



CABLE & WIRELESS
JAMAICA

C&WJ'S RESPONSE
TO THE
OUR'S CONSULTATIVE DOCUMENT ON DOMINANT PUBLIC
VOICE CARRIERS NO. 3

April 29, 2003

INTRODUCTION

Cable & Wireless Jamaica Limited (“C&WJ”) welcomes this opportunity to respond to the OUR’s Consultative Document on Dominant Public Voice Carriers No. 3 (“the Third Consultative Document”).

C&WJ notes with concern however, that the Third Consultative Document does not address many of the concerns raised by C&WJ in its response to the OUR’s Consultative Document on Dominant Public voice Carriers No. 2 (“the Second Consultative Document”), nor its subsequent comments on the responses of the other interested parties. Some of the concerns that C&WJ had raised and which the Company had expected the Office to address in detail in this Consultative Document, are, inter alia, the appropriate application of the SSNIP test, reconsideration of markets in which the OUR has declared C&WJ to be dominant and the matter of dominance by default and in unspecified markets.

C&WJ’s response to the second Consultative Document and its subsequent comments were quite detailed and specific. It is therefore of particular concern to the company that the arguments and analysis contained therein seem not to have been taken into consideration at this third and purportedly final stage of the consultative process on Dominant Public Voice Carriers. Nevertheless, C&WJ trusts that the OUR will address these issues at the Determination stage.

For ease of reference, in framing its response, C&WJ will seek to address areas of concern by following the subject area headings and / or numbering of the Third Consultative Document, as far as is possible.

CHAPTER 1: DOMINANCE AND THE TELECOMMUNICATIONS ACT

1.1

It is C&WJ’s belief that the true purpose of a statutorily required process of declaration of dominance through a consultative process is to avoid declarations based on general opinions. A consultative process should not only identify market definitions, but should provide analysis of market conditions and criteria which relevant parties could reasonably compare and contrast as part of an application for declaration of non-dominance.

To use the existence of legal barriers “across the board” as a basis for declarations of dominance deprives the incumbent of the opportunity to agree or disagree with the identification of relevant markets, and to understand the criteria used by the OUR within particular markets for the purpose of determining dominance. For instance, following the reasoning that the existence of legal barriers are deemed sufficient for a declaration of dominance, C&WJ should logically be able to argue that the removal of those legal barriers are sufficient grounds for a declaration of non-dominance.

While legal barriers may have been sufficient prior to the year 2000 to justify a determination that C&WJ is dominant, it is clear that all markets are now fully liberalized and the current licensing regime is not a barrier to entry . Accordingly, at this point in time, the OUR should

be examining and analyzing the facts, as dominance is not a matter of law, but a matter of fact.

1.2 – 1.3

C&WJ is concerned about the seemingly random selection of the markets for discussion. The OUR has listed several services and then in paragraph 1.3 once more assigned a blanket determination of dominance without any analysis beyond legal barriers in existence prior to 2000. C&WJ also notes that the markets referred to in this Consultative Document are not the same as those set out in the second Consultative Document. This inconsistency without explanation is cause for concern.

C&WJ also wishes it to be noted that the examination of legislation prior to March 2000 cannot and should not be taken as relevant to a declaration of dominance in the year 2003, and further still, beyond the commencement of Phase III of liberalization.

1.6 – 1.7

In respect of these two paragraphs, C&WJ merely wishes to clarify that it was not guaranteed the given range of rate of return, but was allowed to earn between 17.5 and 20% on its net assets. Rate of return regulation is a standard regulatory tool used internationally in monopoly market structures and accordingly C&WJ gained no particular or unusual benefit from same. It must also be noted that this rate of return regulation regime operated in the context of significantly unbalanced tariffs in that the main domestic services (access and national usage) were provided to consumers at rates significantly below cost. Accordingly, while there was no competition, low prices were delivered to customers through regulation of domestic telephone rates at below cost.

1.10

C&WJ is unclear as to the logic of this paragraph. It states both that the legislation required price caps to be imposed as a means of constraining C&WJ's pricing, and also states that the legislation provided C&WJ with sufficient market power to price its services without constraints. The paragraph is further based on the premise that Price caps are related to dominance. Neither section 46 or 81 of the Act ties the imposition of price caps to dominance or the lack of effective competition. Those sections only refer to the existing carrier. The OUR is therefore attempting to colour its reasoning with a presumption of dominance based solely on previously existing legal barriers. C&WJ therefore wishes to emphasize that, as the OUR is aware, C&WJ's ability to price is constrained by Price Caps, and it has not been permitted to rebalance as much it has wanted. Accordingly, it is not correct to state that C&WJ prices without constraints. Having moved past March 2000 as well, it is false logic for the OUR to continue to rely on previously existing conditions as a basis for present day, and on-going analysis.

1.12 – 1.13

The Act provides for the Office to make rules for the imposition monitoring and enforcement of price caps. However the implementation of a price cap regime as a means of general price regulations for consumer protection does not presuppose dominance in discrete markets. Dominance is an issue dealt with under Part V which deals with interconnection while Price Caps is an issue under Part VII which deals with consumer protection. The process to determine dominance should start with a definition of the relevant market, much like the OUR has already outlined in the appendix of the Second Consultative Document.

Whilst the OUR now seems to be attempting to resile from the stated definition of effective competition, it should be noted that the said definition was proposed by the OUR subsequent to the passing of the Act, and during the process of defining specific rules for the price cap regime. It should also be noted that a lack of effective competition in a particular service / market as defined by the OUR does not automatically mean that C&WJ is dominant. It should also be noted that as the Price Cap Rules have not formally entered into force by affirmative resolution as provided for in the Act, the OUR's reliance on same as a basis for stating that the prescribed services are not subject to effective competition, is questionable. Further, it must be noted that in the present framework is legally possible for services subject to effective competition to remain within price caps.

1.14 – 1.15

It must be noted that Section 32 does not state that the existing telecommunications carrier is a dominant carrier. It simply imposes the same obligation upon both categories of carriers. In this regard, C&WJ submitted the initial RIO pursuant to the obligation imposed on the *existing carrier*.

1.16

C&WJ notes that this paragraph once more relies on the false premise that it is sufficient for the OUR to declare dominance without analysis on the basis of previously existing legal barriers. To state that dominance is a question of fact, not of law cannot be overstated nor repeated too often, as it seems to be the foundation of much false logic applied throughout this Consultative process. C&WJ also wishes to note the OUR's euphemistic use of the term "substantially reduced" to refer to the removal of legal barriers. C&WJ takes the position that it is far more realistic to take the position that legal barriers have been removed under the Phase III licensing regime.

1.18

Section 28(3) allows a Carrier declared to be dominant to ask for a declaration of non-dominance, should the facts of the marketplace change over time. There is no provision in s. 28 to consider a carrier "currently regulated as a dominant" to be deemed to be declared dominant. There is no basis for making a Carrier go through the process of requesting a declaration of non-dominance until the OUR has made the prior finding of fact that the carrier is dominant. C&WJ retains its position that it cannot properly be deemed dominant without the process set out in the Act having been followed and the fact of dominance

proven. No carrier, including “the existing carrier” as defined by the Act, is declared dominant under the Act.

CHAPTER 2: JUDICIAL REVIEW, THE ROLE OF THE FTC, MOBILE TERMINATION AND REGULATORY IMPLICATION OF A DECLARATION OF DOMINANCE.

Judicial Review

2.0 – 2.3

C&WJ wishes to state its belief that by raising the issue of the matter under judicial review, Digicel is seeking to cloud the relevant issues at hand, that is, the determination of dominance in the mobile termination market. Digicel’s approach is unhelpful to the development of the telecommunications industry, the proper and efficient regulation of the sector and to consumers in general..

C&WJ believes that in the section entitled “Likely Impact of Excessive Mobile Termination Charges”, the OUR accurately captured the most important effects of excessive mobile termination charges which are of such importance that they bear repeating:

- The high cost of mobile termination charges are borne by fixed line customers.
- Excessive fixed to mobile (FTM) call charges discourage these types of calls and contributes to customers churning off the fixed network.
- Fixed line customers are subsidizing mobile customers who only make calls to other subscribers on their own network.
- The excessive price of FTM calls (resulting from high fixed to mobile termination rates) is an incentive for customers to use the higher cost mobile network than to call from the lower cost fixed network. Indeed, this could be interpreted to be an abuse of dominance under section 20(1)(d) of the Fair Competition Act.

C&WJ supports the position of the OUR in law, in that it appears to have a separate jurisdiction under the Act to make determinations of dominance, regardless of whether any alternative / parallel proceedings take place in relation to related subject matter.

Periodic Re-Examination of Markets for Effective Competition

2.9

C&WJ is not clear on the relationship between the Telecommunications Market Review Process and future determinations of dominance. C&WJ is also not clear on how it is intended that the said market review process should operate

One concern in particular, which C&WJ holds, is that the data collection position paper will be issued in July and the first request for data will be issued in July or August. C&WJ

believes that this is insufficient time to consider representations on the scope or cost or relevance of some of the proposed data to be collected.

Mobile Termination

Barriers to entry

C&WJ recognizes that whilst it may, in theory, be technically feasible for a mobile user to have multiple SIM cards, it is practically infeasible. Not only does it require handsets to be capable of accepting multiple SIM cards it also requires the mobile user to subscribe to more than one mobile network at the same time. The costs associated with this for the mobile subscriber, particularly when he does not have to bear the cost of incoming calls under calling party pays, means that it is highly unlikely that he would have the incentive to subscribe to more than one network.

This was recognized in the recent UK Competition Commission report¹ on the charges for terminating calls to mobile networks, where it stated:

“...one solution would be for the mobile customer to obtain a mobile phone with an internal dual “subscriber identity module” (SIM) card holder that would allow the subscriber to take advantage of the network with lower termination prices. Of tel told us that, if this dual SIM card device was to act as a competitive constraint, mobile customers would have to use the network with cheaper call termination as the “default” network, only switching to the other network to make cheaper outbound calls. Of tel told us that it doubted whether they would switch their SIM card to benefit those calling them; it was more likely, Of tel thought, that those switching their SIM card would do so to take advantage of differentials in outgoing call charges, for example, when roaming overseas. Our own survey evidence supports Of tel's view...Moreover, those being called would also need to be aware of current termination charges on different networks...”

The Competition Commission went on to consider whether any form of automatic intervention was available that would instruct the called party's mobile phone to switch networks automatically.² It reported Of tel's view that such a mechanism did not currently exist and was unlikely to be developed in the foreseeable future, citing the lack of incentives on the called party to use such a facility to reduce the costs of incoming calls. Furthermore, the Competition Commission also stated that it understood that it was not currently possible for a handset to be logged on to two networks simultaneously and this is also the case in Jamaica.

¹ Competition Commission: Vodafone, O₂, Orange and T-Mobile, Reports on references under section 13 of the Telecommunications Act 1984 on the charges made by Vodafone, O₂, Orange and T-Mobile for terminating calls from fixed and mobile networks, December 2002. (Paragraph 2.95).

² Paragraph 2.96, op cit

Q2.1 Is there any technology that allows a caller from a fixed line (for example) to select the mobile carrier's network on which he/she wishes to terminate a call? If yes, provide details.

C&WJ is unaware of any technology that allows a caller from a fixed line to select the mobile carrier's network on which he/she wishes to terminate a call. For such an arrangement to work in practice, the following conditions would be necessary:

- (a) The mobile customer being called subscribes to more than one network;
- (b) The mobile customer being called has a handset capable of accommodating multiple SIMs;
- (c) The calling party (the fixed line customer) is aware of all the different networks (and numbers) that the called party subscribes to; and
- (d) The calling party (fixed line) has the pricing information to inform decisions on which mobile network it wishes to terminate a fixed-to-mobile call.

It is C&WJ's understanding that these conditions are highly unlikely and it is not aware of any telecommunications market or technology where these conditions could be or are currently satisfied. For example, the UK Competition Commission Report³ makes no mention of the possibility of fixed callers selecting the mobile network on which its call is terminated.

Competitive Forces to be considered in assessing the Market for Mobile Termination

Q2.2 Is the buyer power of corporate customers sufficient to constrain the termination process of a given mobile service provider? Explain by providing evidence.

C&WJ believes that the buyer power of corporate customers is insufficient to constrain the termination prices of a given mobile service provider. This view is supported by evidence from the Jamaican telecommunications market:

C&WJ's understanding of the market is supported by the OUR's Consultative Document on the Universal Service Obligation wherein it is stated that no less than 90% of the mobile phone market is prepaid. Given that Corporate customers are primarily post paid customers, and that this would be a smaller subset of post paid customers, Digicel's arguments based on the buying power of corporate customers seem to lack credibility.

It would take significant divergence between average revenue per corporate subscriber relative to residential subscriber for there to be buyer power from corporate customers to constrain mobile termination.

Digicel has maintained the highest retail price for calling Digicel customers from fixed lines. Centential and C&WJ have maintained lower retail prices for calls from fixed line to customers on their respective mobile networks. C&WJ would therefore pose the question -

³ op cit

if buyer power from corporate customers is sufficient to constrain mobile termination, how then has Digicel been able to maintain higher fixed-to-mobile prices (and thus higher mobile termination) in a competitive market.?

Further support of C&WJ's views is evident from the UK Competition Commission, which considered whether the ability of large corporate customers to negotiate more favorable terms with the network operators was sufficient to constrain termination charges. It concluded⁴:

“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.”

C&W concurs with the OUR that it too is unfamiliar with the concept of retail termination charges. It notes that Digicel's comments in this context state that “...termination charges play an important role in ensuring the maintenance of subsidised handsets or low call origination charges...”. It agrees with the OUR that the latter statement is evidence of Digicel's termination charges being above cost.

CHAPTER 3: FIXED LINE AND INTERNATIONAL TELECOMMUNICATIONS FACILITIES MARKETS

The OUR has chosen two markets in this chapter to illustrate how the framework is applied to determine dominance. This in itself raises several concerns. Firstly, the basis on which the OUR selected these two markets is unclear; Secondly, although the OUR purports to be presenting applications of its framework in order to address C&WJ's concerns about a blanket application of dominance, the OUR fails to respond to any of C&WJ's concerns and views which were directed at the various interconnection markets.

LOCAL LOOP

Demand Substitution

Fixed Wireless and Fixed Wireline

The OUR purports to have carried out a SSNIP test in this section. It does so by comparing C&WJ's retail prices for basic telephony products, analysing the costs to the customer if C&W prices were to increase by 10% and comparing this with the costs if the customer were a subscriber of Gotel. The OUR concludes that with the exception of business line rental, a 10% increase in C&WJ's tariffs would not cause customers to switch to Gotel.

⁴ para 2.147, op cit

It is C&WJ's position that such an approach is fundamentally flawed and casts doubt on the OUR's ability to apply the theoretical framework consistently. The bases for this position are set out below.

To begin with, simple economic theory and competition policy dictates that an underlying assumption in a SSNIP test being applied to the hypothetical monopolist is that the level of price increase is unconstrained and above market price. This point is supported by the definition of SSNIP tests as used by the US Department of Justice. In its 1992 Guidelines⁵, it states (emphasis added):

*“A market is defined as a product or group of products and a geographical area in which it is sold such that a hypothetical, profit-maximising firm, **not subject to price regulation**, that was the only present and future producer or seller of those products in that area likely would impose at least a ‘small but significant and non-transitory’ increase in price assuming the terms of sale of all other products are held constant.”*

C&WJ's retail prices for basic telephony services are constrained by historic regulation and now price caps. All of the retail services included in Table 1, with the exception of international calls, are provided below cost. As a result, C&WJ is unable to understand how the OUR could apply SSNIP tests for services provided below cost when Gotel's retail rates are a better representation of what the market price is. In such a scenario, it is hardly surprising that the analysis suggests that customers would not switch to Gotel.

Moreover, even though it is early in the operational life of Gotel, the fact that it has been possible for Gotel to get some customers is evidence that customers are willing to pay the market price in switching from C&WJ.

Of greatest concern is the OUR's failure to disclose in paragraphs 3.6, 3.19, 3.23 and 3.24 – that C&WJ is constrained by regulation through the price cap regime. In particular, it is remiss of the OUR to imply in para 3.19 that C&WJ is dominant because it was able to raise the prices of line rental and intra-parish calls by more than 10% at a time when Gotel was about to commence service. The OUR should be fully aware that C&WJ needs to rebalance its tariffs and it has the flexibility to do so under the price cap regime. The fact that that C&WJ was able to increase its tariffs for some services by more than 10% is a reflection of the CPI + 10 constraint for these services in the price cap. Such tariff increases are far from being examples of pricing by a hypothetical monopolist.

Notwithstanding the above points about the inapplicability of the SSNIP test to services subject to price regulation, C&WJ would contend that the OUR's analysis of price data is very simplistic and likely to result in incorrect conclusions on market definition. In order to use price data for market definition purposes it is not sufficient to compare differences in absolute prices, especially when price differentials may exist due to quality differentials. The OUR has merely assumed in paragraph 3.4 that no such quality differentials exist, when such differences could partly explain (in addition to C&WJ's unbalanced tariffs) why Gotel is able to charge higher rates and why the products are in fact substitutes. C&WJ would contend that a more appropriate comparison for the OUR to make would be to consider changes in

⁵ Horizontal Merger Guidelines, US Department of Justice and Fair Trade Commission, April 1992

relative prices, as this would take account of any quality differences. For such a comparison to be made, however, it is necessary to consider how relative prices have changed over time. It would also be useful to consider any volume changes for the respective services in response to any such relative price changes. This will also require substantial data but as Gotel only launched its services in November 2002, it is clear that such price series do not yet exist. Therefore C&WJ believes that any attempt to draw conclusions on market definition from the limited data that is currently available to the OUR (as shown in Table 1) will be fundamentally flawed.

C&WJ would contend, therefore, that the OUR's conclusions drawn in paragraph 3.6 are meaningless, both in terms of the application of the SSNIP test to regulated prices and in terms of the current limitations on data availability.

Supply Substitution

C&WJ disagrees with the OUR's conclusion that cable operators cannot compete with C&WJ on a national basis in relation to the provision of a substitute for the local loop. C&WJ is required to price on a geographically averaged basis. Hence, C&WJ's retail prices in every geographical segment of Jamaica must be exactly the same. At a customer level in a particular geographical segment in Jamaica, customers would have the prospective option of subscribing to C&WJ or to the STV operator. C&WJ would then be facing competitive pressure from STV operators.

In addition, to the extent that the OUR has proposed that the relevant geographic market is Jamaica, then STV operators collectively could offer prospectively viable competition on a national basis. Indeed, C&WJ would refer the OUR to the UK Competition Commission Report on the acquisition of CWC and NTL⁶. It concluded that the product market included telephony services provided by cable operators, and that the geographic scope of that market was national, despite the cable operators only have licences for local franchise areas. The Report states:

"..at present, UK cable operators operate in different and limited geographic areas but all compete with the ubiquitous network of BT."

The OUR has also taken the view that if segments of C&WJ's business earn excess profit relative to the cost of capital, then business segments are not subject to effective competition. Whilst C&WJ agrees that it is likely that business customers are more profitable than residential customers the OUR has failed to give due consideration to the fact that cross-subsidisation of residential segments by business segments is a legacy of the social, economic and telecommunications policies of the Government of Jamaica. C&WJ is unclear as to the relevance of the information contained in 3.14 regarding the present coverage of GoTel's service. Even if some parts of the population do not currently have the ability to access GoTel's services, GoTel is in the process of rolling out its network to other areas and so represents imminent future competition, which acts as a constraint on

⁶ NTL Incorporated and Cable & Wireless Communications PLC: A report on the proposed acquisition, Competition Commission, March 2000.

C&WJ. Further, given that GoTel **does** currently compete in some parts of Jamaica and acts as a competitive constraint on C&WJ in those areas, it will also act as a competitive constraint against C&WJ nationally due to the requirement on C&WJ to offer geographically averaged pricing.

C&WJ's comments on Wireless Local Loop can be found in its response to the section on Entry Barriers below.

C&WJ notes the comments in 3.15 regarding the price cap and would remind the OUR that in the consultation on Specific Price Cap Rules C&WJ had taken issue with the OUR's test for effective competition on the following grounds:

- a. the test and procedures should be consistent with those used by the FTC for the enforcement of the Fair Competition Act;
- b. the scope of competition should not be limited to operators using their own switching and transmission facilities as this excludes the impact of resellers and other service providers. This is of particular concern in a market where the number of service provider licences is unlimited;
- c. the test does not have a geographical aspect and,
- d. the term "a large portion of demand" is not a proper definition and will lead to very subjective assessments.

Furthermore, C&WJ believes that the current capacity of GoTel, as reported in paragraph 3.16, does not give a complete picture of the extent to which GoTel acts as a competitive constraint on C&WJ. While GOTELE's current network capacity may be able to accommodate in the region of 250,000 customers, within the next two years its capacity is expected to grow by a factor of more than five. This potential and imminent competition now acts as an effective constraint on C&WJ.

Profitability of Business Segments Relative to Cost of Capital

C&WJ notes the OUR's comments in paragraph 3.20 regarding the need for detailed cost information and would wish to point out that the OUR already has available to it cost information for C&WJ that the Office has subjected to very vigorous review. This information clearly demonstrated the cost price ratios of key retail services such as access and domestic and international call minutes. Additionally interconnect services are offered based on a reference interconnect offer and are cost based. The OUR approves these rates. The OUR therefore has adequate visibility of C&WJ's cost information. Further pricing decisions for the portfolio of products that are not deemed to be effectively competitive are already subject to some type of regulation.

GEOGRAPHIC MARKET

C&WJ agrees with the OUR's analysis in paragraph 3.21 that the geographic scope of the market for fixed telephony is national, and that a major reason for this is the geographic averaging of tariffs. C&WJ also understands that while Subscriber Television Operators are not licensed on a national basis, they would also form a part of the national fixed telephony

market when they begin to offer the service. The basis of this understanding has been provided above in C&WJ's response on "Supply Substitution".

ENTRY BARRIERS AND COMPETITIVE CONSTRAINTS

C&WJ agrees with the OUR that entry barriers are important to any assessment of dominance. It notes the arguments in paragraphs 3.23 to 3.25 in relation to the need for rate rebalancing to ensure that other access providers are not discouraged from entering into the supply of these services, and agrees that it is important that C&WJ be allowed to rebalance its tariffs as appropriate, taking into consideration C&WJ's historical inability to rebalance because of regulatory constraints and the realities of the market.

Vertical Integration and Corporate Relationship

C&WJ would like to object in the strongest possible terms to paragraph 3.29. There is currently a firewall in place to ensure that sensitive information is not exchanged between carrier services and the retail divisions of C&WJ. The OUR is well aware that there is such a firewall, and there is absolutely no evidence to suggest that it is not operating effectively. C&WJ considers it inappropriate and unprofessional for the OUR to suggest otherwise and it is certainly not what C&WJ would expect of an independent and objective regulator.

Geographic Restrictions on Coax Cable TV Operators

C&WJ believes that, whilst a single operator supplying service in a single zone may not be able to compete effectively at a national level with C&WJ in supplying a substitute for the local loop, this does not mean that cable TV taken as a whole is not an effective substitute for the local loop. Whilst such services may be supplied by different operators in each zone they could still act as a price constraint on a service that is supplied at the national level. As C&WJ has already noted in response to paragraph 3.12 above, this was the view reached in the recent Competition Commission enquiry into the acquisition of CWC and ntl⁷, which concluded that the geographic scope of that market was national, despite the cable operators only have licences for local franchise areas.

DOMINANCE

C&WJ does not believe that the OUR can reach the conclusion in paragraph 3.36 that, based on the SSNIP analysis, GoTel should not be considered part of the relevant market, when that analysis is flawed. The reasons why C&WJ believes the SSNIP analysis is flawed are detailed in our comments above in relation to Table 1 and paragraph 3.6.

In summary, C&WJ believes that the limitations on the available data are such that it is not possible to draw any sound conclusions from such a quantitative analysis. The limitations of the usefulness of price data for market definition purposes has been recognized by

⁷ op cit

competition authorities such as the UK general competition authority, the Office of Fair Trading (OFT). In its Research Paper on market definition in UK competition policy⁸ it states: “*The naïve application of price tests can be seen to result in erroneous market definitions...*”. It then continues that any such price tests should form only part of the analysis of the relevant market.

C&WJ agrees with this view and believes that, even if there were adequate and sufficient price data to conduct SSNIP tests, the results of any such tests should not form the sole basis for the analysis of markets. Particularly in view of the fact that GoTel only introduced services as recently as November 2002, C&WJ believes that the OUR needs to take a more qualitative approach to assessing the extent to which GoTel’s services are part of the relevant market.

This could take the form of conducting consumer surveys to gauge the extent to which consumers would be prepared to switch to GoTel’s services in the event that C&WJ tried to increase its prices. It could also ask direct questions about whether customers will be considering switching to the services offered by GoTel as they are rolled out.

C&WJ is aware that GoTel’s current, market entry strategy is to target its services at densely populated areas, and areas where penetration by C&WJ’s fixed line network is limited. C&WJ fully expects that, once established in these areas, GoTel will start to target other areas where C&WJ has existing customers. This very real threat of potential competition is acting as a constraint on C&WJ now and means that the OUR should consider the services offered by GoTel to form part of the market for fixed telephony access. At the very least, we would urge the OUR to conduct a more detailed and qualitative analysis of the relevant market in order to reach a thorough understanding of the market.

Furthermore, C&WJ is disturbed that the standard of proof requested by the OUR to prove non-dominance is “beyond doubt”, which is inappropriate in this context since “proof beyond doubt” is a criminal standard of proof.

INTERNATIONAL FACILITIES (Transit and switching services)

Q3.1: Are voice transmissions via satellites on any given international route substitutable for transmissions via submarine transport cables? Explain.

Generally a ‘voice grade’ service is realized via a 8-16 Kb/s bandwidth and accordingly is independent of the medium i.e. satellite or cable. The compression mechanisms (or the absence of them) and resultant ratios are the primary drivers of quality on any international route. This is almost always true for any medium of transport.

International routes may be made up of one or several ‘hops’ utilizing satellite, cable or both. The latter is where some differentiation between satellite and cable may occur. The delay and

⁸ Market Definition in UK Competition Policy by National Economic Research Associates (NERA), OFT Research Paper 1, February 1992

echo inherent in satellite transmissions does not recommend multiple hop satellite routes. Hence not more than one hop in a multi hop route should be satellite. Continued improvement in echo cancellation technology is serving to mitigate this phenomenon

Much of Jamaica's international traffic is served via direct routes. These comprise purely satellite routes; purely cable routes and a mixture of satellite & cable routes and of such both media are perfect substitutes. Traffic to the UK (& The USA) for example, is served via both media at an undifferentiated price and is largely indiscernible to the calling public.

Q3.2: Should back haul circuits be offered as part of C&WJ's RIO?

C&WJ refutes the OUR's interpretation of the Act in relation to its statement that C&WJ has an obligation to provide interconnection to its "international transit and switching facilities", and that this includes C&WJ's cable facilities. The only obligation for interconnection stipulated in the Act is to the public voice network of other carriers (Sections 29(1) and 30 (1) of the Act). Furthermore C&WJ's RIO was submitted on the basis that the Act states that the existing carrier had to submit a RIO within 30 days of the appointed day (Section 32 (b)) and not on the basis of being dominant.

As established elsewhere in C&WJ's response to this Consultative Document, and in particular our response to Q 3.1 above, voice transmission via satellite is substitutive for the same via cable. The same can be said for almost all data transmissions. Since March 12, 2003 at least two international licensees have been operating totally independently of cable facilities with a significant combined market share of national outbound traffic. Additionally C&WJ owns only one of the cable landing stations in Jamaica and new carriers are on record as having offered to provide their own back haul facilities to the non-C&WJ landing station.

Understanding that alternatives abound to C&WJ's cable facilities, namely, satellite, non C&WJ cable ownership and alternatives to C&WJ's backhaul, C&WJ could not sustain uncompetitive prices in the market for its cable services (IPLCs or any wholesale backhaul service it may develop) and in such a competitive market the Company has no incentive to withhold the provision of service. In a market in which the Company will be competing, it would not make good commercial sense for C&WJ to over price its cable services namely,. Additionally, any withholding of its services in this regard would be to C&WJ's detriment.

In light of the options open to international service providers and the lack of incentives for C&WJ to overprice or withhold its cable services, it would therefore appear unreasonable to classify backhaul as a bottleneck facility and more so to suggest that C&WJ should offer backhaul services as a part of its RIO offering. The supply of backhaul services is competitive and therefore there is no need to regulate.

Credibility and Corresponding Operating Agreements

It is true that new licensees in Jamaica, who already own and operate international carrier facilities in other jurisdictions will leverage that experience to their advantage. That being

said the proliferation of licensed international carriers in relevant foreign markets up to July 2002, (°US 1800, UK 500, Canada 96, Total world 4726); allows unfettered opportunities to any nascent international carrier licensee providing the promise of domestic termination in Jamaica. The proliferation of bypass operators in Jamaica over the last 3-5 years attests to this. Most such operators to date are known to be relative new comers to the industry and even though 'illegal' (hence risky and transient) have had no difficulty obtaining suitable corresponding agreements with their foreign counterparts.

Quite the contrary to the OUR's concerns regarding new entrants, their foreign counter parts will likely be pursuing them for lower cost termination in Jamaica. In general, this has been an entry strategy for new entrants who wish to undersell the incumbent and drive traffic onto their networks and who do not have the same imbalanced regulatory cost structure as the incumbent. This being the case it is not envisaged that any material disadvantage will befall them in negotiating corresponding agreements.

3.65

C&WJ continues to express concern regarding the OUR presuming the Company to be dominant in markets without proving the fact of dominance. The fact of dominance must be proven before an application for non-dominance can be made. The Company also continues to express concern about the inappropriate, criminal standard of proof that is required by the Office to prove non-dominance.

CABLE & WIRELESS JAMAICA
April 29, 2003

⁹ Telegeography 2003