Response to OUR Consultation Document “Competitive Safeguards - Draft Rules Notice of Proposed Rule Making”

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1. Introduction

1.1. Digicel response

Mossel (Jamaica) Limited T/A Digicel (“Digicel”) would like to thank the Office of Utilities Regulation (“OUR”) again for the further opportunity it has given to Digicel to respond to the OUR “Competitive Safeguards - Draft Rules Notice of Proposed Rule Making” (“the Consultation”). Digicel looks forward to file further comments to the responses to this Consultation Document on or after February 16, 2007.

Digicel's failure to respond to any issue raised by the OUR in this Consultation Document does not necessarily represent agreement in whole or in part with the OUR’s position on those 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.

Digicel will discuss the Consultation Document and raise issues of any in accordance with the order of the Consultation Document as it was published by your Office and where Digicel deems it is necessary to do so. For convenience we have also provided a short executive summary in the below.

Any additional questions that may arise with regards to this response may be addressed to:

Mossel (Jamaica) Limited (t/a Digicel)
Legal and Regulatory Department

Peter-Paul de Goeij
Head of Legal and Regulatory Affairs
10-16 Grenada Way
Kingston 5, Jamaica
Fax: +1 (876) 920 4626
Tel: +1 (876) 511 5951
Email: peter-paul.degoeij@digicelgroup.com

1.2. Executive Summary

In Digicel's response to NPRM Competitive Safeguards to Address Anti Competitive Practices by Dominant Operators of July 2006, a number of principle matters were raised that Digicel felt had to be addressed by the OUR in its subsequent document.

1.2.1. Concerned

After careful studying of the Consultation Document that was filed by the OUR in response at the 30th of November 2006 ("the Consultation"), Digicel is concerned and it feels that the OUR does not properly deal with most of the concerns as they were raised by Digicel earlier. These points were not raised without a reason and Digicel believes they are important to this process of Rule making. Digicel submits that while it is pleased that it may contribute to consultation rounds, it also would like to see that its efforts are valued by the Office and at least acknowledged with a response and/or consideration by the OUR.

Because the Consultation Document of 30 November 2006 appears to be failing in this respect, Digicel feels it necessary to first reiterate the most important of these general issues that were raised by Digicel in the previous response document of July 2006.

Furthermore, Digicel is of the view that the overall quality of the draft rules of 30 November 2006 as they were published are not sufficient and can - in this state - not be lifted into Rules in force. Filing Rules of this - rather poor quality - may lead to problems and may even lead to avoidable litigation.

With all do respect to the Office, Digicel submits that another document setting out the OUR's preferred draft Competitive Safeguard Rules and another following consultation of all interested market parties may be necessary in order to achieve the necessary quality for any Competitive Safeguards Rules that are to become effective in Jamaica.

1.2.2. Legal Basis

As was raised in Digicel’s earlier response, any Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers (“the Safeguards”) adopted by the OUR must have a firm legal basis in order to ensure legal and business certainty. The legal basis for the proposed Safeguards and the draft rules appear very weak. For example, the underlying objectives of the Telecommunications Act 2000 (“the Act”) and the Fair Competition Act will need to be respected. We stress that the electronic communications sector has not been excluded from the scope of the existing competition rules found in the Fair Competition Act. Indeed, international best practice and comparable legislative frameworks in other countries the applicability of general competition rules to a specific sector has clearly fallen within the scope of the national competition authority and not the national regulatory authority.

As regards the Act itself, Part V explicitly concerns interconnection, while Section 35 concerns rules affecting dominant public voice carriers and the development of guidelines as to the types of uncompetitive practices to which the competitive safeguard rules apply. The OUR itself acknowledges the limited scope of Section 35 on several occasions.

1.2.3. Sector Specific Rules

The complex relationship between sector-specific rules and general competition rules, including the responsibilities and roles of the OUR and FTC, has not been addressed. In particular, the OUR will need to respect that the application of many competition law principles is different in an ex-ante environment than an ex-post environment; the starting point is not the same in many circumstances and can achieve different results on occasion.

There is no objective justification for regulatory intervention if the retail market is effectively competitive.

1.2.4. Nascent and innovative markets

Regulatory intervention with nascent and innovative markets needs to be avoided, particularly given the need to encourage investment and ultimately consumer benefits. Any regulatory intervention in such markets should be first required to meet a significant threshold and should be applied in a technologically neutral manner in any event. As an exception, however, Digicel encourages the OUR to intervene in the marketplace where an entity leverages its dominant position in one market to an emerging or neighbouring market. Such foreclose behaviour might include exclusive and unfair contract terms, bundling and anti-competitive discount schemes. Such business behaviour will choke the emergence of effective competition on nascent markets.

a) The identification of dominance under an ex-ante regulatory framework should be concerned with durable or persistent market dominance and conducted having regard to best practice economic principles.

b) A natural monopoly arises where economies of scale are observed, no matter how big the output. As a result, the marginal cost curve holds constant or falls with increasing volumes. In overall terms, average total cost is falling even when the entire market demand is satisfied.

1.2.5. Essential Facilities

And Finally, Digicel considers that any use of the 'Essential Facilities' concept should be tied to the technical economic concept of 'natural monopoly', since this is an instance of monopoly power where regulatory intervention may be justified. By focusing on whether or not there are inexhaustible economies of scale, as well as on average total costs, the OUR will be able to ground decision making in robust numerical analysis. The alternative is decision making based on highly subjective impressions of whether a particular asset is important or capable of replication, which may lead to a grossly over-inclusive and uncertain approach.

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1.3. General Comments

In section 1.3 of the Consultative Document on Competitive Safeguards to Address Anti-Competitive Practices by Dominant Carriers (NPRM)” of June 3, 2006 (the “first Consultation Document”), the OUR states that some retail markets have a 'vibrant competition'. However, the OUR does not specify what those markets are. One of the retail markets in particular has seen a widely recognised revolution invoked by Digicel: the mobile market.

1.3.1. ‘Lagging competition’

The OUR further suggests in section 1.3 of the first Consultation Document that competition in wholesale markets is ineffective, or has ‘lagged behind’, and the OUR seems to offer this lagging competition as the rationale for this consultation document. The OUR may well consider that a competitive wholesale market is per se a worthwhile, but that does not seem to be the focus of this first consultation document. Digicel respectfully suggest that that the OUR should do a proper competitive assessment of the retail market, and then to establish some failure at that end - which it can attribute to a malfunctioning or non-existent wholesale market - in respect of which some type of regulatory intervention may be required, and in respect of which, the currently existing powers are inadequate. Alternatively, the OUR should be indicating and explaining where the alleged problems have occurred (e.g. refusal to supply) and why the OUR’s existing powers, such as the pre-contract dispute resolution procedures, are inadequate.

1.3.2. Added Value

Furthermore, it is quite unclear what the added value of these Competitive Safeguard Rules is meant to achieve. These proposed rules deal with many of the issues that are already covered by general competition law (in terms of the concepts identified), which falls to the Fair Trading Commission (“FTC”) to enforce. In effect, the OUR seems to be creating a parallel competition law charter to be enforced by the OUR. In addition, as first Consultation Document itself acknowledges, the OUR has already adopted specific rules on several issues.

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1.3.3. Alternative

Digicel as an alternative would again like to respectfully suggest that the OUR develop in conjunction and close cooperation with the FTC and the telecommunications industry, a set of general guidelines to deal with anti-competitive conduct in the telecommunications sector. These general guidelines would set specific rules that would apply to the telecommunication sector. A similar approach was taken by the European Union and it proved invaluable in serving the complex and fast moving telecommunications sector.

1.3.4. Nascent market

In 1.6 of the first Consultation Document the OUR acknowledges that Section 35 of the Telecommunications Act ("the Act") deals with dominant public voice carriers only - but claims that its general powers under Section 4(1)(f) and Section 71 will allow the OUR to impose competitive safeguard rules. Firstly, Digicel wishes to underline to the OUR that the data market as it is outlined in first Consultation Document, is still a nascent market. Digicel therefore respectfully suggest that regulating new comers in this nascent market from the onset could hinder the development of a competitive market. This would limit the ability of newcomers into this market to fully compete with existing players such as Cable & Wireless Jamaica to the long term detriment of sustainable competition. Finally, with regards to the view outlined by the OUR in section 4(1)(f), Digicel wishes to point out that Section 4(1)(f) only summarises other functions of the OUR and does not *per se* confer any function on the OUR not otherwise conferred by the Act.

Moreover, Digicel is of the opinion that the OUR is bound by the structure of Section 35(1) of the Act that limits regulatory interventions exclusively to dominant voice carriers. That is to say Parliament has limited section 35(1) of the Act to dominant voice carriers and therefore the OUR can not widen the scope of this section through rule making.

1.3.5. WTO-ABT Reference Paper

In section 2.16 of the first Consultation Document, the OUR is introducing the concept of essential facilities from the WTO-ATB Reference Paper. Digicel considers that any use

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of the 'Essential Facilities' concept should be tied to the technical economic concept of 'natural monopoly', since this is an instance of monopoly power where regulatory intervention may be justified. By focusing on whether or not there are inexhaustible economies of scale, as well as on average total costs, the OUR will be able to ground decision making in robust numerical analysis. The alternative is decision making based on highly subjective impressions of whether a particular asset is important or capable of replication, which may lead to a grossly over-inclusive and uncertain approach.

The OUR in its first Consultation Document further specifically, states under section 2.17 that ‘Interconnection (is) to be ensured’. Digicel for over four years has tried to obtain direct interconnection between Digicel mobile network and the Cable & Wireless Jamaica (“Cable & Wireless”) mobile network. Up until today Digicel has been unsuccessful in its attempts and Cable & Wireless have *de facto* refused direct interconnection (through constructive refusal) to its mobile network. Digicel has filed a pre-contractual dispute requesting that the OUR deal with this refusal to interconnect behaviour by Cable & Wireless.

Given the mentioned commitments of Jamaica to the WTO-ABT, Digicel suggests that the centre of attention of the OUR in setting up the Competitive Safeguards first goes to the refusal, delay and/or frustration of interconnection as the OUR seems to understand the importance and adverse effects to competition in 3.1.3 of the first Consultation Document: “Delaying tactics, or delay in the provision of access (interconnection), occurs where the dominant carrier takes an unusual long period of time to provide the required input to its competitors”.

1.3.6. Anti-Competitive Practices

In the document, the OUR very briefly discuss the ten most common anti-competitive practices. Although, common they are extremely complicated matters of competition law and policy.

1.3.6.1. Tied Selling/Bundling

In section 3.1.4 of its first Consultation Document, the OUR discusses bundling as a practise that is usually anti-competitive. However, as is the case with certain types of price discrimination, there are cases where it is welfare enhancing.

1.3.6.2. Price Discrimination

There are many forms of price discrimination acknowledged in the international literature Digicel, therefore, urges the OUR to reconsider its definition as price discrimination can even enhance competition by having some people paying more so that other people can pay less. A clear example of this is in the US, where rural communities pay the same price for telecommunication services as urban communities.

1.3.6.3. Predatory Pricing

The definition that the OUR uses in its first Consultation Document for Predatory Pricing seems to be a modified version of the Areeda-Turner test - which is just one of many standards. Digicel would like to respectfully point out to the OUR that the most influential work on predatory pricing is being undertaken by Bradley, Riordan and Bolton[1] (Princeton and Boston University respectively).

1.3.6.4. Price Squeezes

In the section 3.1.8 of the first Consultation Document that deals with Price (Margin) squeeze one of the more important issues seems to be missing. In order to be able to speak of an unlawful price squeeze, one of the prices must also be predatory (unlawful).

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[1] In Ireland, the Irish Competition Authority adopted the Bradley, Riordan and Bolton doctrine on Predatory Pricing. In the Drogheda case the Competition Authority has taken the view that alleged predatory conduct by the Drogheda does not breach the Competition Act 2002. This view is taken on the basis that the Drogheda is not dominant nor could its alleged conduct constitute an abuse. The alleged conduct is arguably pro-consumer and more indicative of intense competition in the market than predatory conduct by a dominant undertaking. http://www.tca.ie/decisions/enforcement/e_05_001.pdf

1.3.7. Dominance in mobile call termination services

In section 3.4 of the first Consultation Document the OUR is discussing the Determination that declared all mobile operators dominant in the respective call termination markets, which has been under reconsideration for quite a while now: “the OUR is currently reviewing the matter and will issue a decision when it is completed. Given that the determination is currently under review, it’s currently not in force.”

1.3.8. Old Information and developments

Digicel does not quite understand how the OUR can reasonably suggest in its first Consultation Document that it is reviewing a decision pertaining to a process in which the last consultation on dominance was almost two and a half years ago. It is inconceivable given the time that has past since then, that the OUR would rely so it seems, on old information in some cases 3 to 4 years out of date today, to make a determination now. Furthermore, real prices have fallen significantly further since the last review and many other market dynamics have changed.

1.4. The Concept of Dominance

Before the OUR can even determine that there is Dominance, there is an extensive amount of factors that have to be taken into consideration by the OUR. This practise should be based on the major doctrine with regards to Dominance and the guidelines that apply to the establishing of Significant Market Power.

Dominance is essentially a special form of market power. The concept of dominance or Significant Market Power is following a well established worldwide regulatory practice, whereby important assessments of market power and corresponding regulatory interventions are left to a specially constituted regulator. The concept of dominance has its origins in the competition (anti-trust) law, including merger control laws of the European Union (“EU”). The definition of dominance has been adapted in a number of decisions of the European Court of Justice.[2] Dominance is defined as a situation where:

[2] See Case 27/76 United Brands v Commission 1979 ECR 207

"A market player enjoys, either individually or jointly with others, a position of economic strength that enables it to behave independently of competitors and customers in any relevant market for telecommunications services. "

1.4.1. Behaviour

The concern to identify whether firms are dominant is based on a desire to prevent or punish exploitative or exclusionary behaviour by one or more firms. A typical example of exploitative behaviour by a dominant firm would be over-charging. This would amount to an abuse of a dominant position where the price of a service did not bear a reasonable relationship to the economic costs of its provision.

In Europe, the key determinant for the imposition of certain regulatory obligations in the telecommunication sector is the concept of Significant Market Power ("SMP"). The SMP concept has evolved under the existing regulatory framework to reflect the concept of dominance as understood under EU competition law, though such dominance must be of an enduring nature for SMP to exist (which is similar to a finding of dominance under EU merger control laws but not necessarily the case for a finding of an abuse of dominance under Article 82 of the EC Treaty). Both concepts relate to market power. The greater that power the more likely the holder is of being able to act independently of both its customers and competitors.

In order to assist national regulators in deciding whether there is SMP in a particular market, the European Union adopted Guidelines emphasise the factors that should be considered by regulators when analysing a relevant market.[3]

These include:

a) The overall size of the firm under review;
b) The control of infrastructure not easily duplicated;
c) Technological advantages or superiority;
d) Absence of-, or low countervailing buying power;

[3] EC Guidelines, paragraph 76-78

e) Easy or privileged access to capital markets/financial resources;
f) Product/services diversification (e.g. bundled products or services);
g) Economies of scale.

1.4.2. Dominance in the Telecommunications Market

The making a determination of dominance or SMP in any case involves a very detailed appraisal of market specifics. A typical determination of dominance would at least require an identification of a specific market, an assessment of market shares, an analysis of barriers to entry, a consideration of effects of historic incumbency, an analysis of pricing data and a forward looking projection of how the market is likely to evolve, taking account of all of the factors as the were identified by the European Commission (see the above).

No one factor is necessarily conclusive: for example, a firm may have a large market share, but if other firms can enter the market quite easily and/or others have countervailing bargaining power, then the finding of dominance or SMP may not be warranted.

2. The November 30, 2006 Consultation Document

Now that the most important points that were raised in Digicel’s earlier response of July 2006 to the first Consultation Document have been sufficiently reiterated and voiced again and the OUR has the opportunity to respond it, we will continue in the below to respond to the second NPRM document Competitive Safeguard – Draft Rules (“the Consultation”) as was published by the OUR on November 30, 2006.

2.1. Chapter 1: Introduction

In paragraph 1.2 of the Consultation the OUR appears to have understood Digicel’s contribution to the Consultation process as “resistance”. Digicel has made it clear in its response of July 2006 that it feels that regulating nascent markets is not preferable and suggested to the OUR that focus on the abuse of dominance in markets that have established a considerable level of competition. Digicel expressly submits that it does not resist to any Consultation and Digicel sincerely hopes that criticism will not be mistaken for resistance. The fact alone that Digicel makes all effort to contribute to the Consultation process and has made some valid and sound arguments, only give proof of Digicel’s commitment to the process.

In paragraph 1.3 the Office further states that “it still holds the view that data services are specified services under the Telecommunications Act and are thus subject to regulation by the Office”. Digicel thinks the office should at least further clarify and substantiate why it still holds this view as this paragraph nor any other paragraph in the Consultation Document seems to address the foundations of this argument made by the OUR here.

In paragraph 1.4 the OUR mentions the number of complaints of alleged anti-competitive behaviour and the interest of facilitating competition as the reasons why it has decided to separate the rules for voice and data. Apart from the fact that Digicel is still interested to see what the number of complaints about anti-competitive behaviour is in the telecommunications sector (outside the complaints that it has made itself and is well aware of), it does not understand why that should lead to separation of the two fields in telecommunications regulations: voice and data.

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As Digicel has already raised in its previous response and reiterated in the above, it is the mere different stages of development that both different (partial) markets are in, that makes it important to distinct between voice and data. Data is a nascent market and the voice market (although not matured) has seen a period of (relatively) successful competition already, especially in the mobile market.

2.1.1. Consultation with the FTC

The OUR mentions the statutory duty it has in this case to consult the Fair Trading Commission (“FTC”). As will be further addressed and explained below, Digicel thinks that apart from the fact that this indeed is the case (as was pointed out in Digicel’s response of July 2006), Digicel also submits that any submission, consultation and/or recommendation made by the FTC should be an integral part of the Consultation process and should be documented and public to all interested parties and active contributors of this Consultation process.

Digicel will elaborate to this somewhat further in the below paragraph that deals with Digicel’s Response to the first Consultation Document.

In paragraph 1.6 of the Consultation document, the OUR explains that “the document addresses the responses to the first NPRM” but as already said in the above, Digicel doubts that the Consultation Document properly deals with the Digicel response of July 2006, even at a minimal level.

2.1.2. Chapter 2 Responses to first NPRM

In paragraph 2.1 the Office repeats part of Cable & Wireless’ response: “On reading the Act, it is clear that rules as to competitive safeguards, are applicable to dominant public voice carriers only…”. Then the Office deduces from this section that Cable & Wireless is in agreement with the issuance of competitive safeguard rules for the voice market. Apart from the fact that Digicel can not follow the OUR in this deduction of this Cable & Wireless quote, Digicel submits that the OUR would better acknowledge that what Cable & Wireless stated in its response in fact is correct: in accordance with the Act, Competitive Safeguard rules only apply to declared dominant public voice carriers.

In paragraph 2.2 in the Office’s response to a point raised by Cable and Wireless Jamaica about the absence of a basis in the law to regulate essential facilities, the Office seems to suffice with quoting words from sections 4(1)(a), 4(3)(c) and 35(1)(d) of the Act and then concludes without explaining or giving its understanding of the Act why it thinks Cable & Wireless’ argument is wrong. It overlooks the fact that the Act for instance does not mention ‘essential facilities’ but ‘facilities’ only.

In Paragraph 2.3, the Office discusses in a - very short - summary, the Response that Digicel filed on the first Consultation Document published June 2006. It mentions the fact that Digicel asked that the OUR could elaborate a little on the number and character of the complaints it received on anti-competitive behaviour. The OUR, in its response of November 30 2006, mentions the complaints that Digicel has filed with the OUR about anti-competitive behaviour by the incumbent, dominant public voice carrier Cable & Wireless and does not mention any other complaints about anti-competitive behaviour. Apart from the fact that of course at least Digicel is well aware about the complaints it has filed with the OUR about such behaviour, Digicel submits it would be better for reasons of transparency and clarity if the OUR could further substantiate in terms of numbers or statistics, its earlier explanation that there are so many market-failures or there are so many complaints about anti-competitive behaviour in the telecommunications market that further rule making is necessary.

Further, in the same paragraph the OUR addresses one of Digicel’s other issues as it did raise in its prior response document about the cooperation with the FTC. As already stated in the above, Digicel thinks that, only the statement that the OUR has consulted with the FTC in this consultation process, is not sufficient. Digicel thinks it is very important to know and understand whatever the FTC brought into the deliberations and thinks that all interested parties should benefit from this exchange of views between the two regulatory bodies. This is further in line with the principle of transparency and eventually will only add to the quality of the eventual rule making.

In the Office’s explanation of its own role in developing *ex ante* rules and setting the stage and environment for a level playing field and discouraging anti-competitive

behaviour it fails to first determine what the level playing field looks like. Digicel submits that this is essential to a successful setting of rules.

In the Office’s response to Reliant the Office says it “accepts the recommendation of Reliant to work with the Ministry to include new telecommunications legislation that reflects current market “landscape” conditions”. If Reliant and the OUR indeed meant to say that the current legislative framework is not perfect and does not meet the requirements of today’s situation in Jamaica, Digicel can follow so far, but Digicel would once again like to plead for technology neutrality in legislation and regulation. Therefore we should less consider current market landscape conditions and try to establish a framework that survives technology trends and market fluctuations and is able to stand the test of time.

3. Draft Competitive Safeguards Rules

In paragraph 3.1 of the Consultation Document the OUR states that competition increased in the various markets and that this requires an active regulatory involvement to remove barriers to entry and to ensure a level playing field for new entrants to compete fairly with incumbents and/or dominant operators. Digicel submits that if competition increases, the regulatory involvement should be decreasing as the market mechanics are doing their work. If competition increases, then barriers to entry should be flattening at the same time and the levelling of the playing field will also more and more be taken over by the market. It should be the abuse of dominance of dominant public voice carriers that the OUR increasingly focuses on in case competition increases. The market will make sure that the most efficient carriers will earn their place in the market.

Furthermore the OUR says it has the 'responsibility' under section 35 of the Act to establish rules dealing with competitive safeguards as where the Act in section 35 only speaks of a possibility for the OUR rather than a responsibility: the Office **may** do so to prevent abuse of dominance by **dominant** public voice carriers.

In addition, in this paragraph and throughout the whole document, the Office uses all sorts of words and descriptions for the carrier that this Competitive Safeguard rules will apply to: the dominant public voice carrier. In order to prevent misunderstanding or discourse about the meaning and applicability of these rules, Digicel respectfully suggests following the expressions as they are used in the Act only.

3.1. Reference Interconnection Offer

In the paragraph dealing with the Reference Interconnection Offer, the OUR discusses the RIO as the offer "setting out the terms and conditions upon which other carriers may interconnect with the public voice network of that dominant carrier, or other carriers may interconnect with the public voice network of that dominant or other carrier, for the provision of voice services". Digicel wishes to respectfully point out to the Office that section 32(1) of the Act that the Office is quoting from, applies to 'filing of offer by

dominant and other carriers - and not the specific Reference Interconnection Offer, which is an offer from a dominant public voice carrier only, that is to be scrutinized by the Office and serves as a starting point in the negotiations for interconnection requesting carriers.

In accordance with the Act the Reference Interconnection Offer only applies as a *reference offer* mandatory for the dominant public voice carrier (section 32(2)) of the Act. In accordance with the basic principles of contract law, the other party to an interconnection agreement can only be bound after a valid offer by the dominant public voice carrier (based on the reference interconnection offer as is scrutinized and approved by the OUR), negotiated between the dominant public voice carrier and the requestor-non dominant public voice carrier and a subsequent acceptance of an offer. This affirmation, this action by the requestor is necessary to make any section from a reference offer binding upon the non-dominant public voice carrier.

In the determination TEL 2004/11 dealing with Cable & Wireless' RIO 5, the OUR stated: "In keeping with the provisions of the Telecommunications Act, the tariffs terms of conditions of Offer approved herein will take effect on November 2004 in respect of all new interconnection agreements and will be incorporated into existing agreements **as provided for in the terms of those contracts**" [emphasis added]. In line with the above mentioned principles of contract law and the fact that no party can be bound by a unilateral offer without acceptance, the last sentence in the quoted OUR determination further proves that an approved RIO only applies to the issuer (in this case the dominant public voice carrier) and binds no other party, without the acceptance of that offer. Existing interconnection contracts have indeed as the OUR said in this determination, terms that provide for a procedure that must be followed before the Reference Interconnection Offer as approved (or parts thereof) can become part of an existing agreement. Interconnection Agreements have extensive terms that deal with review and how that should be dealt with, also in case the OUR has approved a new Reference Interconnection offer.

And finally, with regards to the Reference Interconnection Offer, the International Telecommunication Union itself, in a case study on Cable and Wireless Jamaica's

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approved RIO, writes the following very important notion about the function or role a Reference Interconnection Offer has in the Interconnection process in Jamaica:

> **“Objectives and Role of the Reference Interconnection Offer** [4]
>
> A “Reference Interconnection Offer” is 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.
>
> The incumbent (and any dominant carrier) is required by statute to lodge a RIO. Non-dominant carriers may submit their RIO’s to the OUR but this is not obligatory.
>
> **The requirement for a RIO aims to provide entrants with sufficient information about the incumbent’s network to allow for decision-making and to provide a baseline for negotiating an interconnection agreement”.** [Emphasis added]

And the ITU document about the Cable and Wireless Jamaica Reference Interconnection Offer then further continues with:

> “… In approving the RIO (or part thereof) the OUR must ensure that the RIO is consistent with principles for interconnection contained in the Telecommunications Act”.
>
> The OUR rejects RIO terms and conditions, and interconnection agreements, that do not comply with these principles. The OUR also rejects terms and conditions that are found to breach the Fair Competition Act (Jamaica’s competition legislation).
>
> Even where the terms and conditions of interconnection agreements are based on voluntary negotiations, or on acceptance of the RIO, the OUR may reject them if they are not consistent with the Telecommunications Act and the Fair Competition Act. Similarly, **the OUR may approve an agreement that is**

4 http://icttoolkit.infodev.org/en/PracticeNote.2622.html The ICT Regulation Toolkit is a joint production of infoDev and the International Telecommunication Union.

> **consistent with these Acts, even if it is not consistent with an approved RIO.”** [Emphasis added]

This finally also gives overwhelming proof of the fact that a RIO is not and can not be imposed on any party without its prior consent, or by virtue of being declared or determined in force by the OUR. An Interconnection Agreement that has been negotiated by the dominant public voice carrier and the interconnection seeker, based on the reference clauses from approved RIO, may vary from the clauses of this approved RIO, as long as **the varying sections are not inconsistent with the principles of the Act. Inconsistency with the RIO is not the measure for validity of any Interconnection Agreement it is the principles of the Act and the Act alone.**

At the end of this paragraph, the OUR states that the current RIO applies only to interconnection between Cable & Wireless and other carriers. As we have seen in the above, that is not correct as RIO’s do not apply to non-dominant public voice carriers.

3.2. Separation of Accounts/keeping of records

In paragraph 3.2.4 the OUR amongst others, states that “the principles embodied in this document will be applied to any other service carrier/ service provider that is declared dominant in a relevant telecommunications market. In that event, comparable guidelines will be prepared for any such carrier”.

Digicel submits that in order to act transparent and non-discriminatory, the same procedure must be followed as was the case with Cable & Wireless and a consultation on Accounting Separation for such carrier might proof to be necessary as the circumstances are different and have to be weighed into the determination of Rules applicable to any such carrier.

Finally with regards to this paragraph, Digicel fails to see the extra value to this consultation of the extensive copying of large parts of previous determinations, e.g. about Accounting Separation, in the consultation on Safeguard Rules for Dominant Operators.

4. Telecommunications Competitive Safeguard (Voice services) Rules, 2006

First of all, given the fact that the moment that these Competitive safeguard Rules are expected to come into force (we are well underway in the year 2007) is most likely to be somewhere in the summer of this year earliest, Digicel suggests to change the last part of the title or name into 2007.

4.1. Citation

Digicel respectfully suggests adding to the line in the paragraph at the end the following: as has been determined dominant pursuant to section 28 of the Act.

4.1.1. Interpretation

Overall, Digicel would like to suggest that the citation is to be as much uniform with - and in line with the citation of the Act and Digicel would rather not see any expansion of the Act through terms and explanations in this proposed Rulemaking that are foreign to the Act.

4.1.2. Competing carrier

In the proposed citation (and further throughout the proposed Rules) the OUR uses the term ‘competitive carrier’ whereas Digicel submits that this term is most likely not the best word to use in respect of the legislation and the meaning that appears to be given to it in the rules: a public voice carrier that is competing in the voice telecommunications market. Digicel therefore respectfully suggests that throughout the whole document the Office use **competing** carrier, rather than competitive carrier.

4.1.3. Customer facing division

The explanation or definition given to Customer facing division seems rather complicated and Digicel thinks that the following might be a simpler, more effective description of this term:

> “any part of a public voice carrier’s organisation that interfaces with subscribers and/or retail customers of this public voice carrier’s organisation or parts thereof”.

4.1.4. Dominant public voice carrier

The OUR in its definition uses the word ‘declared’ which is not the word that the Act uses in section 28 of the Act. The act speaks of ‘classified’. Digicel respectfully suggests following the wording of the Act.

4.2. Prohibited Actions

The OUR suggests to use as one of the instances in which an essential facilities owner shall not refuse certain actions or discriminate. Digicel thinks this can not only be an essential facilities owner but it must also at the same time a dominant public voice carrier in order to be regulated by these rules. Otherwise they do not apply. The rules should reflect this as much as possible.

Further, Digicel submits that the use of subjective terms such as: without having **reasonable** grounds” should be minimized to the extent possible. In this case Digicel submits that it does not make anything clearer then without the word reasonable added and in our view only opens up debate about what is reasonable under the circumstances. Digicel respectfully suggests deleting the word ‘reasonable’ and giving a list of grounds that are considered to be reasonable. Furthermore we suggest deleting the word under (c), ‘unfairly’.

Finally, with regards to this paragraph, Digicel respectfully submits that copying complete sections from the Act into the proposed rules does not per definition add value

to the contents of the proposed rulemaking document. Given the fact that they are in force by law already, there is no real need of repeating all in this consultation document.

4.3. Safeguarding of Proprietary Information

Under paragraph 4.6 section (g) the Office suggests the following text: "Where an employee is promoted or transferred out of the wholesale business unit, the company shall ensure that any confidential information that is acquired while that employee was a member of the wholesale business unit is not used to the detriment of the company supplying that information or to gain a competitive advantage in the market."

Digicel thinks that this can be made even more precise by adding the following piece of text to the Office's proposal: "… in the customer facing department of the dominant public voice carrier, directly or indirectly …" so that the whole section would read:

> "Where an employee is promoted or transferred out of the wholesale business unit, the company shall ensure that any confidential information that is acquired while that employee was a member of the wholesale business unit is not used in the customer facing department of the dominant public voice carrier, directly or indirectly, to the detriment of the company supplying that information, or to gain a competitive advantage in the market."

Section (i) of paragraph 4.6 of the Office's proposal is very unclear and may lead to confusion and disagreement. Digicel submits that the following draft text may be considered by the Office:

> "a public voice carrier that has been classified dominant pursuant to section 28 of the Act, shall each calendar year perform an internal audit of its compliance with these rules and the handling of Confidential Information as referred to in this section of the rules. The dominant public voice carrier shall submit the results of the annual internal audit to the OUR as soon as the audit is complete and the result becomes available, but in any event within two (2) calendar months after the year on which the internal audit is performed, has expired.

> In the event that it is the first time that a public voice carrier is classified as a dominant public voice carrier, the audit shall be performed and ultimately submitted within six (6) calendar months after the date the carrier’s classification as a dominant public voice carrier by the Office pursuant to section 28 of the Act, or such longer time period after the moment of classification, as the Office may prescribe”.

We feel that this may assist the Office in constructing the clearest text for these rules and may prevent any unnecessary discussions in the future.

And finally with respect to this paragraph under (j) the Office proposes the following text to be enclosed in the rules: “Audits should certify that the dominant public voice carrier operates in accordance with the rules a-h of this section.” Digicel suggests tightening this text up further by suggesting the following text to the OUR:

> “Audits shall certify that the dominant public voice carrier operates and has operated in compliance with the Safeguard Rules for Dominant public voice carriers and the principles of the Act.”

4.4. Provisioning of Service

Under (1) in paragraph 4.7 where the Office suggests: “…. *should* not put the buyer of such service...” Digicel submits to the Office that it rather uses shall in stead of should because the meaning of the word ‘shall’ is more demanding than the word ‘should’.

Furthermore, Digicel suggests adding to the last sentence of the section (1) of this paragraph after the part: “….buying a similar service.” the following sentence:

> “…., such including internal customers, i.e. other business units, or operating companies owned in whole or in part by the dominant public voice carrier that the Wholesale Business Unit belongs to or has a majority control over.”

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And finally with regards to this paragraph under (4) the Office uses ‘retail arm’ where Digicel would rather keep the terms as universal as possible and would like to suggest using the term Retail Business Unit in stead. Furthermore, this section also needs to include at the end:

> “… (partly) owned and/or controlled by the dominant public voice carrier.”

4.5. Unfair price discrimination

Rather then calling it unfair price discrimination, Digicel would like to see a different approach. First of all, discrimination can also occur outside the scope of charges applicable to wholesale services. The section should deal with all forms of discrimination and mention the discrimination that the Office, under certain preconditions, might allow. Therefore it should just be called: ‘Discrimination’.

Furthermore, in this paragraph or section under (a) and (b) should be completely replaced by the following text suggestion:

(a) “shall not charge its wholesale customers a higher charge for the underlying service than it charges its own retail customers for the retail version of the service; and

(b) “shall not discriminate, in price nor in action (or the lack thereof), between any of its wholesale customers (including its prospective customers), whether they are owned and/or controlled by the dominant public voice carrier or any third party public voice carrier, if they are requesting the same or similar service”.

In the event that the Office feels that certain types of discrimination could be allowed under certain circumstances, Digicel suggests it ads a subsection (c) in which it lists the circumstance and/or considerations under which certain specific occasions might be allowed.

4.6. Unfair cross-subsidy

In this section the Office should use dominant public voice carrier, such further in line with the Act, in stead of referring to ‘dominant voice carrier. Furthermore Digicel thinks that the section should be altered as follows:

> “A dominant public voice carrier shall not use any of the revenues it has earned or earns in markets in which it has been declared dominant and incur losses on - and/or subsidize services in - another market where it has not been declared dominant and thus cross-subsidise services in that market.
>
> It may not offer services in the market they have not been declared dominant, at lower rates then would otherwise be economically possible. A service is deemed to be cross-subsidised if over the lifetime of the service, the revenues obtained from the service, do not exceed the outcome between the total long run incremental cost (“LRIC”) of providing the service and the stand alone cost (“SAC”) of providing the service, so, however, that the prices shall be so calculated as to avoid placing a disproportionate burden of recovery of common costs on services.
>
> Where there is a group of services sharing common costs, a combinatorial test will be applied to examine whether the services between them cover the rate set between LRIC and the SAC of the combination of those services”.

As shown in the above, the proposed text also correctly reflects the principle of section 33 (e) of the Telecommunications Act that applies to interconnection charges.

4.7. Complaints Procedure

From experience Digicel knows that these procedures must be very precise and water-tight in order to prevent discourse about the complaints procedure itself. Digicel feels that although it will give some text suggestions to add to the quality of the proposed, it still needs some extra attention by the Office. Under section (1)(i) of paragraph 4.11 of

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the proposed rules, the OUR describes the procedure in case there is an alleged breach and an aggrieved party wishes to file a complaint. Digicel thinks the dominant public voice carrier should at least be simultaneously served with a copy of the complaint and further it should state that the complaint shall be in writing and is supported by all possible, rather then necessary documentation.

Furthermore under (ii) the time within which the OUR is to acknowledge receipt of the complaint should be limited as much as possible and therefore should include the words ‘of the complaint’ and it should do so in writing so it now reads:

> “The Office shall review the complaint and the supporting documentation and inform the complainant in writing within fourteen (14) calendar days of receipt of the complaint, as to the proposed course of action”.

Furthermore, Digicel feels it necessary to restraint the number of times the OUR may request for additional information and section 2 (a) of paragraph 4.11 should reflect that.

And finally with regards to this paragraph under section 3, Digicel suggests that the text will be altered into the following:

> “The dominant public voice carrier against whom the complaint is directed shall be given the opportunity to respond to the allegations. This response shall be in writing and shall be copied to the complainant. If necessary the Office, the complainant and/or the defendant may request face-to-face meetings”.

End of Document

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