&WJ's conduct are highly prejudicial to its business and are ruinous to the company's reputation. Accordingly C&WJ urges the Office to refrain from publicly treating allegations against C&WJ as proven fact, on which the Office is obliged to act...*"

2.3 Moreover, by letter dated July 14, 2006, C&WJ submitted for the Office's better information an external opinion from experienced Competition lawyer Emanuela Lecchi of the firm Charles Russell in the United Kingdom on the allegations of anticompetitive behaviour made by the OUR. The opinion examined the allegations brought by the Office and stated as follows:

> *"it would be absurd for any authority to interfere with a commercial contract economically justified, entered into between two operators, particularly when, as in this case, the intervention by the authority effectively means that C&WJ will be asked to cross- subsidise its own competitors. It would even be more absurd for the authority in question to engage in this course of action in the absence of any anticompetitive effects and/ or any complaints by the competitors in question …".*

2.4 The OUR quotes in paragraph 2.1 from C&WJ's response which states "On reading the Act, it is clear that rules as to competitive safeguards, are applicable to dominant public voice carriers only …" The NPRM continues *"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."* C&WJ has not by this sentence given its *carte blanche* approval for the issuance of competitive safeguard rules for the voice market. Any competitive safeguard rules must be within the parameters of Section 35 of the Act.

2.5 In paragraph 2.2 the OUR responds to C&WJ's statement that it does not have a basis in law to regulate essential facilities by relying on Sections 4(1)(a), 4(3)(c) and 35(1) as providing the legal basis. C&WJ rejects the reliance on Sections 4 and 35 as a basis for writing rules on essential facilities and provides details on its argument at paragraphs 4.1 to 4.8 herein.

3 THE NPRM - CHAPTER 3 COMPETITIVE SAFEGUARDS & CHAPTER 4 TELECOMMUNICATIONS COMPETITIVE SAFEGUARD (VOICE SERVICES) RULES, 2006

3.1 In Chapter 3 of the NPRM, the OUR provides a theoretical outline for the importance of competitive safeguard rules and the steps it suggests that it has taken to limit anticompetitive behaviour in the telecommunications market.

3.2 C&WJ notes the statement made on "Dominance in mobile call termination services at paragraph 3.2.2:

> *"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."*

3.3 In Chapter 4 the document sets out the draft rules the "Telecommunications Competitive Safeguard (Voice Services) Rules, 2006". The OUR defines an Essential Facility at paragraph 4.4:

> *"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."*

3.4 The OUR gives the methodology it will use to determine how a network will be deemed an essential facility, the actions which are prohibited by the owner/operators of essential facilities and exceptions to the enforcement of essential facilities doctrine. While C&WJ has focused on the jurisdiction of the Office to make rules on essential facilities, the Company wishes to state unequivocally that we do not believe the methodology the OUR has proposed for determining whether a network will be deemed to be an essential facility is in line with current best practice and established (European) jurisprudence. In particular, paragraph 4.4 of the NPRM makes no mention of the need to demonstrate that access to a facility is **indispensable** to competition (as established in *Oscar Bronner*[2]) and that any refusal to supply will not be an abuse unless it would lead to the total elimination of all competition in the relevant downstream market (as established in *Commercial Solvents*[3]).

3.5 At paragraph 4.5 the document speaks to "Enforcement of Access". The OUR recites Section 55 of the Act which deals with enforcement of access to land by application to the court by the carrier denied permission. The Office concludes this paragraph with the statement *"The Office shall make rules governing the*

[2] *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG,* Case C-7/97 [1998] ECR I-7791, [1999] 4 CMLR 112

[3] *Commercial Solvents v Commission,* Cases 6/73 & 7/73 [1974] ECR 223, [1974] 1 CMLR 309. See also *Oscar Bronner*, [1998] ECR I-7791, [1999] 4 CMLR 112, paragraph 38.

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." While there seems to be a typographical error in the quotation, C&WJ is of the opinion that the presence of Section 54 in the Act, supports C&WJ's argument that it was not the intention of Parliament for sections 4 and 35 to be used as the basis for including the essential facilities doctrine under the Act, as it has provided for parties who are denied access to land or the facilities of another carrier under sections 54 to 55.

3.6 The Draft Rules conclude with statements for safeguarding proprietary information supplied by competing carriers, the provisioning of service in a timely manner, the prohibition of unfair price discrimination and cross subsidy, the enforcement of the competitive safeguard rules and the complaints and enforcement procedures for the rules.

3.7 C&WJ's argument is that the OUR does not have jurisdiction under the Act to issue rules for competitive safeguard in relation to essential facilities. This document therefore does not examine the proficiency and adequacy of the rules themselves, but examines the legal basis for issuing the rules. Notwithstanding, C&WJ repeats its concerns with the substantive provisions of the Draft Rules, particularly the methodology used to determine an essential facility at paragraph 4.4. C&WJ notes that the provisions at paragraphs 4.5 to 4.13 flow from the determination of an essential facility and therefore fall outside the OUR's legal purview.

4 THE LEGAL BASIS OF THE OUR'S TELECOMMUNIATIONS COMPETITIVE SAFEGUARD (VOICE SERVICES) RULES 2006

4.1 The OUR has purported, through the use of powers granted to it under Section 35 (1) (d) of the Act, to issue Competitive Safeguard Rules in relation to essential facilities. Section 35 in its entirety reads:

> *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 su*ch *abuse or practice*.

4.2 The OUR has interpreted its powers under Section 35(1) (d) as being applicable to essential facilities based on its mandate in Section 4(1) and 4(3)(c) of the Act. Section 4 reads in its entirety:

(1) The Office shall regulate telecommunications in accordance with this Act and for that purpose the Office shall –
- *(a) <u>regulate specified services and facilities;</u>*
- *(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;*
- *(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.*

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

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

(b) give 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 matters contained in any such submissions;

(d) give reasons in writing for each decision;

(e) give notice of each decision in the prescribed manner.

(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) <u>whether the specified services are likely to promote or inhibit competition.</u>

(4) Where the Office has reasonable grounds for so doing, it may for the purpose of its functions under this Act, require a licensee to furnish, at such intervals as it may determine, such information or documents as it may specify in relation to that licensee's operations and the licensee shall be given a reasonable time within which to furnish the information.

(5) The Office may make rules, subject to affirmative resolution, prescribing the system of regulatory accounts to be kept by a dominant carrier or service provider in relation to specified services.

4.3 There are three issues which arise from the OUR's interpretation of its powers under Sections 35 and 4:

4.3.1 Whether the mandate given to the OUR in Section 4 can be used as a basis to make competitive safeguard rules relating to essential facilities under Section 35.

4.3.2 Whether the issuing of competitive safeguard rules for essential facilities was contemplated under the Act in Section 35 (1) (d).

4.3.3 What is the relevance of Sections 54 and 55 to Section 35 (3)?

4.4 <u>Whether the mandate given to the OUR in Section 4 can be used as a basis to make competitive safeguard rules relating to essential facilities under Section 35.</u>

4.4.1 According to the marginal notes, Section 4 concerns the "Functions of the Office". The section is wide-ranging. Subsection (1) makes a list of the functions of the Office and begins at (a) with *"regulate specified services and facilities."* Subsection 2 gives the OUR guidance as to how it is to *"mak[e] a decision in the exercise of its functions under [the] Act"*. In Subsection (3) the Office is directed to have regard to the matters listed in the exercise of its functions. The list concludes at (c) with *"whether the specified services are likely to promote or inhibit competition."* In subsection (4), the Office is given authority to require a licensee to furnish information or documents where there is reasonable ground for so doing. Finally, and most important for these purposes, the Office is authorized to make rules, subject to affirmative resolution, prescribing the system of regulatory accounts to be kept by a dominant carrier or service provider in relation to specified services.

4.4.2 To answer the question posed at paragraph 5 herein, our first enquiry is, "*what is the mandate posed by Section 4 of the Act as it relates to competitive safeguard rules?"* The answer is given unequivocally at Subsection (5): "*The Office may make rules subject to affirmative resolution, prescribing the system of regulatory accounts to be kept by a dominant carrier or service provider in relation to specified services."* The OUR is specifically given a mandate to prescribe a system of regulatory accounts.

4.4.3 The OUR's interpretation of its mandate seems to be much wider. The OUR seems to have interpreted its mandate according to the general guidance given in Subsection 4(1) to *"regulate specified services and facilities"* and Subsection 4(3)(c) having regard to *"whether the specified services are likely to promote or inhibit competition"* as opposed to the specific mandate given in Subsection 5. The OUR has used the general mandate given in Subsections 4(1) and 4(3)(c) as the basis for writing competitive safeguard rules on essential facilities, where within the same section of the Act, the competitive safeguard rules are specifically restricted to a system of regulatory accounts. The OUR's approach does not follow established legal principles for statutory interpretation. The most relevant to these principles is *generalibus specialia derogant* (special provisions override general ones). Bennion[4] expresses it thus:

[4] FAR Bennion, <u>Statutory Interpretation</u>, (Butterworths, 2002), p. 998

"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, 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."

4.4.4 The principle was applied in the case of *Vinos v. Marks & Spencer plc*[5]. 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.

4.4.5 C&WJ is also of the opinion that the rule of *generalia verba sunt generaliter intelligenda* (general words are to be understood generally) is applicable to these circumstances. The general words of Subsections 4(1) and 4(3) or Section 3 are not sufficient to enable the OUR to write rules on all matters of competitive significance under the Act, such as essential facilities, in the absence of specific provisions on the subject matter.

[5] [2001] 3 All Er 784

According to Bennion[6] *"It is not to be supposed that the drafter could have had in mind every possible combination of circumstances which may chance to fall within the literal meaning of general words."* Where 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:

4.4.5.1 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.*"

4.4.5.2 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 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.*"

4.4.5.3 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.*"

4.5. Whether the issuing of competitive safeguard rules for essential facilities was contemplated under the Act in Section 35 (1) (d)

4.5.1 Section 35 (1) empowers the Office, after consultation with the Fair Trading Commission, to issue competitive safeguard rules prescribing (a)

[6] Bennion *supra* p. 999

separation of accounts; (b) keeping of accounts; (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." The OUR has interpreted the provision of 35(1)(d) as being wide enough to include rules on essential facilities. It states at paragraph 2.2 of the NPRM *"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."* C&WJ is of opinion that the generous interpretation that is given to Section 35(1) (d) goes against the provisions of the Act, and accepted rules of statutory interpretation.

4.5.2 Section 4(5) of the Act is very clear as to the purpose of the rules to be made by the Office under that section. It reads *"The Office may make rules, subject to affirmative resolution, prescribing the system of regulatory accounts to be kept by a dominant carrier or service provider in relation to specified services."* Is there a contradiction in the Act? There is none. The provisions from Section 35(1)(a) to (c) are all directly related to the "system of regulatory accounts" – separation of accounts; keeping of accounts and privacy of competitors' information.

4.5.3 The question that then arises is: *how is Section 35(1)(d) to be interpreted?* Can it be stretched to include provisions not related to the "system of regulatory accounts" as the OUR is attempting to do? In answering these question, C&WJ relies on an accepted rule of statutory interpretation, the *ejusdem generis* rule. Bennion explains the principle as follows:[7]

> *"The Latin words ejsudem generis (of the same kind or nature) have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of association, but the most usual form is a list or string of genus-describing terms followed by wider residuary sweeping-up words."*

4.5.4 The *ejusdem generis* rule applies where there is sufficient indication of a category which can be described as class or genus. In the Act there is no task of finding a genus as the Act gives the reader the genus at Section 4(5). Further the matters listed in the Act are sufficiently related to the keeping of regulatory accounts to form a genus, even if it were not specifically stated. So the purpose of Section 35 is to empower the Office to write detailed competitive safeguard rules on the keeping of regulatory accounts. What kinds of rules are to be written? The rules must be related

[7] *supra* p. 1054

to the separation of accounts, the keeping of accounts, provisions to ensure that information supplied by the other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose and *such other provisions as the Office considers reasonable and necessary for the purposes of the competitive safeguard rules*. Any competitive safeguard rules which are written, and are not listed in Section 35(1) must be *ejusdem generis* to the examples listed in the Act. Rules related to access to essential facilities are not *ejusdem generis* to the separation of accounts, the keeping of accounts, provisions to ensure that information supplied by the other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose, and do not fall under Section 35.

4.5.5 The Act has described the genus, but what does the class or genus comprise of? Section 35(1) (a) and (b) clearly deal with the dominant carrier's own records and the need for transparency, while Section 35 (1) (c) which applies to *"provisions to ensure that information supplied by other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose"* speaks to sensitive information which a dominant carrier may obtain by virtue of its dominance, for example, traffic information and forecast, and customer numbers which are provided by other carriers. It is commercially sensitive information extrapolated from the volume forecast which can be used by the dominant carrier for uncompetitive purposes. The OUR explained the risk in its Determination Notice titled *"Cable & Wireless Jamaica's Reference Interconnect Offer"*, published February 2001:

> *"For the purposes of facilitating interconnection, entrants may be required to provide information that is confidential and commercially sensitive. For example, to permit the incumbent to undertake proper network planning, interconnection seekers may need to provide the incumbent with detailed information on traffic. This could include current and expected traffic volumes, time of day profile, geographical pattern, etc. Some of this information will presumably be obtained by C&WJ's Carrier Services Division, and forwarded to the network implementation groups for provisioning. Others, such as actual traffic levels, will be collected in the network operations unit. In either case, it is important that this information does not "leak" back to the business units that are in competition with the entrant. The confidentiality of such information needs to be respected by the incumbent. It must not be*

disclosed to the entrants' competitors, including the incumbent's own retail and/or value-added businesses."[8]

By that statement, the OUR has acknowledged the mischief which Section 35 (1) (c) intends to avert.

4.5.6 The OUR continued by delineating rules "dealing with the potential misuse of information supplied for the purpose of facilitating interconnection" at Determination 6.1 which reads in its entirety:

"Determination 6.1: The Office has determined that the organizational arrangements, information flows and responsibilities set out below are to be inserted in the revised version of the RIO to provide safeguards for the handling of proprietary information supplied by competing carriers.

- *All communications between competitive carriers and C&WJ shall flow through a separate organization. This organisation will be referred to herein as, the Carrier Services Division, or CSD.*
- *"Customer Facing Divisions" of C&WJ are defined for purposes herein to include the units responsible for the wireless services operations of C&WJ, and the marketing and customer services units for all retail telecommunications services.*
- *The CSD shall be organizationally separate from other units in the company, and shall report directly to a corporate officer.*
- *The CSD unit shall not share offices with any customer-facing division of C&WJ. Separate buildings are not required, but the offices must be clearly separated from the others.*
- *All employees of the CSD 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.*
- *The CSD shall not share employees with any other unit of C&WJ.*
- *There will be no restriction on the movement of personnel to or from the CSD.*
- *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 CSD, shall be marked as "Confidential" and shall not be shared with any customerfacing division.*
- *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.*

[8] OUR's Determination Notice "Cable & Wireless Jamaica's Reference Interconnect Offer", February 2001, p. 25

- *Internal audits of the handling of confidential information shall be performed by C&WJ within six months after the effective date of the RIO and no less frequently than annually thereafter. The results of the audits and plans for action in response to the results, if any, shall be reported to the Office at least two months after completion of the audit."*[9]

4.5.7 The rules that are therefore contemplated under Section 35(1)(d) are those rules to enhance the efficacy and better implementation of any of the rules created under Sections 35(1)(a)(b) and (c). While the OUR has repeated aspects of Determination 6.1 above at paragraph 4.6 of the Draft Rules, it has gone beyond its mandate of proper management of information contemplated by Section 35 (1), and sought to extend the principles propounded in that section into the area of access to the essential facilities. As part of the Draft Rules, the subject of which is the access to essential facilities, paragraph 4.6 remains *ultra vires* the Act.

4.5.8 A simple illustration of the application of the *ejusdem generis* rule is seen in the case of *Brownsea Haven Properties Ltd. v. Poole Corporation*[10] . Section 21 of the British Town Police Clauses Act 1847 reads *"The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses and persons, and for preventing obstruction of the streets … in all times of public processions, rejoicings, or illuminations, and in any case where the streets are thronged or liable to be obstructed …"* The court held that the italicised words were by implication restricted to causes of congestion *ejusdem generis* with public processions, rejoicings or illuminations, since otherwise there was no point in mentioning these things.

4.6. <u>What is the relevance of Sections 54 and 55 to Section 35(3)?</u>

4.6.1 Sections 54 and 55 read:

54 (1) Subject to subsection (3), if the requirements of subsection (2) are satisfied, a carrier (hereinafter in this section referred to as the "provider carrier") may permit another carrier (hereinafter in this section referred to as the "requesting carrier") to enter, on a non-discriminatory basis, any land or facility owned or controlled by the providing carrier.

(2) The requirements referred to in subsection (1) are as follows –

(a) the requesting carrier shall, before the proposed date of entry on the land, give reasonable notice of the purposes for which such entry is required and the approximate dates and duration of such entry;

(b) the providing carrier shall be entitled to reasonable compensation in relation to that entry, to be determined

[9] *Supra*, pp.26-27
[10] [1958] Ch 574 at 610

in accordance with the relevant provisions of the Land Acquisition Act;

(c) entry on the land shall be carried out or supervised by the providing carrier and any action taken thereon shall be carried out by a certified technician.

(3) 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.

55(1) Where a carrier is denied permission to enter on any land or the permission for such entry is unreasonably delayed, the carrier may make an application to the court for an order permitting such entry.

(2) An application under subsection (1) shall-
(a) identify the land on 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 for 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 section 53 and 54.

4.6.2 Paragraph 4.5 of chapter 4 of the NPRM "The Telecommunications Competitive Safeguard (Voice Services) Rules, 2006" speaks to "Enforcement of Access". The paragraph begins *"In furtherance of its business in the telecommunication industry pursuant to the provisions at Section 55 of the Telecommunication (sic) Act, no carrier shall be unreasonably denied access to land."* The paragraph continues by reciting Section 55(2) and (3), and concludes *"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."

4.6.3 Section 35(3) provides a restriction to the Office's powers to make competitive safeguard rules under the section. *"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 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."* While C&WJ does not agree with the OUR's interpretation of Section 35(1) (d) as the basis for writing competitive safeguard rules in relation to essential facilities, it posits the following argument in the alternative. The Office must meet the two criteria of Section 35 (a) and (b). In relation to essential facilities, the OUR must first show instances of competing carriers who have been denied access to essential facilities and secondly that there is no other adequate remedy for this abuse. The Act provides a means of access to the land or facility owned by a carrier under Section 54. The Act provides the right to access in Section 54, and provides a remedy of an application before the Courts under Section 56 where access is denied. The use of the word "only" (underlined above) in Section 35 (3) makes it unequivocally clear that the competitive safeguard rules are not be made where "other means are available to the Office for the provision of an adequate remedy in relation to such abuse or practice." Sections 54 and 55 provide such a remedy for access to physical facilities. The fact that the Act does not provide a remedy for access to non-physical facilities, does not allow the OUR to simply create one.

4.6.4 In support of this position, C&WJ calls to its aid the rule of statutory interpretation commonly called the *expressio unius* principle. The maxim in its entirety is *expressum unius est exclusion alterius* (to express one thing is to exclude another). It is generally applied where a statutory provision might have covered a number of matters but in fact mentions only some of them.[11] In relation to remedies, where an act sets out specific remedies, penalties or procedures it is presumed that other remedies, penalties or procedures that might have been applicable are by implication excluded. An example of the application of the principle is Felix v. Shiva[12]. The case concerns Sections 103 and 20 of the British County Courts Act. Section 103 applies to the general principles of High Court practice to county court, while Section 20 of the Act specifically empowers the making of county court rules enabling the court to order a party to make an interim payment. It was argued before the Court that because no such county court rule had been made, a corresponding High Court rule for interim payment could be relied on by virtue of Section 103.

[11] Bennion, *supra*, p. 1072
[12] [1983]QB 82. See discussion in Bennion p. 1075

The Court held that Rules under Section 20 were the only available method, and in their absence Section 103 could not be relied on.

4.7. The conclusion of the discussion on the legal basis of the NPRM is that the OUR does not have jurisdiction under the Act to make competitive safeguard rules in relation to essential facilities. The rules are therefore *ultra vires* the Act. In the first NPRM, in which the OUR had purported to make rules in relation to data under Section 71 of the Act, C&WJ had expounded on the importance of the actions of the OUR being *intra vires* the Act. An excerpt is restated below.

> *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."*[13]

4.8. It is also important that it is realized that the essential facilities doctrine has long been recognized by academics, policy makers, legislators and the judiciary as being controversial.[14] The basis of the controversy is the fact that to its critics it represents an interference with property rights, and an over-zealous application of competition law principles which seem to have as their aim the "punishment" of firms defined as dominant. While C&WJ is not engaging in a wholesale criticism of the essential facilities doctrine, it is critical of the method chosen by the OUR to attempt to introduce the doctrine into the Act, when it was not the decision of the legislature to include the principle in this form.

5. CONCLUSION

5.1 C&WJ therefore concludes by reiterating that any competitive safeguard rules which are made by the OUR under Section 35 of the Act on essential facilities will be *ultra vires* the Act and void. C&WJ also reiterates that while it was not the focus of its response, the Company also has concerns about the substantive provisions in the Draft Rules on essential facilities, and point to the glaring

[13] C&WJ's Response To OUR's Notice Of Proposed Rule Making On Competitive Safeguards To Address Anticompetitive Practices By Dominant Carriers p.4

[14] See e.g. P. Areeda "Essential Facilities: An Epithet in Need of Limiting Principles" Antitrust L.J. 1990 (58) 841 and A. Bavasso "Essential Facilities in the EC law: the rise of an "epithet" and the consolidation of a doctrine in the consolidation of a doctrine in the communications sector" 21 Yearbook of European Law, 2002 , 63.

deficiencies in the methodology proposed for determining whether a network is an essential facility.

5.2 This is the second attempt by the OUR, in recent times, to assume legislative powers which it has not been given under the Act. This attempt to introduce competitive safeguard rules on essential facilities under the Act is particularly worrying as the OUR had itself admitted at paragraph 2.40 in the its Determination Notice on "*Dominant Public Voice Carriers*", published August 14, 2003:

> "*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]"[15]

END DOCUMENT

[15] OUR's Determination Notice "Dominant Public Voice Carrier", August 2003, p.17