

**Consultation on Liberalisation of
Telecommunications Directory Information Markets
(Products and Services)
Cable & Wireless Jamaica (CWJ)
Comments on Responses to
First Consultative Documents
October 2001**

1 Introduction

1.1 Pursuant to the Consultative Document “*Liberalizing Telecommunications Directory Information Markets (Products and Services)*” issued by the Office of Utility Regulation (OUR), July 2001, interested parties have filed comments on the issues set out therein. Cable and Wireless Jamaica (“CWJ” or the “Company”) has received comments filed by the Fair Trading Commission (“FTC”), Digicel and Jamaica Promotions Corporation (“JAMPRO”). According to the procedures established by the Consultative Document, these are the initial comments of CWJ on the responses filed by other parties. CWJ expects to make additional comments on these issues as the OUR proceeds with the further steps as outlined in Table 1.0 of the Consultative Document. In the event that any of the interested parties has made a statement in its comments contrary to the position of CWJ, failure to address such a statement or comment specifically below should not be taken as agreement by CWJ.

1.2 At the outset, the Company notes that the Consultative Document states that (at page i):

“The proposals put forward in this document are intended to provide improvements in directory services and products, to prevent the misuse of customer information and generally to create a competitive environment.” [Emphasis added]

1.3 CWJ has indicated in its comments that it supports measures to open the market which will provide demonstrable public benefits in the particular circumstances of Jamaica. The objective should be to improve services to the public and, accordingly, any measures proposed should be tested against that standard. However, there were suggestions made by interested parties which, if implemented, would actually prevent or undermine improvements in services to the public. These measures, intended to assist the business plan of potential new entrants,

- 1.4 disregard the adverse impact on the public. For example, Digicel (at page 10) proposes that, until new entrants in DQ services are established, “C&WJ should be restricted from introducing an upgraded DQ service”. In effect, Digicel advocates that the OUR prohibit ongoing improvements in the nature or quality of directory services in order to assist Digicel’s business objectives. This is the precise opposite of the purpose of regulation which is to protect the public and to improve the overall level of service in all respects. This case serves as an example of what often becomes a pattern: new entrants advocate measures which may serve their own business plans but which actually hinder the quality or value of services available to the general public. Accordingly, CWJ reiterates its view that the various mechanisms or options for market opening should not be regarded as objectives in their own right but only as potential means which must be shown to produce tangible benefits to the Jamaican public.
- 1.5 The Consultative Document indicates (in Table 1.0) that there are a number of further steps contemplated by the OUR including the publication of a Code of Conduct. The proposed date for the Determination Notice is March 2002. In this regard, CWJ notes that Digicel has urged the OUR to accelerate the whole process and issue a Determination Notice by January 2002. In the view of the Company, the first round of responses of interested parties to the Consultative Document has revealed five important policy, operations and legal matters that must be resolved first before a Code of Conduct can be issued or further steps taken. Each of these is discussed below.

2 Intellectual Property Rights

- 2.1 C&WJ remains of the view that the issue of intellectual property rights in the C&WJ databases must be fully assessed and accounted for before any liberalization occurs which may affect the rights of C&WJ and its suppliers.
- 2.2 In this regard, we note that Jamaican Promotions Company (JAMPRO) and Digicel both acknowledge the importance of intellectual property rights in their submissions, echoing the position of the OUR itself which has recognized that intellectual property rights can have a significant impact on the market for information services.

- 2.3 Specifically, Digicel, in its submission, has noted that “the importance of intellectual property rights in any liberalized telecoms market should not be ignored....” And that “[i]nsofar as the information is deemed public or non-confidential, service providers should make all the necessary information available for the purpose of providing a common DQ database to which all services providers can access....” JAMPRO acknowledges in its submission that directories in which there is an original selection and arrangement of content can be said to be original and therefore subject of copyright.
- 2.4 C&WJ reiterates its previously stated position that it has proprietary rights in its databases, in both electronic and printed form. Certain of the information contained in the various C&WJ databases is also confidential business information of C&WJ, the proprietary nature of which is protected by law. As noted in our first submission, the protection afforded by law to the C&WJ databases and the data therein recognizes the significant time, money and effort (both intellectual and otherwise) which has been invested, and continues to be invested by C&WJ in the creation, maintenance and verification of these databases. We disagree with the assertions made by JAMPRO that “the White pages in a telephone directory are not generally subject to copyright protection” and that “copyright protection does not prevent someone from extracting the data and making their own arrangement.” Protection of databases and the data therein as intellectual property under Jamaican law is consistent with the treatment of databases and collections of data in relevant international jurisdictions, most notably Europe and the United Kingdom.
- 2.5 We take this opportunity to emphasize again that third party suppliers also have intellectual property rights in the software and systems that form an integral part of the C&WJ directory services offerings. These third parties are suppliers (from outside of Jamaica) who have provided essential systems for the operation of directory services. Such third party rights must be taken into account and dealt with in a fair and equitable manner in any liberalization approach which is adopted. Expropriation of their rights without compensation is not a valid option from a legal or public policy point of view.
- 2.6 As noted previously, C&WJ does not suggest that its legal rights in its various databases, directory services, products and the operating systems that support them would bar any and all forms of liberalization of directory services. However, CWJ is of the firm view that its intellectual property rights and those of third parties must be taken into account as a primary issue in determining the nature, manner, and scope of any access that may be granted to the C&WJ databases. Restrictions on the data accessible, the manner of such access, the use of data, and appropriate and

fair compensation for such access must be considered in order to ensure that any new system respects intellectual property law, and the rights granted thereunder.

3 Costing and Pricing

- 3.1 Before any measures to open the directory services market are taken, it is necessary to measure the appropriate cost of service elements in order to set proper prices for such elements. The Consultative Document proposes six Charging Principles adopted from those developed by OFTEL. CWJ has indicated that it generally agrees with these principles. Digicel has stated (at page 3) that long run incremental costs (LRIC) should be calculated in order to establish the appropriate basis for pricing. CWJ agrees with this view. However, there is no approved methodology at this time to determine LRIC. Nor has there been any costing exercise to gather the data necessary to apply such a methodology. An LRIC methodology needs to be developed and the costing data to implement such methodology needs to be collected. Otherwise, any pricing of directory service elements will fail to reflect LRIC and will not meet the OUR's principle of cost causation. In this regard, it must not be assumed that costs and prices developed in other jurisdictions are equally valid in Jamaica. Costing studies must be undertaken in order to properly reflect the economic reality and circumstances of Jamaica. The measurement of these costs must also reflect fair and reasonable compensation to the holders of intellectual property rights that may be affected by the liberalization plan.

4 Content of Directory Databases, Use of Customer Data and Customer Privacy Expectations

- 4.1 A further issue that needs to be determined before any plan of implementation can proceed is the relationship between customer expectations and the contents of any comprehensive databases that may be developed through this OUR proceeding. Currently, customers have a right to a listing in the printed directory and a right to be excluded from all forms of directory service if they wish. Customer expectations regarding their rights to control their own listing information should be a central part of this regulatory process. Indeed, the *Telecommunications Act*, Section 47, makes privacy a statutory right of customers by providing that information may not be disclosed to third parties without written customer consent.

- 4.2 Privacy principles affect both the content of directory databases and the uses that may be allowed of customer data. Specifically, to date most cellular customers have chosen not to have their listing information included in either the printed directory or the directory enquiry database. If the OUR wishes to establish a system by which both CWJ and all other service providers may offer a comprehensive directory enquiry service for all subscribers, including cellular services, subscriber data will have to be exchanged between carriers. However, there remains the question of whether this can or should be done without regard to customers' views or expectations regarding their personal information. Section 47 of the *Telecommunications Act* indicates that their consent is required before such data may be transferred to parties outside the carrier/customer relationship.
- 4.3 Furthermore, it is also necessary to establish more general principles regarding what limitations should apply regarding any other uses of customer data, such as use for telemarketing purposes. If customer data may be transferred (notwithstanding Section 47) to other service providers such as new directory publishers or new directory enquiry service providers, there must be effective limitations on use of such customer data for any other purposes. In many jurisdictions, customers have expressed increasing concern regarding abuse of their privacy through use of their personal information for telemarketing, direct mailing or customer profiling. Accordingly, having regard to the interest of the general public (which should be the primary consideration throughout), some enforceable limitations must be established on any use of customer data for non-directory services purposes.

5 Access Numbers for Directory Enquiry Services

- 5.1 Several parties suggested that the current short code, 114, should be discontinued. For example, Digicel advocates "creating new short codes for DQ and completely removing the 114 short code from the market...". The Fair Trading Commission also suggests that continued use of 114 "will not facilitate effective competition in the provisions of DQ services".
- 5.2 In response, CWJ notes that the general public of Jamaica is very familiar with the 114 code and recognizes it as a convenient way to reach DQ service. Digicel acknowledges this in its comments. The Consultative Document recognizes that the continued use of the 114 code is compatible with competition in DQ services:

“6.1 In the interest of conserving numbering resources, it would be desirable to continue using the existing short

access code 114 for all subscriber access to DQ service providers. Each service provider would configure their network to deliver 114 calls to their respective DQ call centres. Further, subscribers' familiarity with 114 will facilitate a seamless transition from the existing single DQ service provider to multiple DQ service providers.”

- 5.3 CWJ supports this approach. Each service provider can continue to serve its subscribers by allowing customer access to DQ through the 114 code. This would permit multiple DQ services to operate but minimize any disruption to the public. Many countries (e.g. the U.S.A. and Canada) which have competitive service providers have adopted this approach. Digicel's proposal to abolish the 114 code would harm customers by increasing customer confusion and undermine what the OUR has described as a “seamless transition”. This may serve Digicel's interests but it is not in the interest of the general public.
- 5.4 Accordingly, the matter of access codes for DQ services needs to be resolved before any further steps may be taken toward liberalization.

Conclusion

The foregoing outlines CWJ's initial comments on the responses filed by various parties in respect of the OUR consultative document. We reiterate our view that important policy operations and legal matters presented here must be resolved first before a code of conduct can be issued or further steps taken. The Company welcomes the opportunity to consult further with the OUR and other interested parties who have filed comments as this 1st phase of the consultation proceeds.