RESPONSE TO THE OUR's CONSULTATIVE DOCUMENT

on

PRICE CAP PLAN FOR CABLE & WIRELESS JAMAICA
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March 31, 2009

1. Introduction

In establishing the initial Price Cap plan in 2001, the OUR intended that it would incentivize Cable and Wireless Jamaica (now trading as LIME) to become more efficient in providing services for which there was not much competition at the time. The Price Cap Plan sets a cap or limit on the prices that LIME can charge for services in the price cap basket.

LIME's Price Cap Plan (the Plan) was intended to be a transition mechanism to competition. Against this background, LIME invites the OUR to acknowledge that for some time now, competitive pressures have effectively acted as a constraint on its prices under price cap. As a result, the weighted average price level for services in the Plan falls significantly below the price cap index allowed. This means that while LIME could have legitimately increased some rates (as permitted by the Plan) by as much as 30%, it did not, because the aggressive competition in the market would have rendered such a move unprofitable.

This is a clear indication that since the initial Price Cap Plan, Jamaica's telecommunications industry has changed tremendously and is now very competitive. Competition has achieved the desired result and the OUR is urged to now remove Price Cap regulation from LIME. Otherwise, LIME will continue to be over regulated in an industry that is competitive. Its viability will be compromised, as well as customers' medium and long-term interests.

2. No Basis for Maintaining Price Cap Plan for LIME

2.1 The OUR notes in paragraph 2.5 of its consultation on 'Price Cap Plan for Cable & Wireless Jamaica' (the Consultation) that there are three criteria for removing services from the Price Cap, these being:

- At least one competitor is actually operating in the relevant market using its own switching and transmission facilities.

- In aggregate, other competitors have capacity in place to meet a large portion of the total output of the relevant market.; or
- The Office determines that the market for the service is not characterized by anticompetitive practices.

2.2 The Office also acknowledged, at paragraph 1.8, of the 'Specific Price Cap' rules published in 2001 that '..*it is anticipated that the market for telecommunications services will become increasingly competitive and that over time the number of products and services regulated by the price cap will fall…*' It has been almost nine (9) years since the original Price Cap Plan for LIME was implemented.

2.3 Since then the following have occurred:

- The OUR has issued over four hundred (400) licences.
- There are three mobile operators, namely Digicel, Claro and LIME, which compete with the LIME's fixed line service in the offering of domestic voice and international outgoing service.
- A new submarine cable system called the Fibralink Cable System, with significant capacity, has been landed in Jamaica. LIME purchases some of its Internet and Leased Circuit capacity from Fibralink.
- Flow, a company that offers fixed, Internet and cable TV service has entered the Jamaican market. Flow is an affiliate of the company, which owns the Fibralink Cable System.
- Digicel now offers a fixed service, using WiMax. This service is targeted to business customers in particular.
- There are less than 400,000 customers on LIME's fixed network, while there are approximately 2.5 million customers on the mobile networks.

2.4 Consequently, Table 1 below shows the impact of these developments on LIME's revenues and volumes for price cap services since 2001.

Table 1. – Year on Year Revenue and Volume Growth (%)

Description	2000/01 to 2001/02	2001/02 to 2002/03	2002/03 to 2003/04	2003/04 to 2004/05	2004/05 to 2005/06	2005/06 to 2006/07	2006/07 to 2007/08	Net % increase/(decrease)
Revenues								
Access Line Rental	14%	-9%	35%	1%	-6%	-22%	-9%	4%
National Calls	-4%	-17%	29%	-18%	-25%	-5%	12%	-28%
International Calls	-11%	-38%	-32%	-27%	-19%	-21%	-36%	-184%
Data Services	40%	-5%	-55%	-35%	13%	18%	-21%	-44%
Interconnect Services	-	114%	-78%	132%	-1%	-11%	276%	431%
Other Products	-35%	-19%	-4%	-7%	-8%	-12%	-18%	-103%
Volumes								
Access Lines	-3%	-18%	16%	-23%	-3%	-14%	16%	-28%
National Call Minutes	-10%	-27%	-9%	-81%	28%	-17%	-23%	-140%
International Calls	-2%	-26%	-11%	-21%	-10%	-25%	-35%	-131%
Data Services	-							
Interconnect Minutes	-	176%	-47%	31%	-32%	-2%	338%	466%

2.5 The above table supports the fact that LIME faces significant competition for price cap services such as access, national calls, toll free service, outgoing international calls and data services.

There is Only One Domestic Voice Market

2.6 In its document titled '*Universal Service/Access Obligation for Telecommunication Services in Jamaica: A Recommendation*' [1], the OUR declared that the universal provision of voice service has been satisfied by mobile service. Also, in '*The Jamaica Telecommunication Policy 2007'*(The Draft Policy), the government acknowledges that voice telephony service is extensively available in Jamaica due mostly to a mobile phone penetration of greater than 80%. The OUR has reported that the teledensity in Jamaica is well over 100%.[2]

[1] Published May 14, 2004
[2] Pg. 11, Management Plan, Fiscal Years 2008 - 2011

2.7 In the Application for the Review of the Voice Market (the Application) submitted to the OUR in January 2007, LIME makes the case that there is one voice market irrespective of whether the underlying technology employed is fixed or mobile. The high teledensity in Jamaica has come about because mobile telephony has substituted for fixed line telephony and has also expanded the market for voice telephony. At present LIME has approximately 400,000-fixed line customers compared to a total of approximately 2.5 million mobile subscribers. The Draft Policy acknowledges that discriminatory regulation can penalize technologies and thus in effect discriminate against competitors. Consequently The Draft Policy strongly recommends that telecommunications regulation must be technology neutral. LIME considers over regulation of its fixed network, by means of a Price Cap Plan to be discriminatory in the current competitive landscape and urges the OUR to lift this regulation.

2.8 The OUR has asked Question 2.1:

Is the wholesale ordering process for xDSL transparent and free from intervention by C&WJ's Carrier Services Division or its retail Division?

2.9 LIME's response is that rules governing the treatment of confidential information were established in the Determination Notice titled ' *Cable & Wireless Jamaica's Reference Interconnect Offer*', published February 2001. LIME has put in place established procedures for the processing of wholesale orders. Its Carrier Services Division does not share any information provided by its customers to LIME's retail, customer-facing business and is not in breach of the applicable rules. The entire Carrier Services Division is subjected to annual audits to ensure adherence to the 'Chinese walls' principles consistent with its remit.

2.10 Based on the foregoing, LIME has established that in accordance with paragraph 1.6 of the '*Specific Price Cap Rules*' (in order to remove services from the price cap basket) the following criteria have been met:

- At least one competitor is actually operating in the relevant market using its own switching and transmission facilities.
- In aggregate, other competitors have capacity in place to meet a large portion of the total output of the relevant market; or
- The Office determines that the market for the service is not characterized by anticompetitive practices.

3. Services to Be Removed From the Basket

3.1 With regards to services to be removed from the basket, the OUR has specifically asked:

Question 2.2:

Do respondents believe that international outgoing calls and other similar services should be removed from the regulated services basket? State the reasons (along with available traffic and other data) for your response.

3.2 LIME's response is yes; international outgoing calls and other similar services should be removed from the regulated services basket:

Options Available to Customers

3.3 There are several means by which customers can access the international services of other providers, which include:

- Legitimate VOIP type products using assigned OUR number ranges, where business and residential customers with ADSL service are provided unlimited international calling packages for fixed monthly charges.
- Unlicensed VOIP type products offered by Skype and Vonage.
- Indirect Access/Two stage Dialing using assigned OUR number ranges, or Toll Free numbers provided by LIME, thus enabling business and residential customers to access the licensee's Interactive Voice Recorder (IVR) platform and convey calls overseas. This is usually done by means of calling cards or direct dialing across networks.

- Special devices that interface with the PBXs of business customers, which enable these customers to make international calls via other Service Providers.
- The purchase of unlimited international mobile packages from mobile service providers.

3.4 The significant expansion of the players in the market for international outgoing calls has made this market very competitive. In placing an outgoing international call, customers have the choice between a number of operators and the various service options of those operators. For example, they may choose Digicel's mobile or fixed wireless service, Claro's mobile service, Flow's fixed line or VOIP service and LIME's mobile, fixed line or NetSpeak service. Then there are other unlicensed and unfettered service providers such as Skype, Vonage, Magic Jack, Yahoo messenger and others, which carry international outgoing calls from Jamaica.

3.5 This increased competition has resulted in a the dramatic decline in international outgoing calls from LIME fixed line as shown in Table 2 below.

Table 2 - LIME international outgoing minutes (Redacted for Public Record)

LIME International Outgoing Traffic	**01/02**	**02/03**	**03/04**	**04/05**	**05/06**	**06/07**	**07/08**
Mobile Traffic carried (mins)	####	####	####	####	####	####	####
Fixed Traffic carried (mins)	####	####	####	####	####	####	####
% Decline year on year fixed traffic	-	20%	16%	9%	8%	18%	4%

3.6 The data in Table 2 shows the steady decline of LIME's fixed outgoing traffic since the inception of the Price Cap Plan (PCP) for LIME. This traffic has declined by 55% between 2001 and 2008. However, what is even more telling is the fact that, by LIME's estimate, the total international outgoing minutes in 2008 for both LIME's fixed and mobile service, represents less than 10% of the total international outgoing minutes from Jamaica. It is clear that the market for international outgoing calls has grown tremendously since 2001, however it is the mobile networks that have benefitted and not LIME's fixed line which accounts for a mere 6% to 8% of international outgoing traffic. Table 2 demonstrates that with 22% of the mobile market share LIME international outgoing calls, since 2005/06, have grown significantly, how much more so the case of Digicel, which enjoys close to 76% of market share.

3.7 The Office must acknowledge that in Jamaica the mobile phone has become a substitute for the fixed line. The month on month churn of LIME's fixed line customers is a reflection of this fact. Notwithstanding that it is generally cheaper to call overseas from a fixed line as compared to a mobile phone (and Digicel in particular), mobile still carries the majority of the international outgoing call traffic from Jamaica. Note the rates in Table 3 below.

Table 3 - Comparison of International Outgoing Call Rates

Called Destination	**LIME Anytime Plan (Mobile)**	**Digicel Flex (Mobile)**	**Claro Easy Connect (mobile)**	**LIME Yard & Abroad**	**Digicel Int'l Calling Plan**	**LIME Homefone (Fixed Line)**
USA & Canada	15.00	17.75	17.50	$1,000 for 250 int'l (US, CAN, UK) mins + 250 local mins	$999 for 1,000 int'l (US, CAN, China, Spain) mins	15.75
UK fixed lines	15.00	17.75	17.50			15.75
Rest of World*	15.00	17.75	17.50			15.75

* Except Cuba for LIME

3.8 It is against this background that LIME made its Application in January 2007 for a Review of the Voice Market. This important review is yet to be completed and much depends on it.

3.9 Such an expectation is based on the OUR's own comments. For example, regarding LIME's Application for Declaration of Non-Dominance, the Management Plan states that '*Consultation on this matter was undertaken during fiscal 2007/08 with a view to the Office making a decision by October 2007. Arising from the assessment of the responses to the consultation however, the Office has determined that there is a need to assess each market on an individual basis and a notice has been issued* *to that effect. It is now anticipated that a final decision on the first of these, outgoing international termination, will be issued by end of August 2008"*[3]

3.10 Also, the OUR's Management Plan for Fiscal Years 2008 – 2011 states that '*While some work was undertaken in respect of developing new parameters for a new price cap regime the Office has become sympathetic to the view that it may be necessary to conclude its current enquiry into C&WJ's application to be declared non-dominant before proceeding further with this project. Hence the timetable for this project was altered.*[4]' It is noteworthy that the Barbadian regulator conducted a market review, which informed its deliberations on price cap regulation.

3.11 At paragraph 2.17 of the Consultation the OUR disputes that C&WJ needs to prohibit Indirect Access (IA) using its DELs. LIME disagrees with the OUR on the basis that the market for international outgoing calls is very competitive as demonstrated in 3.6 above. Again, the total international outgoing minutes in 2008 for both LIME's fixed and mobile service, represents less than 10% of the total international outgoing minutes from Jamaica. As such, the imposition of IA on LIME would be unreasonably punitive and burdensome particularly where LIME has already, per section 3.3, provided a form of IA to the market to facilitate prepaid calling cards. In any event, LIME has made an appeal to the Telecommunications Appeal Tribunal in relation to the OUR's Determination on a particular form of Indirect Access called two – stage dialing and now await its judgment. LIME is of the view that based on the level of competition in the market, the OUR should now remove international outgoing calls from the price cap.

3.12 The Office continues to consider LIME's Terms and Conditions for its fixed line service) to be inappropriate, while not providing the legal basis for its position. On the other hand, LIME has submitted to the Office, a Legal opinion supporting the appropriateness of these Terms and Conditions. LIME continues to rely on this Legal opinion. LIME was compelled to obtained this legal opinion because of the OUR's contention that LIME's terms and Conditions which does not permit two –stage dialing is anticompetitive.

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[3] Pg. 13, Management Plan, Fiscal Years 2008 - 2011

[4] Pg. 12, Management Plan, Fiscal Years 2008 - 2011

3.13 Without prejudice to LIME's position that there is no basis for continuing the existing Price Cap Plan, it is understood that any Decision by the OUR is dependent on the completion of further consultations such as the Weighted Average Cost of Capital (WACC) and the X factor. LIME maintains that the Price Cap Plan as put forward by the OUR is inappropriate and should not be adopted.

3.14 Question 2.3:

Should international leased lines be removed from the regulated services basket? Where possible, provide data to support your response.

LIME's response is yes. The wholesale market for international leased line is very Competitive. Flow is LIME's major competitor and is unregulated. In an effort to renew expiring contracts, LIME has had to reduce its rates in excess of 40% for a T1 and 45% for an E1 with a resulting fall off in revenue of approximately 47%.

3.15 The reality of this competition is referenced on Flow's official website http://www.flowjamaica.com/, which states:

> **" Flow International Private Line**
> *We provide companies with a clear channel, point-to-point connection between offices in Jamaica and the NAP of the Americas in Miami. We can also extend the connectivity to New York. This is a guaranteed bandwidth TDM solution, ideal for companies, which require their own private circuit to support transmission of mission critical data. Flow International Private Line service includes the Jamaica local loop. Capacities from 128 Kbs to STM1 are available."*

3.16 LIME is aware that Flow has built out its network to effectively cover the entire island, with major transmission points in Negril, Montego Bay, Ocho Rios, Mandeville, New Kingston, and Portmore. FLOW also has direct international connectivity to Florida, Colombia and Dominican Republic.

3.17 The foregoing highlights that Flow is a significant competitor to LIME and can effectively offer international leased circuits to business customers and others from just about any location in Jamaica. In fact LIME purchases capacity from Flow in order to meet the needs of its own customers for international lease line service.

3.18 Question 2.4:

Should any service provided to business customers be removed from the regulated services basket? If yes, provide data to support your response, defining the relevant markets and the conditions of market entry and exit.

Please see response to question 2.2. Business customers can and do avail themselves of all the means of making international outgoing calls and these customers are particularly sought after by competitors. Generally, businesses are high consumers of bandwidth and lease lines and there are numerous offers available to them. So far as LIME is aware, Digicel's fixed wireless service is being offered to business customers. LIME strongly urges the Office to remove international outgoing calls, lease lines and domestic voice services from the regulated price cap basket.

4. Addition of New Services to the Price Cap Plan Unsupported by Market Developments

4.1 In Annex A.1.2 the OUR proposes to add toll free service for telecommunications licensees' to the list of regulated price cap services. Regarding these services the OUR has asked:

Question AI.1:

Given regulatory intervention and changes in market conditions, should toll free services and D-Slam ports be included in the basic services basket? If yes, justify any proposed adjustments.

4.2 Prior to April 2008, all service providers who required toll free numbers had to get these numbers from LIME who, because of the history associated with the domestic 1 888 numbers, acted in essence as the number administrator for toll free numbers. However, in April 2008 (as agreed by the industry) the OUR assumed this role and has since assigned toll free numbers to all service providers who applied for such numbers. Therefore a service provider, subject to the OUR's numbering rules, can apply to the Office for an assignment of toll free numbers at any time. Consequently, there is absolutely no basis for the OUR to include this service under the Price Cap.

4.3 The proposal to include D-Slam ports in the price cap is without merit. The OUR is reminded that Jamaica's low Internet availability is related to low PC penetration The inclusion of ports in the price cap is not a remedy for this issue and would result in burdensome regulation being imposed on LIME. Since 2007, Flow has been competing aggressively with its value proposition of more speed for less money. The OUR should bear in mind that LIME actually purchases Internet capacity from Flow, an affiliate to the company that owns the Fibralink Cable System. In other words LIME's major competitor for Internet Access has more bandwidth than LIME and similar national coverage. See reference 3.16 and 3.17 above. Flow is a formidable competitor that is vertically integrated but is unregulated. The Office is advised to let the competition regulate prices for Internet access and not intervene with unwarranted regulation. Flow is also a major competitor to the ISPs.

5. Duration of Price Cap Plan and Inclusion of Q-Factor

5.1 The Office asks the question:

Question 3.1:

Is a four-year Plan (commencing April 1, 2009) appropriate for the next Price Cap Regime? If no, provide reasons to justify your response?

5.2 Without prejudice to its position that there is no basis for maintaining the existing Price Cap Plan, LIME does not believe that a four-year duration is appropriate for a new Price Cap Plan. The Office cautions in paragraph 3.1 that with technology convergence and the proliferation of alternate technology care must be taken to avoid overregulation. Yet at paragraph 3.3, the OUR proposes a four (4) year cap which is the same duration as the original price cap regime. This would be contrary to the competitive environment within which many services are now offered. The Price Cap regime should not continue to exist but if it did, it should not be for more than two (2) years given the existing competition, as well as the competition being brought about by convergence. Of course, all services that currently face competition should be placed in an unregulated services basket.

Activation of Q-Factor in Price Cap is Discriminatory

5.3 The OUR proposes to activate the Q-factor in the Price Cap and has asked:

Question 4.1:

Do you agree with the proposed set of quality of service standards and associated conditions? If not, state why.

5.4 The OUR published a consultation on Quality of Service that applied to the entire telecommunications industry on October 10, 2007. Having given regard to the strong views within the industry the Office has not issued a Determination on the matter but has opted to maintain a watching brief while allowing the industry to self regulate. This position the OUR represented in its Management Plan 2008[5], where the OUR states '*Stakeholders, responding to the Office's consultation on the development of quality of service standards, have contested the needs for this in a sector that they assert is relatively competitive. The Office remains cognisant however that even in mature competitive markets there is often a range of customer service issues that may not be satisfactorily resolved by the operation of market forces. Moreover, there is anecdotal evidence indicating that consumers may not be as sanguine about service levels as operators. In this regard, the Office proposes to keep this matter under active review and will seek as part of its routine market surveillance to get a better sense of the level of difficulties being experienced….*'

5.5 The OUR states at paragraph 4.4 (6) of this Consultation that *'It is important to note that these quality of service standards are a subset of those that may be established by the Office through its consultation on this matter…*' It would be discriminatory for the OUR to impose QoS standards on LIME only, having already agreed that it would not impose any such standards on the industry at this time. LIME trusts that the OUR will refrain from discriminating against LIME by introducing QoS standards into any revised Price Cap Plan.

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[5] Pg. 37

6. Adjustments to the Price Cap Basket – Standard Fixed to Mobile Regime

6.1 Paragraph 1.4 of the 'Specific Price Cap Rules' delineates *'..four categories of products and services for the assessment of price caps..'* These are:

- No price regulation
- Retail Mobile Services
- Retail Fixed to Mobile Services
- Basic Retail Offering

6.2 The categories of services in 'No price regulation' and 'Retail Mobile Services' are unregulated. The category of 'Basic Retail Offering', which services are governed by the Price Cap Plan, is the main subject of the Consultation.

Question AI.2:

Are there any additional adjustments to the service classification that are necessary? If yes, justify any proposed adjustment?

6.3 LIME is of the view that the category,'Retail Fixed to Mobile Services' which is also governed by a Price Cap must, of necessity, be reviewed and replaced. The mobile network operator (MNO) that terminates calls from LIME's fixed network currently sets the Fixed to Mobile (FTM) retail rate. This FTM regime, which allows the MNO to set the retail rate for LIME's fixed retail customers is abnormal and does not exist anywhere in the world, besides Jamaica.

6.4 LIME strongly recommends that the OUR change this FTM regime to the standard termination rate regime implemented the world over for 'Calling Party Pays' markets, which allows the terminating carrier to set its termination rate in conjunction with the regulator on a cost basis, while the originating carrier sets the retail rate for its customers.

6.5 The weakness of the current FTM regime can be appreciated by the following developments. In 2001 when Digicel became operational, Digicel set the FTM rate at J$12 per minute for LIME customers to make a call to Digicel. This high FTM rate resulted in a significant increase in LIME's bad debt as fixed line customers calling Digicel chose not to pay the resulting high bills they received. Instead, many of such customers churned off the fixed network and acquired a mobile phone. Due to public pressure Digicel reduced the FTM rate to J$7 in September 2003. Digicel has since January 2009 increased the FTM rate for peak period calling to J$8.50 per minute.

6.6 Since the FTM regime allows MNOs to set the retail rates for LIME fixed line customers, it means that LIME's mobile competitors, (in particular Digicel that enjoys more than 70% mobile market share), may:

- Increase rates to LIME's customers at any time they choose to, resulting in a negative customer experience for LIME's customers.
- Negatively impact LIME's fixed business revenues, while the mobile operator profits. For example, high FTM rates exacerbate churn, leading to a loss in the fixed operator's revenues based on line rental and call usage.

To allow this to continue is abhorrent to fair competition.

FTM Regime Facilitates Anticompetitive Behaviour

6.7 LIME has less than 400,000 fixed line customers while Digicel mobile has 1,900,000 customers. The OUR has determined that each Mobile Network Operator (MNO), including Digicel, is dominant on its own network for call termination. By allowing the FTM regime to continue in its current form, the OUR will continue to compound the monopoly power of Digicel, by allowing it to set its termination rate and also the retail rate for LIME's FTM service.

6.8 LIME strongly recommends that the FTM retail rate be unregulated and placed in the unregulated services price cap basket. The basis for this is that fixed line service is now competitive, with such service being provided by Flow, Digicel and LIME. The current vibrant competition is sufficient to regulate prices in this market. Such an approach is needed to discontinue the current anomalous practice where the mobile operator is allowed to set the retail rate for the fixed line operator.

6.9 The existing regime whereby LIME Fixed is regulated and Flow and Digicel are unregulated puts LIME at a severe competitive disadvantage.

Question AII.1:

Do you agree with the proposed set of imputation test rules? If no, explain.

6.10 LIME supports competition and encourages the Office to take steps to ensure a 'level playing field' within the telecommunications industry. In keeping with this position, LIME has been meticulous in ensuring that its pricing arrangements do not result in margin squeeze to its competitors and has always fully cooperated to resolve any queries made by the Office.

6.11 LIME is pleased that the Office has declared that an imputation test will only be initiated on the basis of a 'substantiated complaint'. While this is good and should reduce frivolous complaints, LIME encourages the OUR to go further to define the precise requirements that would satisfy the standard of a 'substantiated complaint'. Precise requirements will minimize misunderstandings and delays.

6.12 Were it to review an imputation test, the Office's primary concern should be to ensure that the cost imputed to the service taker is the same cost that the service supplier imputes to its retail arm, to supply the same service or product. When considering the other cost components of a given retail price, the approach should facilitate the flexibility of operators to adapt their costing strategy to the ever-changing technological, financial and competitive environment in which they operate. The idea is that costs are neither static nor are the methodologies to derive them. Services that are in LIME's competitive price cap basket and whose inputs LIME's competitors offer at the wholesale level, should be expressly excluded from any requirement for an imputation test.

6.13 All costing information submitted to the Office relating to imputation test(s) are to be deemed confidential and barred from disclosure to the public, competitors and unauthorized persons within the Office, since it will contain highly sensitive and competitive information.

7. Conclusion

7.1 LIME has established that it has met all the criteria for the removal of services from the regulated basket in accordance with paragraph 1.6 of the '*Specific Price Cap Rules*'. This criteria requires:

- *At least one competitor is actually operating in the relevant market using its own switching and transmission facilities.*
- *In aggregate, other competitors have capacity in place to meet a large portion of the total output of the relevant market; or*
- *The Office determines that the market for the service is not characterized by anticompetitive practices.*

7.2 LIME therefore anticipates that the following services will be removed from the Price Cap Plan:

- Domestic voice calls
- International Outgoing Calls
- Lease Lines

7.3 LIME strongly recommends that the OUR abolish the existing, anomalous FTM regime. The OUR must then implement the standard regime which exists the world over, where market termination rates are set by the regulator on a cost basis and the originating carrier (the fixed network in this case) sets the retail rate for its customers.

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