CABLE & WIRELESS
JAMAICA

C&WJ'S COMMENTS ON RESPONSES

TO THE

OUR'S CONSULTATIVE DOCUMENT ON DOMINANT PUBLIC VOICE CARRIERS NO. 3

May 22, 2003

Introduction

C&WJ is pleased to be afforded the opportunity to comment on the responses made to the OUR's Consultative Document on Dominant Public Voice Carriers No. 3 (" the Third Consultative Document"). Due to the nature of its comments, and in order to avoid repetition of overlapping concerns, C&WJ has not followed the structure of the responses of Digicel and Reliant Enterprise Communications Limited ("Reliant"), but has sought to divide this document in accordance with issues contained in the said responses.

Procedural Issues

Reference is made to paragraphs 5 and 13 of Digicel's response in which it states that the Office has not addressed its concerns regarding the consequences of being determined to be dominant. In this regard, C&WJ wishes to note that the Telecommunications Act 2000 (the Act) clearly sets out the several consequences of being dominant, but it nevertheless wishes to encourage the Office to specify the exact consequences of being determined dominant in order to satisfy Digicel's concern.

In paragraph 18, Digicel alleges that the Office has not engaged the Fair Trading Commission (FTC) in substantive a priori consultation and goes further to state that dominance is a competition law concept and that this further supports their allegation. C&WJ remains unclear as to the basis of Digicel's allegation in light of the fact that although the FTC is aware of and has participated in the consultation, the FTC has not supported Digicel's allegation. Further, C&WJ wishes to note that dominance is an economic concept that has been enshrined in law and in this respect the telecommunications specific regulator is well within its jurisdiction to apply the law where it has been so empowered.

Fixed to Mobile Termination

C&WJ is somewhat puzzled by Digicel's suggestion, in paragraph 4 of its response, that the OUR has adopted a theory of collective dominance because the Office has arrived at the conclusion that more than one carrier is dominant. C&WJ assumes that Digicel is referring here to the OUR's conclusions that there are separate markets for call termination on each network.

The consequence of this being that C&WJ will be dominant with respect to the termination of calls on the C&WJ network and Digicel will be dominant with respect to the termination of calls on the Digicel network. C&WJ is at a loss to understand how Digicel interprets this as the OUR adopting a theory of collective dominance. Collective (or joint) dominance has been defined in the European Framework Directive[1] as follows:

[1] Annex II of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

" Two or more undertakings can be found to be in a joint dominant position ….if, even in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated effects".

To assess whether a market could be susceptible to joint dominance involves looking at a number of factors especially those concerned with market concentration and transparency. These include considering whether the market, inter alia, involves the supply of homogenous products, similar cost structures and high entry barriers.[2]

As far as C&WJ understands, however, the OUR has not made any suggestion that the supply of mobile termination is such that it is a market characterised by joint dominance. It has not, for example, defined a single, national market for call termination within which conditions are such that there are a number of firms holding a position of joint dominance. Instead, it has applied the relevant economic tests (namely the SSNIP test) to establish that there are no effective demand or supply side substitutes that act as price constraints on each of the mobile operators' call termination services. Therefore, C&WJ believes that the OUR has reached the correct view that there is not one market for call termination but a series of single network markets for call termination, within each of which there is single firm dominance.

C&WJ again reiterates that this approach is consistent with the approach that has been adopted in the UK by Oftel and also within Europe by the European Commission.

In paragraph 14 of its response, C&WJ notes Digicel's view that it is unclear what methodology the OUR will use to assess dominance. In paragraphs 15 to 16, Digicel goes on to question the basis on which the OUR can proceed to make any determination unless it has first identified the relevant market and then applied an approach to determining dominance.

C&WJ believes that the OUR has identified the methodology that should be used for assessing dominance in the Appendix to its Consultative Document No. 2, and that this methodology is consistent with that used by a large number of other regulatory and competition bodies such as in the UK and Europe. The issue, then, is whether the OUR has actually applied that methodology correctly and consistently to all the identified services.

C&WJ believes that the OUR has applied the methodology (in terms of both market definition and the assessment of dominance) correctly to the markets for mobile termination. The OUR has clearly set out its market definition analysis in terms of demand and supply side substitutes and has reached a conclusion that is consistent with that reached by a number of other regulatory bodies.

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[2] The concept has been a contentious issue within Europe but its meaning has been clarified recently by the European Court of First Instance in its judgement on the Airtours/First Choice merger. See *Airtours v Commission*, Case T-342/99, 6 June 2002. *Airtours/First Choice*, Case IV/M.1524, 22 September 1999

As far as its assessment of dominance in the markets for mobile termination is concerned, the type of data that needs to be considered in the context of mobile termination is largely irrelevant. Regardless of the measure used to measure market power in the supply of mobile call termination (or, indeed, fixed termination) the conclusion will be the same, namely that every operator is dominant with respect to calls terminated on its own network. There are no competitive constraints and the operator will have the ability to act independently of its competitors and customers. Therefore no further analysis is required. Given the conclusion on market definition C&WJ will be dominant in mobile termination on the C&WJ network whether its market share is measured in terms of sales value or volume. Similarly, Digicel will be dominant in mobile termination on the Digicel network regardless of what measure of market share is used. It is therefore fallacious for Digicel to argue, in the context of mobile termination, that judgments on dominance cannot be made until the OUR has specified what measures or proxies it will use to measure market power.

C&WJ would share Digicel's concerns, however, as far as the fixed markets are concerned and would contend that the OUR has not applied the methodology to these markets in a manner that is consistent with how it has been applied to the market for mobile termination.

C&WJ notes the statement in paragraph 19 of Digicel's response, that the OUR has not conducted an analysis of the buying power of corporate customers and the suggestion that, had it conducted such an analysis, it would have found such customers acted as a constraint on the prices charged for mobile termination services.

C&WJ refutes the suggestion that corporate customers act as a constraint on mobile termination charges. Reliant, in its response made the point that Digicel offered its corporate customers a facility that would enable such customers to avoid incurring the payment of high fixed to mobile charges by having such calls reflected as Digicel to Digicel calls, which incur a much lower charge. In this way, Digicel has effectively segmented the market by, in effect, offering corporate customers lower termination rates, while the majority of customers continue to pay the excessively high fixed to mobile termination rates. The price of fixed calls terminating on Digicel's network has not in any way been reduced since Digicel first set the rates, and this clearly indicates that corporate customers have not restrained these prices.

C&WJ wishes to repeat the position of the UK Competition Commission[3] quoted by C&WJ's in its response to the Third Consultative Document, as it clearly supports C&WJ's position when it states:

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[3] Competition Commission: Vodafone, O_2, Orange and T-Mobile, Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O_2, Orange and T-Mobile for terminating calls from fixed and mobile networks, December 2002 (para 2.147). Available at: http://www.competition-commission.org.uk/fulltext/475c2.pdf

"For most mobile users, incoming call charges are a relatively low priority. There is evidence of a degree of price sensitivity on the part of a minority of mobile users, including particular groups such as large businesses. The MNOs have, however, in our view largely neutralised the pressure which these groups would otherwise have been able to exert on termination charges by offering such users more favorable terms than the generality of mobile customers, usually in the form of differential tariff rates. By segmenting the market in this way, the MNOs have been able to sustain termination charges for the generality of customers than would otherwise have been the case."

In paragraph 21 of its response, Digicel has stated that *"Any approach to regulation that has an excessive focus on allocative efficiency and the equation of price to some proxy for marginal costs (whether it be LRIC or otherwise) is likely to result in static investment..."*

C&WJ strongly disagrees with Digicel on this statement for several reasons:

- Firstly, economic literature states that productive efficiency occurs when goods and services are produced at minimum cost whereas allocative efficiency occurs when prices reflect marginal costs - C&WJ believes that the OUR's approach to regulation is better characterised by dynamic efficiency rather than allocative efficiency. This is evident on the OUR's implementation of price caps and setting interconnection charges for use of C&WJ's network using fully allocated costs. Both of these regulatory mechanisms are designed to improved dynamic efficiency.

- Secondly, C&WJ is unaware of any efforts by the OUR to equate price with marginal cost (LRIC or otherwise) in any regulatory proceeding. Specifically, the OUR's Determination related to the regulation of mobile termination charges at cost-oriented levels was based on the fully allocated cost methodology and therefore cannot be categorised as an approach by the OUR that focuses on allocative efficiency.

- Thirdly, this statement by Digicel totally contradicts its previous statements in various proceedings related to the appropriate costing methodology for mobile termination. Specifically, in section 2.6 of Digicel's response to the "Assessment of Cable & Wireless Jamaica's Reference Interconnect Offer (RIO 4)", Digicel had publicly stated that LRIC and related methodologies are the appropriate cost methodology to use. Moreover, Digicel went so far as to criticise the OUR for failing to develop a LRIC model. C&WJ believes that it appears that Digicel has reversed its arguments to suit its interests and questions the credibility of Digicel having even made such a proposal in the first instance.

Contrary to Digicel's arguments in paragraph 22 of its response, C&WJ supports the various arguments cited by the OUR regarding the adverse welfare effects of high fixed to mobile charges and believes that there is evidence to support that the effects include:

- discontinuation of fixed line contracts
- churn
- excessive use of high cost mobile network

C&WJ is willing to assist the OUR by providing information in support of these effects, upon request.

Finally, C&WJ understands that a similar set of arguments were adopted by Oftel and the Competition Commission in the UK. For example, in paragraph 2.427 of its Report, the Competition Commission[4] states:

> "   *…we do not accept that the current structure of prices set by the MNOs is either economically efficient or operates to the benefit of consumers or society at large. It distorts consumer choice by encouraging consumers to choose a higher cost service than they otherwise would. Even if the retail market were fully competitive, the setting of high termination charges in order to fund low access and call origination prices would produce a heavily skewed structure of tariffs which would both distort consumer choices, particularly between fixed-to-mobile and on-net calls, and have adverse distributional effects of the kind already considered (see paragraphs 2.396 to 2.406)".*

C&WJ proposes that ex ante regulation is most suitable for the fixed to mobile termination market which has suffered from persistent market failure. By its very nature, ex ante regulation is designed to ensure that such adverse welfare effects associated with excessive pricing for mobile termination do not materialize.

C&WJ shares Digicel's concerns, expressed in paragraph 24 of Digicel's response, that the OUR has applied the SSNIP test inappropriately to the fixed line market, as the prices in that market are subject to regulation. Any attempt to apply the SSNIP test to such price data is therefore likely to result in false conclusions being drawn about the scope of the market. In such circumstance, the boundaries of the market needs to be considered using other, more qualitative methods, such as surveying customers and suppliers directly about the scope for substitution to other products or services.

C&WJ does not, however, believe that this misapplication of the SSNIP test has any implications for the market definition of call termination, as Digicel suggests in paragraph 25 of its response. Whilst there may be implications for the analysis of the extent of substitutability between mobile and fixed networks for origination and access services, there are no such implications for mobile and fixed termination. Terminating a call on a fixed network is not a substitute for terminating a mobile call on the Digicel network, in the same way that terminating a mobile call on the C&WJ network is not a substitute for terminating a mobile call on the Digicel network. This is true regardless of the extent of substitutability between fixed and mobile networks on the origination or access side.

International Facilities

As articulated in CWJ's response to the Third Consultative Document and as reinforced by Digicel, satellite transmission is a substitute for cable transmission. The constraints that Digicel has ascribed to satellite transmission, in paragraph 27 of its response, vis a vis cable, are irrelevant as it pertains to voice telephony.

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C&WJ currently offers a switched minute offering and is happy to continue to do so to support the redundancy remits of other network operators. Additionally C&WJ continues to offer its International Private Leased Circuits (Cable & Satellite) towards this end.

The fact that other operators in the market are owners of cable facilities in Jamaica coupled with the fact that these operators possess the ability to land these facilities clearly indicates that this is not a bottleneck service and should not therefore be included in CWJ's RIO.

Entry Barriers & Competitive Constraints

Reliant has suggested that ISP customers suffer a price disadvantage from having to use C&WJ's fixed network to dial –up and that a similar disadvantage exists for service providers providing Prepaid Card services.

C&WJ would remind Reliant that the markets for all telecommunications services are fully liberalised, so there is no requirement for service providers to use C&WJ's access network to provide any type of services. In fact in its submission Reliant reinforces this position by indicating that it is "*… in the process of building its own facilities and has little requirement for C&W facilities, except for interconnect."*

Further, in addition to the various interconnect offerings, C&WJ provides wholesale services such as wholesale international and domestic direct dialed minutes, wholesale international and domestic toll free minutes and other dedicated facilities that allows service providers to offer their services, and in fact replicate some of C&WJ's retail offerings. Some of C&WJ's offerings such as domestic usage rate (both direct dialed and toll free), are not yet rebalanced and as a result the wholesale offerings which are required by law to be priced at retail minus are being offered below cost. As such, contrary to the impression created by Reliant, C&WJ is, in effect, subsidising the entry of some of these players into the market.

Reliant has also suggested that C&WJ may well be deliberately delaying the conclusion of interconnect agreements. C&WJ vigorously refutes any claim that it is seeking to delay the provisioning of interconnection to any provider.

C&WJ is required to provide interconnection services based on its Reference Interconnection Offer (RIO). This offer is in the public domain and is available to any party who is seeking interconnection with C&WJ. The OUR is responsible for approving the RIO. While the latest RIO (RIO 5) which addresses the provision of new and revised services to take account of the complete liberalisation of the market has not yet been approved, C&WJ has taken the initiative to put out a commercial RIO to facilitate providers who are anxious to interconnect.

The Company has gone further to implement other initiatives such as making available to Interconnect Seekers a summary of the process required to facilitate interconnection and allowing service providers, where possible, to provide both ends of the joining services to allow greater control of the process from the Interconnection Seeker's perspective, once agreement has been reached on the terms of the RIO.

Reliant has also intimated that C&WJ may be guilty of abuses because it is a vertically integrated company. C&WJ refutes any allegations that C&WJ may be competing unfairly because it is vertically integrated. Adequate safeguards, such as the creation of a separate Carrier Services Division separated from the Retail arm of the Company by a corporate firewall, go a long way to ensure that C&WJ's vertically integrated operations do not compete unfairly. In addition, the application of the price cap regime, requirements for cost-based interconnection charges and compliance with the Fair Competition Act, leave no room for C&WJ to compete unfairly.

In responding to the specific allegation by Digicel, that C&WJ is delaying mobile to mobile interconnection, C&WJ wishes to advise that C&WJ had submitted a RIO for direct mobile-mobile interconnection on March 1st 2002. The first formal application for this service came in December 2002 from Digicel and negotiations are currently in progress to advance direct mobile to mobile interconnection.

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