

BEFORE THE TELECOMMUNICATIONS APPEAL TRIBUNAL

**IN THE MATTER OF THE TELECOMMUNICATIONS
ACT (2000) OF JAMAICA**

AND

**IN THE MATTER OF THE OFFICE OF UTILITIES
REGULATION ACT (as amended)**

AND

**CLARO'S DIVERSION OF DIRECT CALL TERMINATION
FROM DIGICEL NUMBER 1-876-619-5000 TO
VOICEMAIL BOXES ATTACHED TO NUMBERS ON
CLARO'S NETWORK**

AND

**IN THE MATTER of an Application by OCEANIC
DIGITAL JAMAICA LIMITED for a Stay of
Implementation of the Decisions by the Office dated June
14, 2010.**

AND

**IN THE MATTER of an Appeal by OCEANIC DIGITAL
JAMAICA LIMITED trading as CLARO Pursuant to
Sections 62(1) (3) of the TELECOMMUNICATION ACT,
2000.**

BETWEEN OCEANIC DIGITAL JAMAICA LIMITED APPELLANT
T/A CLARO

AND OFFICE OF UTILITIES REGULATION RESPONDENT

INTERESTED PARTY: DIGICEL

DATE OF HEARING: 25, OCTOBER, 2010

APPEARANCES: Mr. Harold Brady and Ms. Kayann Anderson for the Appellant
Mr. Alan Wood and Ms. Daniella Gentles for the Respondent
Ms. Georgia Gibson-Heulin for Digicel (Interested Party)

DECISION

1. This is an appeal brought by Oceanic Digital (Jamaica) Limited T/A (CLARO) against a decision of the Office of Utilities Regulation (Office) dated 14th June, 2010, which said decision was subsequently reconsidered by the Office and decision made thereupon 5th August 2010.

The Office made the following determinations based on a complaint by Digicel to the OUR on May 22, 2010:

- (1) The decision of CLARO to terminate calls made from the Digicel number 18766195000 on the voicemail box of the customers on CLARO's network is a flagrant breach of both the interconnection agreement between CLARO and Digicel as well as the Telecommunications Act 2000 – in that CLARO is preventing “any-to-any connectivity” between CLARO's network and that of any other public voice carrier, including Digicel;
 - (2) CLARO is in breach of Section 29 (2) of the Telecommunications Act, that is to say that all CLARO customers are not able to make and receive calls to and from anyone, pursuant to the provisions of Section 29 of the Telecommunications Act;
 - (3) CLARO is in breach of its License, which mandates that CLARO must comply with regulations made pursuant to the Telecommunications Act and the Laws of Jamaica;
2. The Office in making these determinations was acting within the provisions of the Telecommunications Act 2000, and the amended OUR Act. Section 4-(1) and (3) of the Telecommunications Act 2000 provides:
 - (1) The Office shall regulate telecommunications in accordance with this Act and for the purpose the Office shall :
 - (a) regulate specified services and facilities;

- (c) promote the interests of customers while having due regard to the interests of carriers and service providers;
 - (d) carry out, on its own initiative or at the request of any person, investigations in relation to a person's conduct as will enable it to determine whether and to what extent the person is acting in contravention of this Act;
 - (f) promote competition among carriers and service providers ...;
- (3) In exercise of its functions under this Act, the Office may have regard to the following matters –
- (a) the needs of the customers of the specified services;
 - (b) whether the specified services are provided efficiently and in a manner designed to-
 - (i) protect the health and well being of users of the service and such members of the public as would normally be affected by its operations;
 - (ii) protect and preserve the environment;
 - (iii) afford economical and reliable service to its customers;
 - (c) whether the specified services are likely to promote or inhibit competition;

Section 4 of the amended OUR Act provides:

- (1) Subject to the provisions of this Act, the functions of the Office shall be to-
 - (a) regulate the provision of prescribed utility services by licensees or specified organizations; ...
 - (e) subject to section 8A, carry out, on its own initiative or at the request of any person, such investigations in relation to the provision of prescribed utility services as will enable it to determine whether the interest of consumers are adequately protected;
- (2) The Office may, where it considers necessary, give directions to any licensee or specified organization with a view to ensuring that –
 - (a) the needs of the consumers of the services provided by the licensee or specified organization are met; and

(b) the prescribed utility service operates efficiently and in a manner designed to –

(i) protect the health and well being of users of the service and such members of the public as would normally be affected by its operations; and

(ii) protect and preserve the environment; and

(iii) afford to its consumers economical and reliable service;

(3) In performance of its functions under this Act the Office shall undertake such measures as it considers necessary or desirable to –

(a) encourage competition in the provision of prescribe utility services;

(b) protect the interests of consumers in relation to the supply of a prescribed utility service.

Section 9 of the amended OUR Act provides:

(1) Where it appears to the Office that a licensee or specified organization, as the case may be, is not fulfilling its obligations under its licence or enabling instrument, as the case may be, the Office may, by memorandum in writing to the licensee or specified organization, require the licensee or specified organization, within the time specified in that memorandum, to take such remedial measures, as may be so specified.

(2) Any licensee or specified organization which fails to comply with the requirements of a memorandum issued by the Office under this section shall be guilty of an offence and liable on summary conviction before Resident Magistrate to a fine not exceeding two million dollars:

Provided that the court by which any licensee or specified organization is convicted of an offence may fix a reasonable period from the date of conviction for compliance by the licensee or specified organization with the requirements of the memorandum and where a court has fixed such a period, the said daily penalty shall not be recoverable in respect of any day before the expiration thereof.

3. Section 29(1) and (2) of the Telecommunications Act 2000 provides:

- (1) Each carrier shall upon request in accordance with this part, permit interconnection of its public voice network of any other carrier for the provision of voice services.
- (2) A public voice carrier shall provide interconnection in accordance with the following principles-
 - (a) any-to-any connectivity shall be granted in such a manner as to enable customers of each public voice network to complete calls to customers of another public voice network or to obtain services from such other network;
 - (b) end-to-end operability shall be maintained in order to facilitate the provision of services by an interconnecting carrier to the customer notwithstanding that the customer is directly connected to another network;
 - (c) interconnecting carriers shall be equally responsible for establishing interconnection and doing so as quickly as is reasonable practicable;

“Voice Service” is defined in Section 2 of the Telecommunications Act 2000 as:

- (1) The provision to or from any customer of a specified service comprising wholly or partly of realtime or near realtime audio communication and for the purpose of this paragraph, the reference to realtime communication is not limited to circuit switched circuits;
- (2) A service determined by the Office to be a voice service within the provisions of section 52, and included the services referred to as voice over the internet and voice over IP;

4. Section 3 of the Telecommunications Act 2000 states that the object of the Act is:

- (a) to promote and protect the interest of the public by-
 - (i) promoting fair and open competition in the provision of specified services and telecommunications equipment;
 - (ii) promoting access to specified services;

- (iii) promoting the interest of customers, purchasers and other users (including, in particular, persons who are disabled or elderly) in respect of the quality and variety of telecommunications services and equipment;
- (b) promote universal access to telecommunications services for all persons in Jamaica, to the extent that it is reasonably practicable to provide such access;

5. The OUR in section 26 of its decision evidenced in the affidavit of Curtis Robinson, asserts that the objective of the “any-to-any” principle as espoused by the Telecommunications Act 2000 is that the call will be carried, without interference, from the originating party to the intended terminating party. At the point at which it is to be conveyed to the receiving party the convention is that notice of its arrival is provided by way of a ring tone. There are a number of options at this point as to how the call is facilitated in the event that the receiving party does not reply. Some of these options include:

- (i) A ring without a response if the receiving party chooses not to answer or is absent;
- (ii) Call waiting if the line is engaged and the feature is provided for;
- (iii) Conveyance to voice mail if the feature is provided for;
- (iv) Subsequent notification of the missed call if the feature is provided for.

It bears underscoring that with the exception of a ring, all other options are contingencies and are supplementary services that can be unbundled from a conventional telephone call.

6. CLARO submitted that the automated feature implemented does not prevent calls from being successfully transmitted to its customers, and that the voice mail feature of CLAROS' network and the handset are recognized as a terminating feature for recording, storing, and retrieving voice messages for customers.

7. CLARO further submitted that Digicel cannot be regarded as a customer, as section 2 of the Telecommunications Act 2000 defines a "customer" as "a person who is provided with a specified service by a service provider and includes the end user of that service". That Section 43 of the Telecommunication Act 2000 states:

consumer means a person—

- (1) to whom specified services are provided or are intended to be provided in the course of a business carried on by a service provider;
- (2) who is not a carrier;

8. Mr. Woods, on behalf of the OUR, submitted that to redirect a call to the customers voice mailbox without giving the customer any opportunity to accept that call, breaches the obligations for interconnection that are spelt out in The Telecommunications Act 2000 29 (1) and (2). Each carrier is obliged to provide interconnection to its network so as to provide realtime or near realtime audio communications, that is transmission of voice to voice communications. Interconnection between networks includes the termination of the call to the intended destination which comprises realtime audio communication as is clear from the definition in the Act of "Voice Service".

He further argued that section 2 of the Telecommunications Act 2000 defines "Interconnection" as "the physical or logical connection of public voice networks of different carriers", which in the context of a telephone service means the ability for customers to speak to each other voice to voice. Directing calls to CLARO customers voice mail would involve the customers incurring expenses to retrieve the call and calling back the number.

9. Mr. Woods further submitted that there is nothing in the Act that excludes the service provider itself from coming within the definition of a customer where the service provider as a business entity utilizes the voice network in the course of carrying on business whether that network be its own network or the network of

any other service provider. It notes that in Sections 43-49 of the Telecommunications Act 2000 that deals with consumer protection provisions, the definition of a consumer has been expressly limited to exclude carrier. This exclusion they argue supports the view that for all other parts of the Act the telecommunications service provider comes within the definition of a customer when utilizing the service for purposes of carrying on its normal business, as to do otherwise would allow an absurdity as the Act would regulate protection for a business complaining about its own services.

If the service provider who seeks interconnection as a user of the voice network service is not regarded as coming within the definition of a customer, the result would be that the provider as a business entity using the network service could be excluded from voice to voice interconnection by any other service provider so that as a business entity the service provider could be excluded from other networks. This could never be intended as the objective of the Act speaks to promoting competition and universal access to telecommunications services for all persons in the country.

10. CLARO argued that there was no evidence that any CLARO customers were complaining of a lack of ability to make and receive calls to and from any customer of another voice network.

The OUR held that under section 4 of the Telecommunications Act 2000 and section 4 of the OUR Act, the Office is mandated to regulate the telecommunications industry, promote the interest of consumers and promote competition among carriers and service providers, and need not wait on customer complaints, and thus the Office has the authority to intervene in the matter to determine any breaches of the Telecommunications Act, and apply requisite remedies.

The Tribunal accepts this position. The two Acts are complimentary and must be read together.

11. CLARO argued that if, which CLARO denies, the allegations of Digicel as set out in its email to the Office dated May 27, 2010 is correct, the allegations should be dealt with under Clause 22 of the interconnection agreement which states:

“Technical Operations and Maintenance

Both parties agree to work together in good faith to develop appropriate service level agreement covering operations and maintenance requirements.”

12. The OUR held as stated in section 59-60 of the original decision evidenced in the affidavit of Curtis Robinson, the matter falls under the statutory remit of the OUR and not solely under the interconnection agreement per se. It is also a trite law that a contractual agreement does not flout the jurisdiction of supervising statutory provisions.
13. However, as the mobile carriers are licensed to provide interconnection from all networks to enable voice to voice telephone service, the redirection of some calls to a voicemail service without the customers consent does not satisfy the requirements for interconnectivity under the Telecommunications Act 2000. There is a further issue however as to whether the Telecommunications Act 2000 can allow this reduced connectivity between carriers as the Telecommunications Act 2000 speaks to the provisions of service for customers.

The Tribunal has considered all the evidence and submissions of all the parties in arriving at its decision. We have concluded that

- (1) Digicel falls within the definition of “a customer as provided for in Section 29
- (2) (a) of the Telecommunications Act.

(2) Diverting calls from Digicel number 1-876-619-5000 to the voice mail box of Clara customers is a breach of the Telecommunications Act.

For the above reasons, the Appeal is dismissed and the decision of the OUR affirmed.

Chief Justice Edward Zacca (Rtd.)



Chairman

Dolsie Allen



Member

John Preston



Member

Dated:

14/12/10