



REPLY COMMENTS

TO RESPONSES TO THE

OUR CONSULTATION DOCUMENT

“COMPETITIVE SAFEGUARDS

DRAFT RULES - NOTICE OF PROPOSED RULE MAKING”

INDEX

INDEX	2
1. INTRODUCTION.....	3
2. RELIANT ENTERPRISE COMMUNICATIONS LTD.'S RESPONSE.....	4
2.1. FROM DIGICEL'S EARLIER RESPONSES.....	4
2.2. MOBILE, LANDLINE AND MINUTES.....	5
2.3. COST ORIENTATION.....	5
2.4. INTERNATIONAL CARRIERS.....	6
2.5. NOT VISIBLE.....	7
2.6. MOST AFFECTED.....	7
3. CABLE & WIRELESS JAMAICA LIMITED'S RESPONSE.....	8

1. Introduction

Mossel (Jamaica) Limited ("Digicel") takes the opportunity given by the Office of Utilities Regulation ("OUR") pursuant to the Telecommunications Act, 2000 (the Act) to all interested parties to comment on the responses given by parties to the OUR's Consultation Document "Competitive Safeguards - Draft Rules Notice of Proposed Rule Making" ("the Consultation document") on or before January 15, 2007.

Digicel reiterates that the current version of the Draft Rules continues to lack the basic necessary statutory basis. Digicel will have to consider the legal options available to it if the OUR continues with the current proposed rules.

Digicel will address some issues published by interested parties and reserves the right not to comment at this time on all issues and states categorically that Digicel's decision not to respond to any issue raised by the OUR or any party wholly or in part does not necessarily represent agreement in whole or in part with the OUR's or that party's position on these issues, nor does any position taken by Digicel in this document mean a waiver of any sort of Digicel's rights in any way. Digicel expressly reserves all its rights.

Any questions or remarks that may arise as a result of these Digicel comments may be addressed to:

Mossel (Jamaica) Limited (t/a Digicel)
Legal and Regulatory Department
10-16 Grenada Way
Kingston 5, Jamaica

Fax: +1 (876) 920 4626

Tel: +1 (876) 511 5951

Email: regulatory@digicelgroup.com

2. Reliant Enterprise Communications Ltd.'s response

Reliant Enterprise Communications Ltd.'s ("Reliant") in its response to the Office of Utilities Regulation's ("OUR") consultation document Competitive Safeguards – Draft Rules, Notice of Proposed Rule Making ("the Consultation document") of January 25, 2007 states that "further steps are required to make rules binding and encompassing of all dominant carriers to assure fairness in the marketplace".

Digicel supports fairness in the marketplace and reminds the OUR that it is market mechanics that ensures fairness in the marketplace. It is only where there are obstacles in the market place that regulation is used to address and prevent market failure. In keeping with accepted norms on the regulation of (the abuse of) dominance in a market, Digicel asserts that it is the consumer who is to be protected from the abuse of dominance by dominant firms, not companies that are inefficient and consequently not competitive. Companies that cannot withstand normal market pressures have no *raison d'être* to be in the market. It is not the business of the regulator to artificially preserve the existence of companies that are not viable and/or efficient.

2.1. From Digicel's Earlier Responses

Digicel has already pointed out in earlier responses the obvious point that competition does not benefit from over-regulation. This is supported by Competition Commissioner Neelie Kroes who in a speech at the Fordham Institute on the 23 September 2005 when reviewing Article 82 of the European Union Treaty ("the Treaty") within the European Union ("EU") declared that Article 82 analysis must be based on "effects in the market" and that "Enforcement Agencies should be cautious about intervening in the functioning of markets unless there is clear evidence that they are not functioning well".

Commissioner Kroes further said: "My own philosophy on this is fairly simple. First, it is competition, and not competitors, that is to be protected. Second, ultimately the aim is to avoid consumers harm. I like aggressive competition – including by dominant companies - and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 82 is to protect consumers,

and this does, of course, require the protection of an undistorted competitive process on the market. We need to take into account not only short term harm, but also medium and long term harm arising from the exclusion of competitors.”¹

Digicel is currently successfully operating in the now highly competitive Jamaican mobile market and as a result of competition Jamaican consumers in large numbers have experienced and continue to experience the prices for mobile communications consistently falling since the introduction of competition over the past 5 years.

2.2. Mobile, Landline and Minutes

In Reliant’s response on section 3.2.2 of the consultation document, Reliant says it is necessary to reconsider and follow the rules of the Act after looking at the total of minutes of the mobile operators in comparison to the total minutes of the dominant public voice carrier Cable and Wireless Jamaica Limited (Cable & Wireless). Besides the fact that this is a very vague and unsubstantiated observation it is actually irrelevant. The markets for fixed call termination and the markets for mobile call termination are separate and distinct markets. The size of a fixed termination market has no direct implication for the mobile termination market(s) even where a fixed public voice carrier is regarded as dominant in comparison to a mobile carrier.

The fact that the incumbent Cable & Wireless is dominant on the retail as well as on the wholesale market for fixed service is not in any way affected or negated by the total number of minutes in the mobile market and the division of it between mobile and fixed.

2.3. Cost Orientation

Reliant’s assertion that there is “no insight or regulation of cost based pricing for termination of mobile calls” is not accurate. In Jamaica, the call termination charges for calls terminating on Cable & Wireless’ mobile network are scrutinized by the OUR in the

¹Neelie Kroes, Commissioner for Competition, Tackling exclusionary practices to avoid exploitation of market power – Some preliminary thoughts on the policy review of Article 82, speech at the Fordham Corporate Law Institute, New York 23 September 2005.
<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/537&format=HTML&aged=0&language=EN&guiLang>

review process and the subsequent approval of the Cable & Wireless Reference Interconnection Offer regulated by the OUR. When approving a RIO, the OUR must ensure that it is accordance with the principle of cost orientation which has its basis in section 29(4) of the Act and is further set out in section 33(e) of the Act which determines that cost orientation is a cost "between the total long run incremental cost of providing the service and the stand alone cost of the service". It is against this background that Digicel refutes Reliant's statement that customers are "gouged". Digicel submits that these statements are not only unfounded but also somewhat theatrical.

Digicel submits that Reliant's casual reference to European examples to support its case is ill founded because the telecommunications markets in Europe are quite mature and advanced compared with the mobile market in Jamaica has only began to benefit from competition in 2001. Indeed although telecommunications liberalization began in Europe in the 1980's, the regulation of mobile termination charges in the European Union only started in late 2002.

Further, the current termination rates in Jamaica are around the same rate as the average mobile termination rate in the EU, and this only after little over 5 years of competition in comparison to the twenty years it took in Europe to get at that stage!

Reliant's reference to Canadian and United States of America examples are also ill-conceived since wholesale and interconnection in most of the markets in these countries have different wholesale charging models: Receiving Party Pays ("RPP") instead of the Jamaican (and EU) system of Calling Party Pays ("CPP").

2.4. International Carriers

It is the nature of international carriers to seek the lowest termination charge as this will determine total revenue and possible margin. Therefore, the fact that there are companies that complain about 'high termination rates' in order to get a lower price is hardly anything new in this industry. It applies to all international traffic. Reliant, predominantly a reseller of international traffic into Jamaica, knows all too well how this market functions.

Furthermore, Reliant states that the 'mobile market is so large in Jamaica', the operators have the 'ability to engage in anti-competitive pricing practices to limit competition'. This is intrinsically flawed logic as the larger a market becomes, the less limited competition will be. In a bigger market with more players, operators are not free to do indiscriminately what they like and must pay keen attention to their competitors and remain competitive.

2.5. Not visible

Reliant states that "there are various methods of price discrimination that are not readily visible to regulators or competitors" and continues to mention a few examples of these practices. Digicel reminds Reliant that Section 4(1)(d) of the Act does give public voice carriers and others the opportunity to apply for and request the OUR to investigate into possible anti-competitive behaviour by Licencees. Additionally the OUR is empowered on its own initiative to investigate and prevent anti-competitive behaviour without the need for additional powers.

2.6. Most affected

Finally, Reliant is of the opinion that the entity that is most affected by "such actions" is competitors. It then continues to argue that therefore strong motivators for deterrence are needed. It may well be the case that companies are most affected by competition but given the above repeated quote from the European Commissioner Neelie Kroes and the stated object of the Act as identified in section 3, it is not competing the companies that need protection by the legislation or the regulator but it is the consumer that needs its protection against possible failures of the market, anti-competitive behaviour and the abuse of dominance.

Section 3 of the Act very clearly states:

"The objects of this Act are to promote and protect the interest of the public by ["..."] promoting fair and open competition in the provision of specified services and telecommunications equipment ["..."] providing for the protection of

customers; [...] to promote the telecommunications industry in Jamaica by encouraging economically efficient investment in, and use of, infrastructure to provide specified services in Jamaica.”

Reliant’s suggestion to protect or even compensate a carrier for the adverse affects of competition to such carrier, is contrary to the nature of a liberalized market like the Jamaican telecommunications market. This proposal by Reliant, if adopted would lead to the irrational situation where inefficient companies are subsidized and protected and effectively ‘kept alive’.

3. Cable & Wireless Jamaica Limited’s response

Digicel has carefully reviewed the Cable & Wireless response and as has been stated earlier is also concerned about the legislative basis upon which the OUR is seeking to draft these rules.

End of Document

--