



**CABLE & WIRELESS**  
JAMAICA

**C&WJ'S RESPONSE TO THE  
OUR'S COMMENTS ON THE RESPONSES TO  
DOMINANT PUBLIC VOICE CARRIERS 2 & 3**

*July 7, 2003*

## **Introduction**

Cable & Wireless Jamaica (C&WJ) is pleased that the Office has, in its comments, sought to address the specific issues raised by the interested parties in their response to the consultative documents, “Dominant Public Voice Carriers” 2 and 3 respectively.

Since the Office’s response to C&WJ, in particular, surrounds a few fundamental issues, C&WJ will structure its response around these issues. C&WJ, however, still believes that the comments provided by the OUR to its responses are vague and have not brought the level of clarity and direction to the issues that C&WJ had expected.

## **Application of SSNIP Test**

C&WJ notes the OUR’s response in paragraphs 1.2 and 1.3 to the concerns C&WJ has raised about the OUR’s application of the SSNIP test. In particular, we note that the OUR agrees that the correct purpose of the test is to define the boundaries of the market. That is, that the test should only be used to consider the response to a *hypothetical* price increase by a *hypothetical* sole supplier of the product or service in question. As the OUR agrees, in paragraph 2.7 of its response to Digicel, only when this has been done would it be appropriate to consider the *actual* market situation of firms within that defined market. C&WJ agrees that one part of this analysis could involve considering evidence of actual price movements and whether a particular competitor has been able to sustain an actual price increase for a significant period of time.

Given the likelihood of an erroneous definition of the market, when the SSNIP test is applied in a market where prices are regulated, it would be expected that the Office would seek to mitigate the likelihood of this development. Since most of the markets in which the Office is seeking to determine dominance or non-dominance are price regulated, and since the outcome of a declaration of dominance is significant to any company, it behoves the Office to bring all due care to bear to ensure that markets are properly defined. Merely accepting the limitations of the SSNIP test is not sufficient. The OUR must propose how it intends to overcome those limitations.

As such, C&WJ is pleased to note that the OUR recognizes, at paragraph 1.3, that regulation may limit the usefulness of price data and how that price data may be used in the application of the SSNIP test. C&WJ also appreciates that the Office recognizes that without subcaps on access and call charges, the relevant market may include GOTEL. C&WJ is further heartened that in its response to Digicel’s concerns at paragraph 2.8, the Office indicated that it would re-examine the application of the SSNIP test to regulated prices before issuing a Determination Notice. C&WJ welcomes this positive step by the Office and looks forward to seeing the outcome of this re-examination.

Nevertheless, C&WJ would like to emphasise that it believes that the OUR has appropriately applied the SSNIP test as far as mobile termination is concerned. It wholly supports the OUR's conclusion that there are a series of single network markets for mobile termination markets, as an application of the SSNIP test clearly demonstrates that a hypothetical sole supplier of mobile termination would not be constrained in its pricing due to the lack of any demand or supply side substitutes.

### **Competitive Safeguards**

C&WJ notes that the Office has concluded that C&WJ has admitted to being dominant in the "international voice service market". Certainly, C&WJ disagrees with this conclusion – the Office is just now conducting a consultation on the matter of dominance, C&WJ has never been declared dominant in any market, by the Office, according to the procedure established in the Telecommunications Act 2000 (the Act), although the Office has regulated C&WJ as if it were dominant. This presumption of dominance is, however, not founded in law, as the Act requires a determination of a fact, not a presumption.

C&WJ also brings to the Office's attention that it is in error where it states that C&WJ "*... agrees that the services under the price cap are not supplied in effectively competitive markets.*" C&WJ is not in agreement with the Office's conclusion. As the Office is aware, the price cap rules must be subject to affirmative resolution, which has not yet occurred. Therefore until the parliament has approved the rules, the basis upon which C&WJ can remove services from the basket is not yet known. As such, the Office cannot validly conclude that services are in the basket because the market for such services is not effectively competitive – at the present time, they are in the basket, whether or not the market is competitive.

At paragraph 1.12, the Office speculates that the courts may not be efficient in resolving disputes related to facilities sharing and that litigation could be used to delay access to facilities. While C&WJ will not venture to comment on the efficiency of the Courts, it must be said that the Company is not aware of any situation, in Jamaica, in which litigation has delayed access to facilities, and the OUR's comments may be interpreted as alarmist at worst and speculative at best.

### **Consulting on Other Consultations**

The Office recognizes that indirect access, including carrier preselection, is the subject of another consultation, however C&WJ reminds that numbering issues are also the subject of a separate consultation, "The Jamaican National Numbering Plan" issued May 2002. While C&WJ would ask to be forgiven for the same error as the Office, it must be noted here that, as numbering issues have become more important, the OUR has inappropriately sought to use consultations on dominance and indirect access to give direction on the issue. The Office should not allow this state of affairs to continue but should confine matters of numbering to the numbering consultation.

## **Historical Legal Rights as a Basis for a Declaration of Dominance**

Throughout its comments, the Office insists on equating the historical legal rights that C&WJ enjoyed in the past with dominance in the markets as they exist today. Once again, C&WJ reiterates that dominance is not a matter of law but of fact and encourages the OUR to follow the principles set out in its own Guidelines for Assessing Dominance In Telecommunications Markets, including examination of a wide range of factors rather than being confined solely to comparisons of market shares.

Further, it follows logically that if legal barriers were a basis for dominance then the removal of legal barriers should be the basis for non-dominance.

Not only is the use of historical (and expired) legal rights as a basis for a declaration of dominance illegal, according to the procedure established by the Act, it has also not been C&WJ's experience that those historical rights have impeded the emergence in short order of effective competition once those rights were removed. This is particularly the case for the call origination markets in general. Once again, C&WJ emphasizes that a determination of dominance must be founded upon current facts, and not upon an untested notion that a no-longer applicable circumstance determines the present.

The Office itself has conceded that markets are dynamic and therefore need to be reviewed on a continual basis. Any attempt to found dominance on the past is erroneous. Dominance must be proven currently and projected into the future, not historically.

Further, C&WJ notes that the Office has persuaded itself that the "existing carrier" as referred to in section 32 of the Act is a dominant carrier in the context of that section. However, for the Office's benefit, C&WJ makes reference to the definition of an existing telecommunications carrier as is found in the Act which:

*"means Cable & Wireless Jamaica Limited and includes any wholly owned subsidiaries or any successor or assignee of that Company"*

The Office should note that this is the context within which "existing telecommunications carrier" is used in the Act and nowhere in that definition is there any wording or reference suggesting dominance.

## **Liberalisation and Effective Competition**

While C&WJ agrees that liberalization is not synonymous with effective competition, liberalization is a prerequisite for effective competition. Given that liberalization facilitates increasing competition, C&WJ agrees with the Office that the markets must be under continual review.

C&WJ notes that the Office at paragraph 1.37 opines that it is *likely* that “C&WJ’s dominance is entrenched” and *likely* that “there is limited or no competition”. That the Office can label fundamental issues as “*likely*” is a concern to C&WJ because it is indicative of a speculative opinion that has not been proven by fact. Once again, C&WJ reiterates that dominance is a matter of fact, which has to be proven.

It is further noted that the Office supports, that where an enterprise has a statutory monopoly, it is regarded as dominant. In a monopolistic market, where there is no competition it may well be so. However the telecommunications market in Jamaica is not monopolistic, it is competitive, therefore the Office has to prove the fact of dominance, it cannot be presumed as in the case of monopolistic markets.

Just as monopoly fundamentally defines a market so does liberalization. The characteristics of a liberalized market are different from the features of a monopolistic market. According to a report on page 14B of the “ Business Observer”, the Minister of Technology, Phillip Paulwell, has indicated that two hundred and seventy four (274) licenses have been issued so far. Competition is already thriving in some market segments, and steadily developing in others

At paragraph 1.39, the Office completely disregards the provisions of section 28 of the Act, where the Office is required to determine dominance subject to public consultation. Instead the Office has sought to illegally declare C&WJ dominant without following the proper procedure. Furthermore a declaration of non-dominance must be preceded by a declaration of dominance, according to the procedure set out in the Act. The Office declaration of C&WJ as dominant is therefore illegal.

### **Declaration of Dominance Based on Insufficient Data**

As indicated in its previous response to Dominant Public Voice Carriers 3, there is no known technological substitute for terminating a call on the network to which a customer is subscribed. This is so for termination both on the fixed network and mobile network. In this respect there is no need for additional empirical data.

Specifically, C&WJ makes reference to the recent court decision in the U.K where three mobile operators did not succeed in their judicial review of the Competition Commission decision to force the mobile operators to lower their termination rates by 14-15% by 24 July 2003. The decision to impose regulation of termination rates was based on the fact that all mobile operators are dominant in their termination market.

However in other markets where empirical data is necessary, C&WJ remains concerned that the Office would proceed to make a declaration of dominance with insufficient information. In this respect, C&WJ notes that the OUR has stated at paragraph 1.6, that it could not consider using relative rather than absolute prices for the fixed line transit market, due to the lack of data. However, C&WJ is pleased, that in its response to Digicel at paragraph 2.4 (2),

the Office has indicated that it will present empirical data where it is necessary to justify the definition of the relevant market.

In addition to the application of empirical data, when considering the boundaries of the relevant market, C&WJ would urge the OUR to conduct surveys of customers and potential suppliers in order to obtain as full a picture as possible of the potential demand and supply side substitutes. This will be of particular importance, where gaps in the data exist for any of the markets under consideration.

### **Cross-Subsidy & Backhaul Services**

As the Office is fully aware both C&WJ's access and call charges are below cost. As the Office can appreciate, business customers are likely to be more profitable than residential customers because (1) the price of business access is more than residential and (2) on average business customers make more calls than residential customers.

In relation to backhaul services, C&WJ does not believe that the Office has grasped the import of C&WJ's argument. To reiterate, section 29 (1) speaks to interconnection to a "public voice network". Neither this section nor any other section in the Act makes reference to an obligation by C&WJ to provide interconnection to its "international transit and switching facilities".

Moreover, based on the alternatives and substitutes to C&WJ's facilities, C&WJ could not be declared dominant in the markets for cable facilities, backhaul services, international transit or switching facilities given that:

- As at March 12, two (2) international licensees, with significant combined market shares, were operating totally independent of C&WJ's cable facilities.
- Satellite is a substitute for cable.
- C&WJ owns only one of the cable landing stations

The Office itself in "Dominant Public Voice Carriers No. 3", at paragraph 3.64, has conceded that "*the OUR does not anticipate that C&WJ's dominance [note that this is an illegal declaration] in the markets for international transit and switching facilities and associated markets for international voice minutes will last for any considerable time beyond March 2003..*" This is consistent with C&WJ's own position and makes inapplicable the OUR's argument that "legal barriers" are a credible basis for a declaration of dominance.

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**CABLE & WIRELESS JAMAICA**  
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