FLOW's Response to

OFFICE OF UTILITIES REGULATION

Notice of Proposed Rule-Making

on

Infrastructure Sharing

2017 May 26

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1. Opening comments

This response is submitted on behalf of Cable & Wireless Jamaica and Columbus Communications Jamaica Limited (jointly hereinafter referred to as 'Flow".) Flow appreciates the opportunity to participate in the discussion on the Office of Utilities Regulation Notice of Proposed Rule-Making on Infrastructure Sharing published on 2017 March 30. The Notice of Proposed Rule-Making is a comprehensive document which runs almost one hundred pages with seven chapters listed below and the proposed Infrastructure Sharing Rules annexed.

1. Introduction
2. Legal Framework
3. Modalities of Infrastructure Sharing
4. Benefits and Challenges of Infrastructure Sharing
5. Regulatory Option and Trends
6. Infrastructure Sharing in Jamaica
7. Framework for Infrastructure Sharing in Jamaica

Chapters 1 and 2 provide an introduction to the document and the OUR's powers under the Telecommunications Act and the Office of Utilities Regulation Act. The substantive document begins at chapter 3, and continues to chapter 5 with providing general learning on infrastructure sharing pulling from research done around the world. While Flow is grateful for the learning provided in these chapters, it is important that this issue is investigated on the basis of the realities of the Jamaican market and not other countries that have little in common.

Chapters 6 and 7 seek to deal specifically with "Infrastructure Sharing in Jamaica" and "Framework for Infrastructure in Jamaica". The early chapters then reveal themselves to be more than an examination of infrastructure sharing across the globe, but the basis on which the OUR seeks to lay the foundation for developing a framework on infrastructure sharing in Jamaica. Flow is concerned that every effort to make Infrastructure Sharing Rules must be faithful to the intent and objective of the Telecommunications (Amendment 2012) Act. The Act never intended to impinge on the infrastructure investment of private entities on a wide ranging basis but only in very specific circumstances which need to be consulted on prior to any efforts at Rule-Making. The overall consequence is that this Notice of Proposed Rule-Making does not provide the basis on which the OUR plans to exercise its jurisdiction under Section 29A of the Act, set out below.

"29A (1) Subject to subsection (3) the Office may-

(a) impose an infrastructure sharing obligation a licensee, where the Office considers it to be justified having regard to any of the following considerations-

(i) matters relating to public health or to the environment or town planning or other development considerations;

(ii) economic inefficiencies;

(iii) physical or technical impracticability;"

It is the OUR's mandate under the Act is to impose an Infrastructure Sharing obligation on a licensee where the facility meets any of the three considerations. Flow submits that the OUR has not presented sufficient details in this document as to how it intends to impose an infrastructure sharing obligation on a licensee. When the reader has completed this comprehensive document, he remains unclear what criteria will be used by the OUR in examining the three considerations under the Act. Instead the OUR proceeds to issue a general obligation to share infrastructure on dominant licensees. Flow considers that the OUR has misunderstood its mandate under the Act and needs to reconsider its proposals

Flow has structured its response to the Notice of Proposed Rule Making by responding to the questions posed at the end of each chapter. We consider the proposed Infrastructure Sharing Rules to be premature in the circumstances. We reiterate that the OUR needs to issue a consultation on the specifics of its jurisdiction under the Act, as it has set the stage in this document with general principles. At the end of the OUR's clarification of its approach under the Act, Flow expects that the Infrastructure Sharing Rules will be amended and reissued. Flow expressly states that failure to address any issue raised in this consultation process for not necessarily signify its agreement in whole or in part with the OUR's proposal. Flow reserves the right to comment on any issue raised in the consultation at a later date.

Please refer all questions or comments to Charles Douglas at charles.douglas@cwc.com.

2. OUR's questions on chapter 3 and Flow's response

1. **Do you agree with the definition of passive and active infrastructure outlined above? If not, please provide alternative definitions.**

   Answer:

   Flow disagrees with your definitions. The definition of passive infrastructure should properly exclude power, cooling, heating or ventilation. These services are only purchased and consumed on a "time bound basis", otherwise they are not available. In addition, cables are not to be considered as passive infrastructure since they are installed in conjunction with active network elements, which make them functional.

   Any form of mandated passive infrastructure sharing (which Flow does not consider fitting) should be limited to real estate related elements, namely, towers, poles, ducts or buildings/shelters, such that they satisfy the criteria outlined in the Telecommunications (Amendment 2012) Act.

2. **Are there any other infrastructure (passive and active) that you consider essential for sharing?**

   Answer:

   No.

3. **Given the various forms of passive infrastructure sharing described above, which ones do you think are most suitable for Jamaica? Please provide reasons for your choice.**

   Answer:

   Where the circumstances satisfy the requirements of the Act, Flow considers that the most suitable form of passive sharing for Jamaica is that of mobile/cellular sites (and on a commercial basis).

4. **Are there any other forms of passive sharing that are possible between operators? If yes, please provide details.**

   Answer:

   A commercial hosting service could be provided to house the core network equipment for some operators.

5. **In your opinion, should sharing of the core network be allowed? Give reasons for your answer.**

   Answer:

   Flow maintains that the criterion to determine if sharing is required is strictly outlined in the Telecommunications Act at Section 29. It is only on this basis that sharing should be mandated. Otherwise operators should be allowed to enter into commercial arrangements that mutually support their business models.

   Flow considers that there are no major benefits for operators to share their core network, since any savings will be minimal to zero. This is because the major investments/costs are in the access layer, not the core layer. The core network is "the brain" which provides rating, billing and commercial offer implementation. In essence, it is the design and execution of its core network that allows an operator to differentiate itself from its competitors. Any requirement for operators to share their core network would materially diminish their competitive advantage to innovate and compete. This outcome would act as a dis-incentive to investment in networks.

6. **Given the various modes of active infrastructure sharing described above, which ones do you think are most suitable for Jamaica? Please provide reasons for your choice.**

   Answer:

   Flow does not consider that any of the models described should be mandated by Regulatory fiat for Jamaica. Instead, operators should be allowed to enter into commercially mutual agreements as driven by market forces. We strongly believe that negotiated commercial agreements should be the basis for introducing national roaming or MVNOs into the market. To the extent that the Regulator has concerns regarding coverage, it is best (more pragmatic) that Licensees are held accountable for meeting their roll-out or development plans/commitments as a condition of their license. To the contrary, attempts to dilute or compromise their infrastructure investments will cause a chill/dis-incentive for future investment.

   For example, notwithstanding the fierce competition between Digicel and Flow, both saw the need and benefits of entering into a mobile tower sharing agreement, both parties contributing major investment dollars to the agreement. We say, let the market work.

7. **Are there any other forms of active sharing that are possible between operators? If yes, please provide details.**

   Answer: No.

8. **What in your view accounts for the failure to attract the entry of MVNOs into the Jamaican market? Is the mandating of active infrastructure sharing a pre-requisite for the emergence of MVNOs? Do you consider MVNOs as a viable option in the Jamaican market?**

   Answer:

   Our view is that the size of the Jamaican market is too small, such that the niches that are likely to be interested in an MVNO are not sufficient to sustain the fixed cost of a MVNO operation. So both the demand and supply side required are not there. The mandating of active sharing on existing providers' networks to subsidize the market of entry for MVNOs would be inefficient and punitive to operators that have invested heavily in both infrastructure and retail channels and at significant financing costs. Furthermore, as repeatedly stated, Flow does not believe that the Telecommunications (Amendment 2012) Act contemplated or would support mandating such heavy handed regulations.

9. Please provide examples of how active and passive infrastructure is being shared in Jamaica.

   Answer:

   Flow currently has a commercial agreement with Digicel for the sharing of mobile cell sites.

OUR's questions on chapter 4 and Flow's responses:

1. **Do you agree that infrastructure sharing will encourage faster deployment of broadband networks throughout Jamaica? If not, please provide the reason(s) for your answer.**

   Answer:

   No, Flow does not agree that mandated infrastructure unbundling or sharing is an effective means of encouraging faster deployment of broadband networks in Jamaica. Commercial infrastructure sharing, however, may offer benefits that could include faster network deployment, but it is essential to distinguish between these two types of sharing arrangements—mandated or regulated, and commercial or voluntary—when making these assessments.

   There is large body of empirical literature that has evaluated the economic effects of mandatory sharing on broadband deployment and with very few exceptions this research has found that mandates are counterproductive and in fact discourage the very ends they seek to promote. See, for example, a recent survey of this literature conducted by economist Wolfgang Briglauer and Ingo Vogelsang: "The Impact of Alternative Public Policies on the Deployment of New Communications Infrastructure – A Survey," *Review of Network Economics* (2014)". According to Professors Briglauer and Vogelsang, *all* the empirical studies considered in the survey found a negative impact of ex ante access regulations on broadband deployment, measured either as the amount of investment or availability of broadband services (Briglauer and Vogelsang (2014), p. 12). Furthermore, these results are not new or anomalous. For instance, economist Carlo Cambini and Jiang Yanyan conducted a survey five years prior, and found similar results: "Broadband Investment and Regulation: A literature Review," *Telecommunications Policy* (2009). Professors Cambini and Jiang determined that a majority of the empirical studies they considered found mandatory network unbundling regulations to discourage all types of operators--regulated incumbent and unregulated new entrants--from investing in their networks.

2. **In your opinion, how do you think infrastructure sharing will encourage service based competition?**

   Answer:

   No, Flow does not believe that mandatory infrastructure sharing will encourage competition. It may encourage the availability of different retail options, but at the expense of overall competition and investment. Please see our response to Question 1 above and literature cited therein.

3. **Do you feel infrastructure sharing will give rise any competition concerns among the operators? If yes, please identify the concerns and suggest how they should be addressed so as to ensure that there will not be any adverse impact on consumers' benefits regarding choice of service providers, availability of services, service variety, QoS and pricing.**

   Answer:

   Our competition concerns on infrastructure sharing are limited to mandatory sharing. Prior experience with sharing/unbundling regulations clearly demonstrates that they do not achieve competitive benefits and, to the contrary, discourage entry and investment by facilities-based operators. No, Flow does not agree that mandated infrastructure unbundling or sharing is an effective means of encouraging faster deployment of broadband networks in Jamaica. Commercial infrastructure sharing, however, may offer benefits that could include faster network deployment, but it is essential to distinguish between these two types of sharing arrangements—mandated or regulated, and commercial or voluntary—when making these assessments.

4. **Should the sharing of active infrastructure beyond Level 4 in Figure 4-4 above be allowed? Provide reasons for your response.**

   Answer:

   Flow believes that mobile network sharing beyond Level 1 (Passive site elements) is unnecessary or inappropriate, and should not be allowed. The technical complexity of network sharing beyond Level 1 increases significantly, while the economic benefits decline. Furthermore, the dis-incentives to invest in one's own network and compete on facilities-based basis increase with the ease and pervasiveness of mandatory sharing.

OUR's questions on chapter 5 and Flow's response

1. **What measures could be introduced to incentivize network operators to voluntarily provide access to their infrastructure?**

   Answer:

   A helpful starting point is to consider that Operators were granted licences to operate in Jamaica within a certain market context. Absent infrastructure Rules and independent third party suppliers (such as private companies as exist in India or Africa) from which to lease infrastructure, these Licensees have invested heavily in their networks at significant risks. Such investments are predicated on a given return on capital, over a payback period promised to their shareholders/owners. In the normal course of things, the risks they face are exacerbated by the rapid convergence of services and network features enabled by technological advancement, high levels of taxation, a weak international settlement rate policy, unfettered market access by Over-The-Top (OTTs) operators, high spectrum costs and low demand for services at market based prices due to a weak economy and low income per capita.

   Against this backdrop, Companies are determined to leverage any competitive advantage they earn from their investment in infrastructure. As such, any incentive that would cause them to voluntarily share their infrastructure with a direct competitor, would need to make commercial sense. Given Jamaica's market size, weak economy and relatively low income per capita, operators should not be forced to dilute their investment and harm their return/commercial viability.

   It is not sufficient to focus solely of the "global" Industry benefit for any infrastructure sharing arrangement in the short to medium term. There also needs to be an understanding of the financial impact on the infrastructure provider, it having made the investment. These companies often finance their build-out with huge amounts of debt (high financing costs) and thereby earn the right to leverage their property/assets to ensure the viability of their operations. Simply put, companies seeking to enter the market, often "cherry picking" subscribers from lucrative niches in the market, ought to be required to pay commercially negotiated market rates for any sharing arrangements.

   Nevertheless, Flow can think of three approaches that the government could pursue to achieve its Public Policy goals;

   a) First, it should make available to "fit and proper" ICT Licensees (on some transparent basis), access to all infrastructure over which it has direct control, e.g ducts along the highways and elsewhere, poles, civil works, buildings etc. Government would therefore lead by example and incentivize investment.

   b) Second, the Regulator/government should require non-competing Industries to share relevant passive infrastructure on fair market terms. For example, passive infrastructure owned/controlled by Radio Stations, the Jamaica Public Service, the National Works

Agency, National Water Commission and others should be made available of fair market terms to Telecommunications providers seeking to invest in Jamaica. In some instances there are also clear opportunities to enter into partnerships to build out new infrastructure as a group or consortium. With each entity having an invested stake in the venture, not merely "piggybacking" on that of others.

c) Third, the government should seek to expand on the Public Private Partnership already used on the e-learning Project by the Universal Service Fund. The operators currently facilitate this Fund to the tune of billions of dollars. Competing operators have "bid on" projects and as a group build-out major parts of the e-Learning infrastructure backbone across the island. Instead of seeking to "confiscate by decree" infrastructure already single handedly invested in by Licensees, a framework for joint cooperation on certain major infrastructure projects by Licensees and the Universal Access Fund Ltd/Government going forward would better facilitate the joint/common ownership of key infrastructure and thus increased sharing in the near-term. Flow strongly recommends that this proposal be given very serious consideration.

2. Are there particular telecommunications infrastructure in Jamaica for which you think sharing should be mandated? Please provide reasons for your answer.

Answer:

No, Flow does not agree that mandated infrastructure unbundling or sharing is an effective means of encouraging faster deployment of broadband networks in Jamaica. Please see our response to chapter 4, question 1 for our reasons.

3. Do you believe that requiring all operators to provide information to enable OUR to compile a detailed inventory of the nature, location and capacity of Jamaica's telecommunications infrastructure is necessary, or should the information only be required from operators on which sharing obligations have been imposed?

No. Flow does not agree. Our reading of section 29 of the Telecommunications (Amendment 2012) Act suggests that it did not contemplate this intrusive, labor intensive and bureaucratic outcome. Instead it contemplates that in the circumstances where a few specified conditions are met, then and only then should the Office seek to consider infrastructure regulations to treat with those instances. As such, we believe that what constitutes the proper circumstances under which Infrastructure Sharing Rules are to be imposed on a Licensees needs to be consulted on with the Industry by the OUR. Certainly, this is not to be arrived at by an entity merely being a Licencee, or a Dominant Service Provider.

OUR's questions on chapter 6 and Flow's response

1. **What are the main bottlenecks (practical, behavioural, administrative, technical or legal) that operators wishing to deploy high-speed communication networks have been confronted with when attempting to access existing telecommunications infrastructure in Jamaica?**

Answer:

a) Flow considers that the nature of the Jamaican market is a constraining factor. On the evidence over time, it seems that Jamaica's market (population size, income per capita) is not able to generate sufficient revenues to sustain more than two aggressively competing operators. The geography of the country also plays a role. In that, creating a ubiquitous networks in Jamaica requires many points of presence (PoPs). These in turn, drive high fixed costs to maintain and operate the network. Once the investment has been made, companies are eager to realize a reasonable rate of return.

OUR's questions on chapter 7 and Flow's response

1. Do you agree with the basic infrastructure sharing principles outlined in Section 7.2?

Answer:

Section 7.2 Basic infrastructure sharing principles on page 74

The thirteen basic principles set out in para 7.2 are wide in scope. These principles are the basis of the proposed Rules. The premise of the principles seems to be that all licensees which own or control telecommunications infrastructure should provide access to the infrastructure except in two sets of cases set out in subparagraphs (2) and (5):

> "2. *The Office shall not require a Licensee to make telecommunications infrastructure available where such Licensee does not also make such infrastructure available to itself or a connected company or otherwise use such telecommunications infrastructure in offering its own services.*
>
> *5. An Infrastructure Provider on whom an obligation to share has been imposed, shall not refuse to provide infrastructure sharing services, except where it is due to circumstances related to technical feasibility, such as: impairment of the security or reliability of the infrastructure or the infrastructure provider's (or third party's) network; a lack of currently available space; or future needs for space. Any such claim shall be subject to independent verification by the OUR on a case-by-case basis."*

Flow's concern is that this approach is in opposition to the mandate given to the OUR in Section 29 of the Telecommunications Act ('the Act'). Section 29(A) allows the OUR to impose an infrastructure sharing obligation on a licensee where it is justified in certain circumstances.

> *"29A (1) Subject to subsection (3) the Office may-*
>
> *(a) impose an infrastructure sharing obligation a licensee, where the Office considers it to be justified having regard to any of the following considerations-*
>
> *(i) matters relating to public health or to the environment or town planning or other development considerations;*
>
> *(ii) economic inefficiencies;*
>
> *(iii) physical or technical impracticability;"*

The OUR's mandate under the Act is to impose an Infrastructure Sharing obligation on a licensee where the facility meets any of the three considerations. The OUR is instead imposing a general obligation to share except in the *circumstances of sub-paras (1) and (5). So the basic principles end in sub-paragraph 13:*

> *"Any licensee that owns or controls any passive network infrastructure will be required to, within a timeframe to be specified, provide the OUR with a complete inventory of its passive infrastructure in order to facilitate the establishment and maintenance of a national database for passive infrastructure. Licensees will be required to provide updates on newly commissioned infrastructure."*

Flow therefore submits that the issuing of a Notice of Proposed Rule Making ("NPRM") by the OUR is premature. Our expectation is that the OUR would begin by consulting with stakeholders on how it will treat

with the three conditions set Section 29A(1)(a). Once the OUR establishes its treatment of the three conditions (and its concomitant obligations set out in Section 29A(1)(b) and (c)), the OUR should consult on its obligation in Section 29A(3) on the application of the principles in Section 33 to Infrastructure Sharing. So, while Flow is grateful for the general learning on Infrastructure Sharing and its development around the world in the ninety-nine page NPRM, Flow is incredulous that approximately six pages (pp 76-81) address the three conditions in Section (1) (a) directly. The "Principles for Cost Apportionment" is also given short shrift, being dealt in four pages (pp 82-85).

The OUR's examination of its obligations under Section 29A of the Act is done in Chapter 7 "Framework for Infrastructure Sharing in Jamaica". After giving the "Background" in part 7.1, the OUR sets out the "Basic infrastructure sharing principles" which reflects the OUR's distillation of its examination of Infrastructure Sharing, and is not, in Flow's opinion, grounded in the Act. Chapter 7 then continues with part 7.3 "Basis for the Imposition of an Infrastructure Sharing Obligation" which deals with Section 29A(1) of the Act. Chapter 7 concludes with part 7.4 "Principles of Cost Apportionment".

Flow's submission is as follows. Section 29(4) of the Act gives a list of "tangibles" and "intangibles" which can be subject to Infrastructure Sharing. There is no presumption that a tangible or intangible infrastructure owned by a carrier, dominant or not, is to be shared. Where the OUR receives a complaint from a carrier that it is seeking access to infrastructure, the OUR may "impose an infrastructure sharing obligation on a licensee, where the Office considers it to be justified having regard to any of the following considerations- (i) matters relating to public health or to the environment or town planning or other development considerations; (ii) economic efficiencies; and (iii) physical or technical impracticability." The OUR has not indicated to its stakeholders what factors it will use to make the determination. This should be the subject of a separate consultation.

Rule 4 in the Draft Rules (page 89) reads inter alia:

"4.3. Where a Licensee has been refused a permit to construct telecommunications infrastructure by any of the responsible authorities, the OUR may mandate the sharing of existing infrastructure that will provide the Licensee with the same/similar facilities as the infrastructure for which permission was not granted.

4.4. In considering whether to issue a direction in the public interest to share an infrastructure under rules 4.2 and 4.3, the Office shall take into account relevant matters including, but not limited to the following:

i. the existence of technical alternatives;

ii. whether the infrastructure is critical to the supply of services by the licensees;

iii. whether the infrastructure meets the technical parameters of the Infrastructure Seeker's network;

iv. the availability of space to host the Infrastructure Seeker, including the network operator's future needs for space (this must be sufficiently demonstrated);

v. safety and public health concerns;

vi. the impact on the operational integrity of the Infrastructure Provider's network or any existing equipment at the collocation or sharing site that are under the control of infrastructure provider or any other third party;

vii. the risk of serious interferences of the planned telecommunications services with the provision of other services over the same physical infrastructure."

By way of example, without the benefit of a consultation on the principles which will guide the OUR in making an assessment under Section 29(1)(A)(i) of the Act *on matters relating to public health or to the environment or town planning or other development considerations*, we are left guessing on what principles the OUR will apply under Rule 4.4 (v) *safety and public health concerns.*

For the avoidance of doubt, the relevant discussion in the NPRM (pages 76 to 78) is set out below in its entirety:

> ***"Matters relating to the public health or to the environment or town planning or other development considerations***
>
> *"Due to the expansion of the telecommunications industry, the location, siting and development of telecommunications infrastructure can become an issue of particular interest or concern in local communities, with debate focusing on visual amenity and public health. As was noted earlier in the document, there are concerns about the effect on the health and wellbeing of the public of human exposure to radio frequency radiation (RFR) emissions transmitted from towers. While the global bodies such as the World Health Organization (WHO) have indicated that they have found no convincing scientific evidence that weak RFR signals, such as those emanating from base stations and wireless networks, adversely impact health, the WHO itself has acknowledged that human exposure to RFR emissions increases with an increase in the number of base stations and wireless networks.75 Additionally, the permits for construction of some infrastructure such as ducts and landing stations which may have been easily obtained when there was a sole operator in the market, may no longer be readily available due to changing development objectives.*
>
> *Jamaica has several pieces of primary and secondary legislations related to environmental protection and planning and development. The main legislations are: the Natural Resources Conservation Authority Act; the Town and Country Planning Act; the Land Development and Utilization Act; the Beach Control Act; the Watersheds Protection Act; the Wild Life Protection Act; and the Endangered Species (Protection, Conservation and Regulation of Trade) Act. Environmental permissions are the remit of the Natural Resources & Conservation Authority (NRCA) who utilises a system of permits and licensing to protect the environment. Planning permissions, falls under the Town and Country Planning Act and are the remit of three public bodies: the Town and Country Planning Authority (TCPA), the Local Authorities (also known as the Parish Councils) and the Government Town Planner. The technical (functional) and administrative mandates of the NRCA and the TCPA are carried out by the National Environment and Planning Agency (NEPA).*
>
> *While the primary environmental and planning legislations do not make any specific reference to the treatment of telecommunications infrastructure, the Development Orders established under the Town and Country Planning Act make mention of telecommunications infrastructure. The Development Orders set out the framework, guidelines and policies for planning and development in parishes and communities. The Government plans to establish Development Orders for all parishes and select communities by 2017.76 To date Development Orders have been promulgated for Portland, Manchester, Trelawny and Negril/Green Island.*
>
> *The Town and Country Planning Authority, recognising the importance of facilitating the growth of telecommunications in Jamaica, has established planning guidelines for telecommunications. The Telecommunications Planning Guidelines are intended to achieve the following:*
>
> *i. balance the deployment needs of telecommunications providers with the protection of the environment for public welfare;*
>
> *ii. assist community understanding of the issues involved in the design and installation of telecommunications infrastructure and provide opportunities for community input in the decision making process;*

iii. promote a consistent approach in the preparation, assessment and determination of applications for planning approval of telecommunications infrastructure;

iv. minimize disturbance to the environment and loss of amenity in the provision of telecommunications infrastructure; and

v. ensure compliance with all local government regulations and health and safety standards in the erection of telecommunications infrastructure.

According to the Telecommunications Planning Guidelines, the policy objective is keeping the number of masts to a minimum and encouraging mast sharing where appropriate. To that end, Planning Authorities are tasked with encouraging the use of existing building and reuse of existing sites to site new antennae rather than supporting new installations. Planning Authorities shall require that the operators/applicants demonstrate that all reasonable steps have been taken to:

a) investigate mast sharing before seeking to erect new mast.

b) pursue the possibility of cooperating with another operator to erect new mast for joint usage.

Where an operator has been refused a permit to construct telecommunications infrastructure by any of the responsible authorities, the OUR *may mandate the sharing of existing infrastructure that will provide the rejected operator with the same/similar facilities as the infrastructure for which permission was not granted.* ***Additionally, where an operator's request to share has been rejected, the OUR will consult with the relevant authorities to determine whether there is grounds to mandate sharing on the basis of 29A(1)(a) of the Act. The OUR plans to establish a protocol with the relevant authorities in order to streamline the process by which mandatory sharing may be triggered due to "matters relating to the public health or to the environment or town planning or other development considerations". (emphasis Flow's)***

Flow, and all other stakeholders are left to await the results of the OUR's consultation "with the relevant authorities to determine whether there is grounds to mandate sharing on the basis of 29A(1)(a) of the Act." This concern is also applicable to the other two considerations. Flow had expected that type of discussion to be done in this consultation. Its absence has materially compromised the effectiveness of the NPRM.

2. Do you agree with the proposed factors to be taken into account by OUR in considering when to impose an infrastructure sharing obligation on a Licensee? Should you disagree, kindly provide a detailed explanation for your views and suggest additional or alternative factors.

Answer:

Section 7.3 Basis for the Imposition of an Infrastructure Sharing Obligation

This section examines each of the criteria set out in Section 29(A) of the Act.

Subsection 7.3.1 Matters relating to the public health or to the environment or town planning or other development considerations

The OUR is proposing *"Where an operator has been refused a permit to construct telecommunications infrastructure by any of the responsible authorities, the OUR may mandate the sharing of existing infrastructure that will provide the rejected operator with the same/similar facilities as the infrastructure for which permission is not granted."* On the face of it, this approach is too simplistic. Absent some justification, there is no basis to assume that such an operator will not be permitted to build in an alternate location that is appropriate or is able to employ technology to meet the intended functional required. Again this issue ought to be properly the subject of Industry consultation. In our considered view there needs to be a number of caveats added to this blanket statement.

Subsection 7.3.2 Economic inefficiencies

This section concludes by stating *"The OUR thinks it reasonable that dominant operators be required to provide access to their infrastructure where technically feasible. In this regard, where a Licensee is declared to hold a dominant position in a relevant market, the Office may impose a general obligation requiring it to share its network infrastructure with other licensees."*

Flow has three fundamental concerns about this statement;

a) First, in our view, the OUR's thinking is evidence of its misinterpretation of its mandate under the Act. Since the Act only intends to impose infrastructure sharing in the exceptional circumstances specified under the Act.
b) Second, any attempt by the OUR to enforce its misunderstanding would be sure to have a chilling effect on investment in the sector.
c) Third, the OUR is to be reminded that dominance itself is not prohibited by any statute or policy. As such, dominant firms are not to be forced to share their investments with others as a matter of course.

3. Do you agree with the considerations outlined by the OUR for assessing physical and technical impracticability? If you disagree, please suggest alternative principles which OUR should consider.

Answer:

Subsection 7.3.3 Physical or Technical Impracticability

The OUR addresses two aspects of this particular element: the physical or technical impracticability of replicating an existing telecoms infrastructure as a reason to mandate Infrastructure Sharing; and the technical infeasibility of sharing a particular infrastructure as an objective reason to prevent Infrastructure Sharing.

Relying on Section 29A(1), Flow argues that Infrastructure Sharing should not be mandated unless it is impossible for the operator seeking access to replicate the facility. We can expand this argument by adding caveats around what constitutes replicating a facility. Furthermore, with the fast paced development of technology, while it may be impossible to replicate a facility, alternative or emerging technology may allow the operator to meet its requirement without access to the relevant facility. Therefore, the physical or technical impracticability of replicating a facility must lead to a competitive bottle neck in the market for there to be a basis for the Office to contemplate the imposition of Infrastructure Sharing.

Subsection 7.3.4 Consultation regarding the imposition of obligation

It is noted that the OUR is proposing to consult before any directive is given under Section 29(A)(1).

4. **Do you agree with OUR's proposed costing principles for the setting infrastructure sharing charges? If you disagree, please suggest alternative principles which OUR should consider.**

   Answer:

   Flow does not agree. As stated repeatedly throughout our response. Infrastructure sharing should not be mandated. Negotiated commercial sharing arrangements should be governed by rates based on market value considerations.

5. **Do you agree with OUR's proposal on the costing methodology for determining charges for infrastructure sharing? If you disagree, please suggest an alternative method of cost allocation along with evidence to support the same.**

   Answer:

   Flow does not agree. See our response to question 4.

Closing remarks

In our view, the conclusions and the proposed draft Infrastructure Sharing Rules are premature and out of step with both the Act and the environment needed to encourage investment in the sector. The issue merits robust discussion and the proposed approach reconsidered. Flow looks forward to continuing its active engagement and participation in the consultation process.

End of document