



LIME's Response to the OUR's Consultation on its Application for reconsideration of the Determination Notice titled *Assessment of RIO 6*, Document No. Tel2011002_DET001 issued on December 24, 2012

February 19, 2013

Introduction

Cable & Wireless Jamaica Limited, trading as LIME (“LIME”) appreciates the opportunity to participate in the OUR’s Consultation on LIME’s Application for Reconsideration of its Determination Notice titled *Assessment of RIO 6*, Document No.Tel2011002_DET001 issued on December 24, 2012.

It is LIME’s considered view that in arriving at its decision the OUR made material errors of fact and law. LIME relies on its Application for Reconsideration and anticipates that all issues raised will be given due consideration. Notwithstanding, LIME takes this opportunity to amplify the following matters contained in its application:

Effective date of Determination Notice

The implementation date of the Determination Notice for Assessment of RIO 6 is punitive in its effect and immediate compliance was impossible.

The intent of any notice is to inform the affected parties and provide them with an opportunity to prepare for effective implementation of the matter addressed in that notice. When the OUR makes a decision it is fundamental to due process that adequate notice be provided prior to its implementation. A Determination Notice issued the afternoon of December 24, 2012 (Christmas Eve), when offices were closed (as is the custom) with an effective implementation of December 24, 2012 is in effect not a notice. By virtue of the time of service alone, the Determination Notice is retrospective in its effect. Further, even on effective receipt of “notice” on December 27, it could not be instantaneously implemented.

Given the complexity and the scope of the required changes brought about by the Decision, it is unreasonable and prejudicial to LIME’s operations to require that the Decision be implemented retroactively. At best, such a precedent is to be avoided.

Determination 15

Unless there are technical reasons on the part of the interconnecting operator that prevents it from obtaining direct interconnection with LIME's mobile switch, there should be no transit or other cost of connection for the interconnecting operator other than the tariffs listed in the Tariff Schedule.

As stated in LIME's application, Determination 15 fails to take into account the complexities involved in establishing the technical requirements for such direct interconnection between LIME mobile and each requesting operator. Given the responsibility of both parties to be interconnected for the Joining Service that provides the interconnection between them, the points of interconnection and the anticipated traffic requirements must be agreed between the parties in order for service to be appropriately dimensioned. Technical readiness for interconnection cannot be unilaterally determined.

Furthermore, in order to arrive at an agreement to interconnect, technical readiness is only one required component. Terms and conditions upon which the service is to be offered, including commercial considerations and prices must also be established prior to proceeding to interconnect. As worded, the determination errs in ignoring the necessity of agreement on all relevant matters prior to implementation and potentially prejudices the interconnection provider by triggering the elimination of transit charges before these requirements are met.

Furthermore, the current consultation on the Mobile Reference Interconnection Offer for the entire telecommunications industry (the "Mobile RIO") is expected to determine all of the terms and conditions for direct interconnection to mobile (including technical, commercial and legal matters). Determination 15 not only requires bilateral negotiation of such terms and conditions, ahead of the Mobile RIO (or interconnection without agreed terms and conditions), but penalizes failure to arrive at such bilateral terms and conditions by depriving LIME of legitimate recovery of the costs associated with providing its transit service.

LIME submits that Determination 15 as worded could prematurely trigger the non-application of transit charges to LIME's detriment. LIME renews its request for the Office

to revise the wording of the determination, and submits the following alternative wording for your consideration:

In the event that LIME refuses to permit direct interconnection to its mobile switch after the parties have agreed the relevant technical requirements and appropriate commercial terms, there should be no transit or other cost of connection for the interconnecting operator other than the tariffs listed in the Tariff Schedule.

Determination 39

The tariffs for Termination, Special Access, and Transit Services contained in the draft RIO 6 are not approved. The approved RIO 6 tariff for PSTN Termination, Retention rate, Incoming International Call Termination, Transit, National Directory Enquiry, 119 and 110 Emergency Services are as indicated in Table 4. The tariff for Weather Warning, 1-888-Call CWJ Access, National Freephone, International Freephone, and Home Country Direct Collect Service shall remain unchanged at the level previously approved in the RIO 5A Tariff schedule.

(b) Use of RIO 5A Rates instead of RIO 5A1 Rates in the absence of acceptable benchmarks

LIME reiterates its position that the Office having determined that it will use RIO5A rates rather than the RIO5A1 rates is a material error of law and fact.

LIME takes the opportunity to set out the chronology:

1. November 19, 2004, the OUR issued a Determination on ***Assessment of Reference Interconnect Offer (RIO-5) and Tariff Schedule 5A*** hereinafter referred to as the “RIO5A Determination”. Determination 4.2 provided inter alia that charges may be varied:
 - 10.4 By C&WJ or the Teleco in the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month

period concluding during the Term of this Agreement, in order to reflect such currency devaluation or revaluation.

2. December 2004 LIME submitted an application for Reconsideration of the RIO5A Determination pursuant to Section 60(4) of the Telecommunications Act 2000 (“the Act”).
3. September 2006 the dollar having devalued, LIME varies the rates in accordance with clause 10.4 and submits amended the Tariff Schedule.
4. March 16, 2007 the OUR issued Reconsideration Notice Tel 2004/11.1. The Office pointed out that C&WJ had requested a modification of Determination 4.2 “*which related to the eventuality of a devaluation or revaluation against the US dollar. **The determination as stated allows either party to unilaterally and automatically vary charges in the event of a devaluation or revaluation against the US dollar in excess of 5% in any six month period.***” (*emphasis added*)

In other words the Office recognized that the determination allowed LIME to unilaterally vary charges in the event of a devaluation of the US dollar.

The Office thereafter issued the following determination 4.2

Determination 4.2

In the event that the Jamaica dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this Agreement, either party reserves the right to vary the charges in order to reflect such devaluation or revaluation. Notwithstanding, any such change shall only become effective after approval by the Office.

Clause 10.4 should be modified to indicate that the provision with regard to devaluation or revaluation shall apply equally to all parties.

5. Accordingly approval of the Office was sought by LIME with respect to subsequent applications of the devaluation clause in November 2007 and December 2008. The Office approvals are contained in Determinations notices Tel 2007/16 and Tel 2008/14.
6. Tariff Schedule RIO 5A1 was submitted to the Office by LIME in keeping with the methodology prescribed and approved by the Office for the implementation of exchange rate variations.

LIME refers to paragraph 5.32 of the Assessment of RIO6 which states as follows:

“The Office accepts LIME’s point that it would be inconsistent for the Office to indicate that it has doubts about the accuracy of the model results and then accept certain portions of it that are within the benchmark levels and reject those portions that are not. However, the Office cannot accept LIME’s proposal to approve the RIO-5A1 rates because as pointed out by Digicel, these rates were never vetted nor approved by the Office. As such, the Office is in no position to vouch for the accuracy of the RIO 5A1 tariffs.”

LIME repeats its position that the use of RIO 5A rates where there are no benchmarks, instead of the use of RIO 5A1 rates is unfair, inappropriate, and a misrepresentation of the rates that immediately preceded LIME’s proposed RIO 6. Moreover, LIME relies on *inter alia* the doctrine of estoppel and states that the Office is precluded from denying or asserting anything to the contrary of that which has been represented either express or implied by acts, deeds or conduct. Having noted in the Reconsideration Notice that **“The determination as stated allows either party to unilaterally and automatically vary charges in the event of a devaluation or revaluation against the US dollar in excess of 5% in any six month period.”** the Office has acknowledged that LIME did not require its approval to apply devaluation. Accordingly, the Office is estopped from:

- a) Denying the applicability of the RIO5A1 rates as they were varied pursuant to the applicable clause; and
- b) Asserting that *“the rates were never vetted nor approved by the Office”* as the Office has conceded that the variation of charges prior to March 2007 required neither its vetting nor approval. As aforementioned in March 2007 the Office added a requirement that application of a rate change pursuant to the Devaluation Clause

“shall only become effective after approval by the Office”. This Reconsideration Notice was effective March 20, 2007 and was not retrospective in effect.

In light of the foregoing, LIME submits that the OUR's ruling that RIO 5A rates be used going forward is unfair and unjustified, as neither the depreciation of Jamaica's exchange rate nor the provision in the RIO permitting adjustments upon the occurrence of such depreciation/devaluation is in dispute.

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