Response

to

OUR's Supplementary Consultative Document

"Assessment of Dominance in Mobile Call Termination"

by

Digicel

May 12, 2004

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DISCLAIMER

Digicel's response to this OUR document should not be taken as in any way acknowledging that the processes adopted by the OUR comply with the requirements of the Telecommunications Act, and in particular the principles of fair procedures. In particular, Digicel's response is submitted without prejudice to our view that the OUR, formally or informally, has already made a decision to make a determination of dominance in respect of Digicel. In addition, we strongly object to the fact that Digicel has not been given an adequate period in which to prepare a response. Although we have attempted to address as many of the issues raised as possible, Digicel was unable to make its points as comprehensively as would be necessary to do justice to its position. As such, all of our rights are reserved."

CHAPTER 6 – PRICING ANALYSIS

Digicel wishes to advise the OUR that all Charts in the 'Pricing' section are confidential. This is because they contain either confidential pricing information or use data, which Digicel had to purchase from a third party. Further any numeric references, including percentages, to Digicel's mobile termination rates should be treated as confidential.

The confidentiality request of course does not extend to the Fair Trading Commission, as full disclosure of contents will be required for them to make effective representation in relation to the matter at hand.

1 INTRODUCTION

The development of the Jamaican mobile market since its liberalisation just over 3 years ago is unquestionably one of the great success stories of telecommunications liberalisation anywhere in the world. Nowhere before have penetration rates been seen to rise at such a rapid rate in a developing economy such as Jamaica. The advent of competition in Jamaica brought with it the opportunity for all Jamaicans[1] irrespective of their demographic to benefit from the Jamaican telecommunications revolution. Mossel Jamaica Limited ("Digicel") has been proud of its participation in this journey, investing billions of dollars in Jamaica along the way and it hopes that clear incentives are maintained for further investment in the sector.

The success of the Jamaican mobile market to date, owes much to the manner in which the market has been allowed to operate with minimal regulatory interference The government of Jamaica recognised the importance of allowing the market to operate without distortion and Ministerial Direction of April 2002, which prohibited intervention of any kind in the setting of mobile termination rates by the regulator, can easily be accredited as one of the main catalysts for the vibrant market that exists today.

Digicel does not believe that the Minister intended for a recent direction early in 2004 to effectively open the gates for regulatory intervention in the mobile termination market. The direction was clearly issued based on a then perceived crisis in the market for international traffic. Concerns about a crisis in that market appears now to have been a complete misconception as evidenced by the Office of Utilities Regulation's ("OUR") decision to remove all the key decisions it issued in response to said 'crisis'.[2] However, the direction from the Minister which was clearly intended to deal with matters pertaining to international settlement rates, now appears as though it will be used as a tool by the OUR for the purposes of regulatory intervention in the mobile termination market generally.

It would be a great pity if the achievements of all concerned with the Jamaican mobile market, including the OUR, over the past 3 years were now to be undone at such a crucial stage of development, because of an imprudent decision to attempt to intervene in the market. Such a move could have far-reaching negative impacts, not just on the mobile market but for telecommunications development and investment in Jamaica generally. Digicel strongly believe that this market has a long way to go before we reach the end in terms of realising its

[1] In this regard we refer the OUR to a paper given by Franklin Browne where he stated – "*Digicel has been more aggressive of the three operators, pursuing a strategy of rapid network expansion into major towns and rural communities, which in some instances might not have been previously served by the incumbent's fixed or mobile network" – September 2003,*
'Mobile interconnection: Experience from Jamaica"
[2] OUR 'Decision on Settlement Rates and Termination Charges Tel 2004/06

full potential. We see scope for increasing penetration by a further ten percent (10%) to fifteen (15%), for providing more and more customers with enhanced data services, new products and ultimately further development in terms of price, choice and quality. Much in this regard, however, will depend on the outcome of the current consultation. Exercising regulatory restraint is no less important to the principle of sound regulation than exacting effective intervention when so required.

In this document Digicel will provide indisputable evidence that no such intervention is required in the market for mobile termination. Further, we regret to say that we have found strong evidence that suggests the OUR has not engaged in this latest consultation in good faith and that the matter of what constitutes the relevant market and the existence of dominance in the market thus defined was decided without serious consideration being given to the views, opinions and evidence as presented by interested parties. We will also highlight flaws in the entire consultation and analysis process, a process Digicel believes does not meet with the standards of natural justice and has failed to observe the procedural requirements set out in the Telecommunications Act, 2002 (the "Telecommunications Act") and which ultimately could only result in a prejudicial outcome.

David Hall
Chief Operations Officer
Digicel

2 EXECUTIVE SUMMARY – JAMAICA: WORLD LEADER IN COMPETITIVE MOBILE TERMINATION RATES

Mobile termination and fixed to mobile retail rates in Jamaica are exceptionally low when compared to international benchmarks. In fact, Digicel has purchased benchmarking data, scoured the Internet for independent telecom's reports and the homepages of international regulatory authorities and has failed to find a single jurisdiction with lower mobile termination rates and fixed to mobile retail rates than Jamaica. Digicel would strongly urge the OUR to test this claim by looking at publicly available information, or purchasing benchmarking data commissioned from any one of a number of reputable international independent telecommunications consultancies. We reiterate that what is so remarkable is that this has occurred only 3 years after the liberalisation of the mobile market in Jamaica whereas most other countries for which comparable benchmarking data is available have mobile sectors which have been liberalised for 10-15 years.

Consequently, there is no reasonable basis for the OUR to investigate the Jamaican mobile sector for the existence of a relevant market of any description or therefore for it to assess whether any operator has market power in mobile termination however the relevant market is defined. It is incumbent on the OUR, in the view of Digicel, to desist from pursuing its apparent program for regulatory intervention in the area of mobile termination if it is to act in the public interest and direct its energies and the funds provided by telecom's licencees into areas of telecommunications where competition is so evidently lacking.

The OUR should desist from regulatory intervention as neither the protection of the public interest would be served nor will such intervention promote the telecommunications industry in Jamaica by encouraging economically efficient investment in, and use of infrastructure to provide telecommunications services in Jamaica. In particular, the OUR does not need to intervene in the Jamaican mobile market for the following reasons:

1. There are strong competitive forces acting on Jamaican mobile termination rates – irrespective of how the relevant market is defined. Nothing else can explain the dramatic decline in fixed to mobile termination ("FTM") and mobile-to-mobile termination ("MTM") rates of all mobile operators since liberalisation. Fixed to Mobile nominal prices alone has fallen by as much as 50 % since the mobile market was open to competition in April 2001.

2. Jamaican mobile termination and fixed to mobile rates are among the lowest in the world.

3. The OUR's own Director General Mr J Paul Morgan said, as reported in the "Observer" on 15 July 2003, and in respect of Digicel's reduction for fixed to mobile calls on September 1, 2003 that "***it is the prospects of a competitive market where Digicel had to react to the market***". The OUR cannot say that this is anything other than further evidence that the mobile termination market is subject to strong competitive forces.

Even if the OUR is still determined to intervene, why it should desist:

1. The OUR has failed to abide by reasonable procedure and the rules of natural justice as required by section 4 of the Telecommunications Act when carrying out its investigations into the mobile sector. The industry has not been given, for example, adequate time to respond to this consultation.

2. The OUR has not requested the necessary information from market players in time to inform the current process. Nor has the OUR carried out an adequate consumer survey as key questions have not been asked. The OUR cannot carry out a reasonable market analysis for the mobile sector without doing this first.

3. The OUR's attempt to analyse the mobile sector for relevant markets is inadequate. The consultation also reveals that the OUR has muddled the analysis on relevant markets and assessments of dominance. The OUR must ensure that is has sufficient resources and expertise to meet the challenges of this task before it considers carrying out such an assessment.

4. The OUR's attempt to analyse the mobile sector for dominance is also not adequate and also muddles the analysis on relevant markets and assessments of dominance Any assessment of dominance is dependent on a proper analysis of the mobile sector to identify whether a relevant market does in fact exist. Any consideration of dominance absent such an approach is ultimately meaningless. Conclusions with respect to dominance cannot therefore legitimately be drawn by the OUR.

5. Given the dearth of public information and documentation on same, it is apparent that the OUR has not engaged and consulted with the Fair Trading Commission on matters of market definition and dominance in the manner as envisaged by the Telecommunications Act of 2000 (TA).

The future of the Jamaican telecommunications market and in particular the mobile market and as a consequently, the public interest is now heavily reliant on the OUR making the correct judgement in relation to this issue of mobile termination. Digicel would strongly urge the OUR to take the public interest into account in reaching its final decision on this matter, which we note it intends to make on the 31st of May 2004. Digicel sincerely hope that this date will not mark the end of the substantial strides made in the Jamaican telecommunications market since the beginning of liberalization of the market a little over 3 years ago.

3 ROLE OF THE FTC

In accordance with section 28 of the Telecommunications Act 2000 (The Act) the OUR is obliged to consult with the Fair Trading Commission (the FTC) and to take account of any recommendations made by the FTC as a part of a process of determining whether particular voice carriers are dominant. The key role of the FTC in this process is underlined by the fact that dominance is defined according to S.19 of the Fair Competition Act 1993 (the "Fair Competition" Act) and not by The Act.

In order for the FTC to make a meaningful contribution to the process Digicel believes that it must be party to all of the submissions made to the OUR in response to its current and previous documents on dominance. The FTC must also be given sufficient time to consider those responses as well as the OUR's documents and to provide a reasonably detailed response in respect both of the methodology employed and the sufficiency of the analysis that has been undertaken.

In an email from the OUR dated 22 April the OUR indicated to Digicel that the following had taken place or would take place:

"Official Presentation of Survey Findings by Market Research to OUR & FTC Representative February 24, 2004 Consultative Meeting with FTC February 26, 2004 Supplementary Consultative Document March 30, 2004 Responses May 12, 2004 Draft Determination Notice for FTC's Comments May 18, 2004 (Tentative) Determination Notice By May 31, 2004"

The first point to note here is that the OUR is suggesting that, given a deadline of 12 May for submissions, it can in the space of a mere four working days thereafter analyse all the responses received thoroughly, reach a considered view, and write a Draft Determination Notice on Dominance for the FTC's viewing. This is not credible. This appears to be another indication that the OUR has pre-judged the issue. Any Draft Determination Notice that is submitted to the FTC on 18 May or soon thereafter would further demonstrate that the OUR is not prepared to apply proper thought to the matter and intends at most to pay cursory attention to any responses received. It might also be a demonstration that the OUR does not sufficiently recognise the important role of the FTC. Moreover, the OUR actions are a breach of the rules of natural justice, the right of a party to be heard and the right of a party to hear the case against it.

We have to make a similar point in respect of the date for the Determination Notice itself of 31 May. The OUR cannot credibly be suggesting that the FTC should be given anything less than several weeks to consider the all the material submitted by market players and to reach a view on a Draft Determination Notice given the importance of the outcome.

Digicel notes that the OUR says that the following took place *"Official Presentation of Survey Findings by Market Research to OUR & FTC Representative February 24, 2004 Consultative Meeting with FTC February 26"*. Market players have had no sight of any comments made by the FTC in this regard. It was incumbent on the OUR, as a part of fair procedure, to have told the public what comments were made. This is clearly a breach of the OUR duties obligations of natural justice and fairness.

Digicel anticipates that in accordance with the OUR's duties under section 4 of the Telecommunications Act, the FTC's response, Digicel's analysis and the analyses submitted by other parties will be thoroughly addressed in any Determination.

In the light of the fact that a week is likely to be a wholly inappropriate period of time in which to consider the relevant matters, and whereas the foremost government institute in terms of expertise on matters of market analysis and dominance is the FTC, Digicel would ask the OUR to consult the FTC on issues raised by Digicel in the following summarised manner:

1. Would the FTC agree that a meaningful assessment of any market requires a process of extensive data collection and analysis of same?
2. Does the FTC agree that countervailing buyer power is a concept considered in an assessment of dominance rather than market definition?
3. Does the FTC believe that a consumer survey, and in particular the consumer survey carried out by the OUR, constitutes gathering of a sufficient level of data to conduct market definition and dominance assessment analysis?
4. In conducting pricing analysis over time should the OUR take account of real as well as nominal prices?
5. Does the FTC agree or disagree that falling prices are indicative of no competition in the market?
6. Does the FTC agree with the approach taken by the OUR in making allegations about excessive pricing on the part of Digicel?
7. Does the FTC believe that it has been consulted sufficiently and provided with sufficient data and analysis to support any determination the OUR makes in relation to mobile termination?

4 PROCEDURAL FAILINGS OF OUR'S APPROACH

4.1 Summary

- The OUR has exhibited clear bias when attempting to deal with the issue of market analysis and dominance in the mobile sector
- The OUR has failed to follow reasonable procedure and even its own procedural guidelines when it has addressed the mobile sector in its documents
- The OUR has attempted in places to place the burden of proof on the mobile sector to disprove the OUR's views rather than, as necessary, attempting to prove its case
- The OUR has not asked for the most rudimentary information from market players necessary for even a simple market analysis
- The OUR's attempts to consider relevant economic[3] markets and any market power in the mobile sector are not adequately thought through and contain significant factual errors: the OUR must carry out these assessments properly
- The OUR has included irrelevant matters as a basis for some of its views
- The OUR has raised a legitimate expectation that no conclusions could have been made about markets and market positions without following a process starting with a proper data collection exercise which would last at least 21 months from the start of that exercise

[3] Note: assessing whether an economic market exists is usually a complex task involving much economic analysis, but in a nutshell, it relates to the extent to which goods and services are interchangeable. If they are largely interchangeable they are within the same product market.

4.2 Procedure for Carrying out Investigations in the Telecommunications Market

4.2.1 Telecommunications Act

Section 4(2) of the Telecommunications Act 2000 requires that when the Office makes a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness and the rules of natural justice.

4.2.2 OUR's duty to observe reasonable standards of procedural fairness

Procedural fairness includes a number of elements. The OUR needs to have ensured it has observed rules of procedure which are appropriate to investigating whether: particular economic markets exist within the Jamaican telecommunications sector; and whether there is a case for saying that any entity operating within those economic markets has a position of dominance.

This is the first time that the OUR has attempted to carry out an assessment of the mobile sector in Jamaica. The approach that the OUR has adopted is to our knowledge without precedent.

An appropriate methodology would involve (for the avoidance of doubt, it is Digicel view that none of the steps referred to below where followed):

1/ first investigating whether there is a prima facie evidence that of a possible failure in the mobile sector as the basis of a hypothesis (perhaps by using international benchmarks);

2/ consulting on the particular information (collected both from mobile operators and the general public) that would need to be collected as the empirical measuring stick against which to test that hypothesis;

3/ collecting the appropriate information from market players and carrying out the necessary public research;

4/ then using the empirical data collected to carry out the market analysis in a thorough fashion.

5/ If any market failures were discovered in relevant economic markets they should then be investigated for any signs of dominance in the market thus defined taking account of international best practice in approaching this subject.

4.2.2.1 The Need for Balance

A regulator should throughout the process demonstrate balance and an open minded approach and be prepared thoroughly to look for and put forward evidence and arguments that there are either economic markets in the mobile sector should be defined one way or another or if in fact no one market pertaining to the mobile sector exists but in fact should take a wider definition including other sectors of the telecommunications industry[4]. A regulator should try just as hard to prove that an economic market does not exist in such a way as to prove that it does. The regulators should then put the arguments on both sides out to public consultation and base its ultimate decision on the weight of arguments put forward by itself, the public, the industry and the FTC.

The Office has failed to meet any of these basic requirements. <u>It is incumbent on the OUR, should it wish to carry out an investigation in to possible markets in the mobile sector, to use this process. The activities that the OUR has carried out to date in respect of the mobile sector have no validity as a basis for reaching regulatory decisions.</u>

4.2.2.2 The OUR's Own Guidelines

In its <u>own guidelines</u> for assessing dominance in telecommunications markets (see the document entitled "Dominant Public Voice Carriers No.2", dated November 2002) the OUR states that prior to assessing markets and prior to an assessment of dominance the OUR should collect and collate the evidence required for the analysis. The OUR states that this evidence must include market share data (sales value and volume); product functionality; prices and costs; inputs (although it is not clear what this means); principal competitors; and market entry conditions.

The OUR has never asked Digicel for information as part of a legitimate exercise to assess markets or dominance in the mobile termination market or any other market for that matter. <u>Digicel believes that, based on this alone, the OUR has no valid basis for deciding that there are or are not any economic markets relevant to new entrants such as Digicel within the mobile sector nor, therefore, for determining whether mobile carriers have dominance in any market.</u>

The OUR's own guidelines also make it clear *in "Dominant Public Voice Carriers No.2"* in paragraph 1.1 that the analytic procedure for assessing dominance *"is a two-step framework involving:*

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[4] In this regard we note that the FTC held the opinion that no single market existed in the mobile sector in its response to the first consultation on the matter in 2000.

A) *The definition of the relevant market*
B) *An assessment of dominant position"* (in the market defined)

We will refer to this later.

4.2.2.3 A Lack of Reasonable Analytical Depth

The issue of mobile call termination is of enormous significance to new entrant mobile players. With this in mind Digicel believes that it is incumbent on the OUR to have been far more thorough in terms of investigating the mobile sector given that it has chosen undertake this assignment in the first place. Notwithstanding that there is no prima facie basis for investigating the sector at (see the graph of international benchmarks at in our section on pricing which demonstrate incontestably that fixed to mobile termination prices in Jamaica are extremely low by international standards), the OUR has devoted only a few tens of paragraphs in all its previous documents on dominance which speak directly to mobile call termination. Moreover these few paragraphs have been spread out in a number of documents over a 4 year period, some of them having being made before the mobile sector was liberalised. This in no way can be considered to be a part of a reasonable consultative process for market as dynamic and young as the Jamaican telecommunications market. This is a wholly inadequate level of thought to apply to such an important matter. In comparison, other regulators such as Oftel wrote substantive documents in assessing the particular existence of markets in the mobile sector and whether or not there was a need to place controls on mobile termination rates.

Digicel recognises that Oftel had greater resources and staff of over 200 people and yet had to seek the assistance of external economic experts to help it in carrying out the complex tasks that the OUR has attempted to deal with its consultation. Indeed as far as Digicel are aware every single National Regulatory Authority in Europe, has employed the services of external independent experts in the area of market definition and dominance assessments in carrying out its market reviews under the new EU regulatory framework.

This new framework has been developed around the importation of the ex post concept of dominance in the competition law sense into a framework for dealing with market power in an sector specific ex ante environment. In short, the approach to dominance with respect to telecom's regulation in Europe is similar in virtually every respect to the approach as prescribed in Jamaica.

Consequently, we fail to understand how the OUR has proceeded with considerably less internal resources than most if not all the European regulators with out once seeking external assistance from a reputable independent consultant. It therefore seems amazing that the OUR can have written so little previously about such an important subject and then propose to make a determination based on what proceeded and a final supplementary document that could have huge consequences for the Jamaican mobile telecommunications sector. When billions of Jamaican dollars could hinge on a decision such as this both from the perspective of already sunk costs and also for the level of future funds being made it available, it is paramount that no stone is left unturned. We submit that this lack of depth in the process is by itself clear evidence that Office has not afforded sufficient thought to this matter, and that it cannot therefore legitimately reach conclusions with respect to either market definitions or dominance.

4.3 Breaches of Procedure and Natural Justice

The OUR has several duties when exercising its role in the telecommunications sector under the Telecommunications Act 2000. The OUR has a duty to observe the rules of natural justice: it must not exhibit bias; it must abide by legitimate expectations raised; and it must afford persons a fair hearing. The OUR has a duty to consult with the Fair Trading Commission and to take account of any recommendations made by that Commission. The OUR also has a duty to consult in good faith with persons who are likely to be affected by the decision. All of these are considered below as we look at the issues of market information and consumer research and the documents published by the OUR on dominance.

4.3.1 Market Information and Consumer Research

It is an absolute necessity for telecommunications regulators that wish to analyse the sector to establish the existence of particular economic markets to collect information from the market players to enable proper analysis to be carried out. It is also necessary to carry out proper market research which reliably establishes the views and behaviours of consumers which were relevant to market analysis.

The Office has not requested information from mobile market players as a part of a legitimate process of establishing whether there are any economic markets within the liberalised mobile sector. Neither did the Office carry out adequate research on consumers as a part of the market analysis process. The Office commissioned some consumer research in December 2003. However, and as explained below, the wording that the Office has used in its 'Dominance' documents strongly suggests that it had made up its mind about what economic markets existed within the mobile sector prior to that date. Further evidence of this is provided in a letter dated 21 April 2004 to Digicel from the OUR's Director General in which he states:

"*The fact of the matter is that the OUR's definition of the market has remained the same throughout its consultations*"

Of course, if the OUR had been consulting properly then it would not have put forward such definitive views on mobile market definitions from the very start. No views can legitimately have been put forward until proper data collection and research had been carried out and the resulting information had been used to inform a thorough analysis of the mobile sector. However, in spite of not having carried out any data collection and market research by the time that the OUR first discussed markets in respect of the liberalised mobile sector in November 2002 ,it came to a view on market definition after a mere a couple of pages of unsubstantiated anecdotal evidence with respect to mobile call termination. <u>This is not credible in Digicel's view and demonstrates clear pre-judgement.</u>

Even if the Office is genuinely using the December 2003 research to inform its opinions Digicel strongly contends that the research which has been carried out is not adequate in terms of assessing consumer views and the extent to which consumers can place pressure on mobile call termination rates. The research on consumers fails to ask absolutely key questions such as how aware consumers are about the cost of making a call to the customers of a particular mobile network, and whether consumers are normally able to ensure that they make calls to a particular person using the cheapest available method (such as by making fixed to fixed calls or on-net mobile calls). If the answers had been yes to these questions, which were not asked, it would have provided strong evidence that the economic mobile markets for call termination on each operator's network which the OUR claims to have identified, may not in fact exist. Clearly dominance in an economic market is not in question if there a economic market has not been properly defined in the first place.

4.3.2 The OUR's 'Dominance' Documents

In order for Digicel to properly address the procedural flaws in this entire process it is necessary for us to look over the history of this 'dominance' consultation. In this Digicel will provided strong evidence that the OUR did not follow procedures it itself endorsed and that the issue of the correct market definition for mobile termination and what parties might be dominant in markets thus defined was never really consulted on in good faith in accordance with the TA.

4.3.2.1 Dominant Public Voice Carriers No.2; Document TEL 2002/06; dated November 2002

It is very noteworthy than in the first 'Dominance' document published after the liberalisation of the Jamaican mobile sector, the Office immediately expressed a clear view in the abstract that all mobile public voice carriers were dominant in relation to mobile call termination on their respective networks when it stated that *"all mobile public voice carriers are dominant in relation to mobile call termination on their respective networks"*.

It is highly inappropriate to make such a statement when considering a competitive sector on the very first occasion. No reasonable regulatory body would make such an assertion when first considering the mobile sector. This was a clear indication that the Office did not have an open mind on the subject from the start of its investigations, and indicates clear pre-judgement.

The Office makes a remarkable allegation in only the second paragraph (paragraph 3.36) of the section on mobile call termination:

"Since the caller pays the price for calling a mobile phone (based on the principle of calling party pays), the mobile service provider has no incentive to lower termination charges, even when faced with declining operating costs and increasing call volumes."

The OUR then attempts to support this statement by indicating that this observation was made by Oftel. It is not reasonable to make this kind of sweeping allegation especially when based on a market analysis in one other jurisdiction which has very different mobile sector characteristics. In the UK there are 5 mobile network operators and the mobile sector has been liberalised for 20 years. Further, in the UK mobile operators do not compete on fixed to mobile calls as mobile operators do in Jamaica. In the UK the mobile networks do not have control of fixed to mobile retail prices.

The Office cannot say in earnest therefore that because something is the case in the UK that it must be the case in Jamaica. The OUR's statement that Jamaican mobile service providers do not have incentives to lower termination charges is therefore unsubstantiated and at the same time a strong indication that the OUR's mind was closed on the issue. This is a particularly serious *a priori* position to take in the process because if this statement is untrue with respect to the Jamaican mobile market, and incentives do exist, it would also be a strong indication that there is economic market for call termination as defined on each operator's network is incorrect. Subsequently there could be no grounds for a finding of dominance in such a market.

The Office then purports to deal with the issue of supply substitution in the space of two paragraphs (paragraphs 3.37 and 3.38). This is not credible in any thorough assessment of the market. A reasonable analysis would be based on significant market data and consumer research and run to many pages. Moreover the Office then alleges without further investigation in one of those two paragraphs that the only way that callers could select or pre-select the mobile network operator that terminates a call would be if mobile operators shared SIM information (3.38). This is not true. It ignores other possibilities such as the prospect a level of users own more than one phone, or that they can receive most of their calls at home or at work where it might be possible to receive calls on a fixed line instead. <u>Reaching such a conclusion without proper analysis indicates that the Office was not consulting in good faith and had decided on the outcome.</u>

The Office then looks at demand substitution, and concluded that there was none, again based on no research about whether customers will act in a way which leads to demand constraints being imposed on mobile termination prices. No reasonable conclusion could have been reached at this point about demand constraints without using market data and adequate research and properly analysing it.

There is a passing reference to buyer power and entry barriers in subsequent paragraphs (3.43 and 3.44) with no attempt at proper analysis. There are a bare four paragraphs which try to deal with the enormous issue of market power and dominance. In a market as dynamic and new as the Jamaican mobile market at that time this simply does not stand-up as adequate given the dramatic developments in the market on monthly if not weekly basis at that time.

There is also a reference to comparative prices in the market place at that time but astonishingly no attempt to address the question of whether the costs incurred by a large established network with economies of scale might have been less than those faced by new entrants with consequently had to price higher to remain viable. Moreover it was clearly in C&WJ's interests at that time, as an operator in both mobile and fixed markets, to try and minimise competition in the mobile sector by using revenues from its fixed line business where it faced less competition, to subsidise its mobile business to fend off competition from new entrant mobile companies. The OUR could not reasonably have raised the issue of prices without devoting a considerable amount of analysis to these issues to see whether there were other reasons such as those outlined above for the differences in fixed to mobile retail prices. It is worth noting in this regard that virtually every mobile operator has unique mobile rates particular to termination on its own network.

Would the OUR conclude that only one of these operators have in fact got a cost based rate while the rest charge excessive or below cost prices?

As its conclusion the Office says in paragraph 3.49 that *"there is no supporting evidence that indicates the existence of a national market for mobile call termination".* Digicel has serious reservations, and there is nothing in the public domain that suggests, that the Office has made a credible attempt to establish whether there was any evidence that there was a particularly defined economic market in the mobile sector or that the market was instead a national market for mobile call termination or if in fact the actual market definition should have been expanded further.

Moreover, it is incumbent on the Office to prove that there is a particular economic market in the mobile sector and that there is dominance within that market and not base market definition on a 'process of elimination' basis. <u>It is not the case that carriers can be subjected to regulation unless they can prove that regulation is unnecessary: the burden of proof is on the OUR to make its case.</u>

Considering the purported analysis of call termination as a whole in this consultation it appears that there are individual sections of it that strongly suggests that the Office was not consulting in good faith. This conclusion can also be drawn when the few paragraphs that the Office devoted to this subject are pulled together and considered as a whole. <u>Accordingly, Digicel believes that this document did not form a part of a legitimate consultation on possible economic mobile markets or a legitimate assessment of dominance in any such possible mobile economic markets.</u>

4.3.2.2 Dominant Public Voice Carriers No 3; dated April 2003

In its abstract to this document the OUR states that *'The **continued existence** of dominant **carriers** in the Jamaican telecommunications markets suggests that the existing quality of service is likely to be lower than in effectively competitive markets and/or higher prices than in effective competitive markets'* [emphasis added].

The fact that the OUR refers in the plural to dominant **carriers** when in fact only C&WJ has been openly determined as a dominant player to date indicates, by inference, that the OUR has already decided that there are dominant players in the mobile sector. The OUR's consultation seems therefore to be merely a process smokescreen, an attempt to disguise a decision that has already been taken. <u>This further demonstrates pre-judgement.</u>

The OUR set out a far more sensible approach to telecommunications market reviews in this consultation document at paragraph 2.9. Digicel would contend that it would still have been too early in the development of the mobile sector to have carried out a market analysis, but at least in terms of the process outlined and the timeframes suggested there was practicality and due process in this approach. The Office suggested a period of 3 months[5] as a part of a data collection exercise which was to include both market and industry information.

This was then to be followed by a year of subsequent market analysis. The next 6 months was to be allowed for an assessment of the degree of effective competition. Digicel fails to understand how the Office could have failed to adopt

[5] Digicel believe that given that this would be the first time that this was done in the Jamaican telecommunications market an appropriate period would be six months. 3 months would probably be sufficient for subsequent reviews.

this kind of approach from the outset. Moreover, even according to the OUR's own specific timetable using this process, the OUR had intended to reach decisions about whether dominance existed in telecommunications markets by April 2005. This raised a legitimate expectation about the process to be followed as the earlier suggested deadline in the consultation of February 2003 was based on an approach which was not in compliance with the Telecommunications Act 2000.

In paragraph 2.13, the OUR rejected Digicel's argument that the buying power of corporate customers constrains the pricing of mobile termination services. The OUR does so on the basis that *"its analysis in this regard demonstrates that there are separate markets for termination services".* However, no analysis was provided by the OUR. This was clear evidence that the OUR was not prepared to provide those consulted with a fair hearing – if the OUR had evidence why was it not put on the public record?

In paragraph 2.16 the OUR made a number of unsubstantiated allegations about the effects of call termination prices. The OUR provided no evidence of the discontinuation of fixed line contracts and no evidence of the extent of customers making a disproportionate (undefined) use of fixed to mobile and across network calls. It was also noticeable that the OUR failed again to follow elementary regulatory good practice here: the OUR did not look at the potential drawbacks associated with regulating mobile termination rates, including the possibility that regulated prices might be sub-optimal and therefore harm the Jamaican economy and Jamaican consumers. This indicated clear bias in the OUR's approach.

Only a handful of paragraphs have been devoted by the OUR specifically to the issue of mobile call termination in this document. This cannot be said in any way to amount to a substantive attempt to deal with the issues of market analysis or dominance.

Following the OUR's consultation in November 2002 a legitimate expectation was raised that the OUR was going to initiate a process that following a credible procedure which would allow for proper market analysis to be conducting. In Appendix paragraph 1.1 and 1.2 of that document it pointed out;

1.1 The analytic procedure (in assessing dominance) is a two step framework involving:

A) The definition of the relevant market
B) An assessment of a dominant position

1.2 Prior to undertaking this procedure, the OUR should collect and collate the evidence required for the analysis. Such evidence include:

- Market Share Data
- Product functionality

- Prices and Costs
- Inputs
- Principal competitors
- Market entry conditions

Digicel's legitimate expectation in this regard of course was never realised.

4.3.2.3 Dominant Public Voice Carriers; Document No Tel 2003/03; June 2003

In the opening section on entitled *"Comments on Responses"* the OUR states that *"any response to this document will form a vital part of the public debate on the issue of dominance".* We note that the OUR had consistently maintained previously that there was a clear dividing line between market analysis and dominance which formed part of two separate exercises. The above wording however suggests that no attempt was being made to consult on market definition at this juncture but apparently only on the matter of whether there were dominant operators in the market.

In paragraph 1.27 the OUR makes it clear that following data collection, market analysis and assessments of dominance it would determine whether any carriers were dominant in the various telecommunications sectors by April 2005. The reference to making determinations by July 2003 only applied if the OUR had the necessary information available to it to reach a view in this respect. Clearly it did not. <u>This strengthened a previously existing legitimate expectation that the timetable would be as stated ie ending around April 2005.</u>

This legitimate expectation is reinforced further by paragraph 1.48 where the OUR states that in relation to the Telecommunications Market Review Process which was part of the process with the end deadline of April 2005 that *"the OUR intends to use this review process to collect and assess information on the telecommunications industry that will allow the Office to determine the level of competitiveness in the relevant markets and to make declarations of dominance or non-dominance where necessary".*

The OUR states in paragraph 2.3 that *"The Office wishes to note that it requested, but did not receive the relevant information from Digicel. Consistent with the aforementioned Determination Notice, the Office maintains that its estimates are reasonably commensurate with international benchmarks.".* Digicel has not received an information request in the context of a legitimate industry wide regulatory exercise to investigate the existence of any economic markets in the mobile sector. For the avoidance of doubt Digicel believes that its termination rates are reflective of cost and in the case of FTM termination, rates are so low we are concerned these may in fact be below cost.

As to the Office's assertion that its estimates are in some way consistent with international benchmarks this is categorically not true as the Office could have confirmed by the simplest of exercises. Indeed in its latest consultation document it provides evidence that its estimate of costs is clearly out of kilter with international benchmarks.

Digicel has obtained data from Ovum, an independent firm of consultants, which can be seen at **XXX** and which demonstrates that Jamaican fixed to mobile termination rates are exceptionally low by international standards. <u>The fact that the OUR's statement is so incontestably incorrect provides strong evidence in Digicel's view that the Office has made its statement without and supports a finding that the OUR is biased.</u>

In paragraph 2.4 (2) the OUR states *"Where required, the OUR will present empirical evidence to justify its definition of the relevant market".* It is difficult to understand how one could ever arrive at a reasonable economic market definition without empirical evidence. If the OUR tried to do so, this would represent a fundamental breach of due process. <u>The burden of proof is on the OUR to establish a proper definition of economic markets not on market players to prove that certain economic markets do not exist.</u>
In the paragraph 2.10 of the OUR then attempts to make a distinction between between the concept of dominance as it is applied by Oftel and the concept as it applies to the FCA. The OUR seems to be suggesting that in assessing dominance it does not need to take account of entities that can act independently of its customers or consumers, only of its competitors. This is a complete fallacy that we are confident could not be supported by the FTC. Following this logic it is suggesting that even if an operator could somehow act independently of its competitors it must be dominant, even in a circumstances where customers stopped buying their product or bid their price down to zero. This defeats the whole purpose of establishing a concept of dominance in the first place.

Further in this paragraph, the OUR has stated that *"the OUR can make a determination of dominance by conducting an investigation into the constraints imposed by suppliers or potential suppliers in a market".* The OUR has chosen to interpret this to mean that it does not need to carry out a thorough investigation of the technical possibilities for termination via other networks. We do not see how the OUR can reasonably have drawn this conclusion. It is precisely the suppliers mentioned which might look to provide those alternative technical possibilities. We believe that the OUR has reached this conclusion because it does not want to investigate alternatives properly rather than because it is not required as a part of due process.

In paragraph 2.12 the OUR states that it has published two consultative documents which contained its assessment of dominance in relation to mobile termination. As explained previously, so little substance and so many procedural flaws exist in those documents that these cannot reasonably be said to form part of a proper consultative exercise. Moreover we note once again that the OUR does not claim to have been consulting on market analysis which is an essential pre-cursor to any determination as to dominance.

In paragraph 2.16 the OUR states *"For the avoidance of doubt, the OUR intends to issue a* ***Determination on Dominance*** *in* ***July 2003****. Subsequently, at the end of the first comprehensive review process in* ***April 2005****, the Office will make a* ***Determination on the degree of effective competition*** *in the various telecommunications markets."* [emphasis added] We understand this to mean that the OUR is claiming that it made mobile market players aware that it had intended to establish whether any economic mobile markets existed and whether there was any dominance in those markets by July 2003.

In order to have done this validly it was incumbent on the office to carry out a proper exercise of assessing what data it needed to collect in terms of assessing the existence of any economic markets in the mobile sector, a thorough process of market analysis, a thorough process of determining whether there was dominance in any of those markets and finally whether the regulator needed to take any action on an ex ante basis even if there was a finding of dominance. The OUR did not follow this process, even according to its own procedural guidelines. It was therefore clear from events, and the only reasonable interpretation in Digicel's eyes, that the OUR could not reasonably have been applying the July 2003 timetable to the mobile sector, but only to the fixed sector. The only potentially reasonable approach in terms of numbers of months allocated to each part of a data collection, market analysis and effective competition assessment exercise was a part of the 21 month process starting with data collection which had April 2005 as the decision date. In Digicel's view this process has not even been initiated.

4.3.2.4 Dominant Public Voice Carriers; Document No TEL 2003/07; August 14, 2003

Digicel notes that in paragraph 1.2 the OUR makes a reference to an earlier survey conducted between February and March 2003. Digicel perceives that this was an attempt to suggest that the February 2003 research contained a reasonable chunk of research into the mobile sector. In fact only one tiny section of that survey mentioned the mobile sector as a part of a large report which looked at a large number of areas which were not relevant to mobile market analysis including consumer *"awareness of regulatory organisations"*. Digicel notes that the only figures gleaned from the survey which were relevant to the mobile sector were possible numbers of Jamaican households and possible numbers of cellular telephones in those households which would provide little or not input in terms of making an informed decision on mobile termination in any respect. Therefore, that consultation did not form a part of a proper attempt at mobile sector analysis.

4.3.2.5 Assessment of Dominance in Mobile Call Termination; March 30 2004

In the abstract the OUR has by its own admission already decided that there is more than one dominant carrier in the Jamaican telecommunications sector. *"The continued existence of dominant **carriers** in the Jamaican telecommunications markets suggests that the existing quality of service is likely to be lower and/or prices higher than in effectively competitive markets."*[emphasis added]

There was clearly only one player with dominance in the Jamaican market prior to this consultation. By declaring that there is more than one the OUR has made it clear that this was not a consultation about whether there were additional players with dominance but a statement that additional carriers were in fact dominant – awaiting only an official declaration. From the context it is also clear that this is a statement about the existence of dominance in markets for call termination on each mobile operator's network. The document is therefore further evidence of the OUR's bias and pre-judgement.

The OUR also states in the abstract that *"During the consultation on Dominant Public Voice Carriers, the Office expressly stated that it intended to make a declaration on dominance in mobile voice call termination".* No account can have been taken even of the OUR's own market research conducted in January 2004 at this stage. The OUR did not even consider the issue that the consumer survey may have raised issues that required further investigation. In fact as Digicel will highlight, the consumer survey exposes the weakness in the OUR's position. This is a further indication that the OUR intended to find a position of dominance in mobile call termination prior to this consultation.

Ministerial Order

In the abstract the OUR indicates that it believes that Ministerial Order 1/2004 gives it the right to intervene generally in mobile call termination. Digicel disagrees. The Ministerial Order was issued specifically in the context of international settlements and is further delimited by constituting a power *"as will stimulate sustainable, effective competition among carriers and service providers".* If termination rates are not relevant to achieving this in the context of international incoming traffic then the OUR has no right to intervene with respect to mobile termination rates whatsoever.

Digicel believes that it is highly unfortunate that a Ministerial Order made in good faith and clearly issued to deal with a perceived crisis in another area of the market, is now being used by the OUR to unnecessarily intervene in another area of the mobile market.

International incoming mobile termination rates are not relevant to ensuring efficient competition in the international settlements market. International mobile termination rates merely form base at which all market participants including mobile operators use as a starting point for selling termination on the international market. If competitors can sell that termination more cost effectively and/or are sufficiently informed in the highly competitive international arena, then they will survive in the market. Digicel notes that the OUR has recently indicated that a difference of 0.8 US cents between the base termination cost and the resold rate on the international market is all the margin that it may be reasonable to expect to compete on. If margins are significantly greater than this, and certainly if they are much more than 1.5 US cents, then it is highly likely that there would be a distortion of the market which would be deleterious to competition.

Moreover, the OUR's right to make stipulations with respect to mobile termination rates for international incoming traffic under this Order is subject to legal challenge. If the OUR's previous determination in this respect is struck out, that will confirm that the OUR has no right to intervene in respect of mobile termination rates in any way.

In the abstract the OUR also states that *"This Consultation Document sets out the Office's views regarding its assessment of dominance in the markets for Mobile call termination."* This is a further declaration that this document is not making a market analysis and that the market has already been determined. As indicated previously, there has been no collection of information from operators, no substantive or recent prior market analysis, and no prior market analysis which takes into account the research carried out by the OUR in January 2004. <u>The OUR cannot assess the existence of economic markets or dominance without first collecting the necessary information and carrying out adequate market research (among other things including consulting on the same).</u>

In the section relating to comments the OUR states that *"Any response to this Document will form a vital part of the public debate on the issue of dominance."* . In other words yet again it is made clear that this consultation is not about market definition but solely about whether mobile operators are dominant in a market which has been pre-defined by the OUR. Although the OUR has denied this in subsequent correspondence with Digicel, that does not overcome the evidence in this and other OUR's document.

Paragraph 1.8 mentions the role of the FTC. Digicel notes that there is only one response post liberalisation of the mobile sector which contains only one page of comment from the FTC which is relevant in respect of the issue of mobile call termination and which is on the OUR web site. We understand that the first response pre mobile liberalisation actually disagrees with the OUR's views with respect to mobile market analysis.

Digicel has had no visibility of the details of any other discussions between the OUR and the FTC, the foremost institution on issues of market definition and market analysis in Jamaica. In the absence of public disclosure of the details of discussions with the FTC, Digicel, and any objective bystander, must be forced to assume that none took place – if it did, Digicel contend that this information should be on the public record. <u>This is a failure of due process.</u> Moreover it is not reasonable for so little input to have been sought from the FTC in respect of a matter which could have such significant consequences for the Jamaican telecommunications market and the mobile market in particular. It may be that insufficient time was provided by the OUR to the FTC in which case this also constitutes a failure of due process. Clearly, the time the OUR has allotted to FTC comment on its most recent document is alarmingly short.

In paragraph 1.11 under the title *"Purpose of this Document"* the OUR states that *"This consultative document sets out the Office's views regarding its assessment of dominance in the markets for Mobile call termination.". We note once again* that there is no reference to the Office consulting on market analysis, merely whether dominance exists in those markets already determined. As is indicated in the OUR's own guidelines an assessment of dominance is a two stage procedure involving definition of the relevant market (if there is one) followed by an assessment as to whether there is dominance or not in that market.

<u>Paragraph 2.1 provides an indication of the OUR's bias with respect to this process.</u> The OUR refers to the concerns that the US Trade Representative has about mobile termination rates in a number of countries. Firstly, it is clearly unacceptable for the OUR to use the general concerns of an authority in the United States about international incoming mobile termination rates as some kind of basis for justifying regulating domestic mobile termination rates in Jamaica. It is highly improbable the FCC would use general concerns expressed by the OUR about international incoming rates as a defence for regulation in its own jurisdiction.

The Jamaican government has already made it clear that it will not be dictated to by large overseas countries. The inclusion of this comment becomes even more inappropriate when it is realised that the USTR was not even referring to Jamaica – the FCC in fact has a benchmark of 19 US cents for settlement rates in Jamaica.

Similar spurious references to overseas jurisdictions are made in paragraphs 2.2 and 2.3. Our full explanation about why these comments are spurious can be seen in our section on market analysis and the assessment of market power. <u>The OUR is not permitted to include irrelevant matters as the basis for arriving at decisions.</u>

<u>Paragraph 2.4 represents a further clear sign of bias from the OUR.</u> The OUR has referred to one rate from one mobile package for making a retail mobile call

from a T-Mobile phone in the USA. Because T-Mobile USA uses a combined calling party and called party pays system a direct comparison between the USA and a country where only the called party pays is entirely irrelevant. The full explanation of why this is so can be seen in the section on market analysis and the assessment of market power. However, even on an immediate intuitive level it is obvious that this must be the case. The inclusion of the reference to the T-Mobile USA rate is so inappropriate in Digicel's view that it could be regarded as reckless. Digicel submits that the OUR appears to have included spurious and misleading information in an attempt to support its desire to intervene in the mobile sector in Jamaica. <u>Irrelevant matters cannot be used as the basis for arriving at decisions.</u>

In paragraph 2.11 the OUR states *"The effect of the CPP regime in the domestic mobile voice call retail market (i.e. the market for calls to mobiles) is that, mobile network operators have no incentive to lower the price of calls to their mobile networks from other networks".* Yet this was contradicted by the OUR's own Director General Mr J Paul Morgan who said, as reported in the "Observer" on 15 July 2003, when referring to Digicel's reduction for fixed to mobile calls that *"it is the prospects of a competitive market where Digicel had to react to the market".* So it is clear that the head of the OUR thought that we did have incentives to lower the price of calls. If we Digicel had no incentives to lower prices what inspired these reductions? Why has Digicel not attempted to maintain real prices at the level they introduced prices at in 2001?

Given the comments by the OUR Director General, it is reasonable to assume that the OUR must have considered that Digicel had incentives to reduce prices for at least a few months following this statement. If so the OUR is therefore suggesting that the mobile market has become uncompetitive since sometime after the Director General made that statement. <u>If so the entire process of assessment of the mobile sector should have started at the earliest some time after the Director General made that statement.</u>

In paragraph 2.17 reference is made to the research that was carried out between December 2003 and January 2004. It seems a great pity that the OUR was not open minded about the commissioning of the research and the questions to be asked. The industry could undoubtedly have added much value to the exercise and perhaps enabled more meaningful results to be obtained from it. Advice could have been sought from the industry or from one of the numerous foreign research companies which have carried out work in respect of mobile termination. Key questions, some of which have been mentioned previously, have simply not been asked. Even absent these questions, what evidence that can be gleaned seems very much opposed to the views of the OUR that appear to have 'cherry picked' specific results to try and support its case.

OUR Paragraph 2.23 - Digicel thinks it is highly inappropriate for the OUR to suggest, based on no evidence, that the introduction of cross network SMS would not have a significant impact in terms of the pressure that might be exerted in terms of mobile to mobile call termination charges. The OUR has to be open minded to the possibility that cross network SMS might have a significant impact. This appears to reflect the OUR's tendency to pre-judge matters in an attempt to justify its arguments. In fact Digicel wishes to point out that it is now in fact at an advanced stage of negotiations in agreeing terms for cross network SMS.

Paragraph A2.13 demonstrates clear bias on behalf of the OUR. The OUR states that *"In relation to the household survey, only 9.1% of the respondents said that they consider the cost of others calling them when deciding to purchase a mobile phone. This provides further evidence that user groups are not likely to constrain the price setting behaviour of domestic mobile operators."* .We notice that the OUR has been very selective about the information it has extracted from the survey. In answer to question number 29, 65% of respondents thought that the cost charged to others for calling the customer was very important. The answer to question 29 is completely at odds with the OUR's findings that there is a market for mobile call termination. Despite this the OUR has highlighted only the figure that appears to point most towards[6] the outcome that the OUR wishes. This behaviour is procedurally and administratively not reasonable and as already indicated demonstrates clear bias.

Clear Factual Errors

In paragraph 3.10 which is headed *"Mobile Termination Rates for MTM Domestic Calls"* the OUR states that *"ODJ's off-net MTM* (termination) *rate increased from $15.00 to $19.70 per minute on November 29, 2002.* Digicel notes that these are clear factual errors. The figures quoted refer to retail rates and not mobile termination rates. If the OUR has approached its analysis believing that some MTM termination rates are $19.70 this must have severely coloured its views. If the FTC is presented with such factually incorrect errors it may not be surprising that it might concur with the OUR in the limited time it is allowed to deal with the issue.

In paragraph 3.11 the OUR states *"even before this judgment, Digicel indicated on November 5, 2003 that it intended to increase its international mobile termination charge to US$0.1661 compared to the OUR's estimated cost of US$0.1108."* This is another clear factual error. The rate that Digicel notified was J$8.30 or US$0.138 US cents, some 20% lower than the OUR is alleging.

4.4 Further Examples of Pre-judgement

[6] Even so Digicel strongly believe that 9.1% of the market with more than one mobile phone, added to numerous other factors provides evidence that there is significant competitive pressure on mobile terminaniton.

The Office announced in document 2004/02 "Observation of Appeal Tribunal's Order on Settlement Rate Decision" and document 2004/05 "Notice of Proposed Decision on Settlement Rate and Termination Charges" a timetable for establishing cost based mobile termination rates irrespective of the outcome of the appeal on dominance.

There was no reasonable use for this information, which is extremely complex and expensive to establish, other than to set cost based mobile termination rates. Cost based mobile termination rates can only be considered as a regulatory requirement once a mobile operator has been found dominant in mobile call termination. Consequently, any exercise aimed at establishing cost based mobile termination rates must be based on an intention to find mobile operators dominant in mobile termination. This constitutes pre-judgement. The OUR only reviewed its position after Digicel wrote to it in this respect on 23 April. It is clear however that the mindset of the OUR was previously to proceed regardless of whether the work was necessary.

In Document Number Tel 2004/06 Digicel notes that the OUR is suggesting that it will publish a consultation document in mid June 2004. It suggests that this is conditional. Presumably the OUR means that it is conditional on whether there is a finding of dominance by the OUR in respect of mobile call termination markets on 31 May. Digicel is forced to point out that it is simply not credible for the OUR to suggest that it can write a consultation document on one of the most complex areas of regulation between 31 May 2004 and mid June 2004.

At a generous estimate it would take several months for the OUR to write such a consultation. The fact that the OUR has the intent to publish this document in mid June indicates either: a/ that it has already been substantially written, in which case the entire dominance procedure has been a sham and the OUR has not in truth been consulting at all on market analysis and dominance because the OUR could only carry out an assessment of cost based termination rates based on a finding of dominance[7]; or, b/ the OUR intends to write such an fragile document that it will constitute a breach of its duties to regulate the telecommunications sector in a reasonable fashion.

To highlight this remarkable timetable and in light in the OURs views on reasonable time periods in other areas, we further note that in a letter dated 26 April 2004 to Digicel *entitled "Consultation of "Assessment of Dominance in Mobile Call Termination""* in response to correspondence from Digicel where we asked for a response on very pressing matters, the OUR noted that it considered 7 working days to be a reasonable timeframe in which to respond to Digicel. This begs the questions that if 7 working days constitutes a reasonable response time

[7] In document number Tel 2004/06 "Decision on Settlement Rates and Termination Charges" the OUR makes it clear that this is the case as in Appendix 1 it states "Dominance as it relates to mobile networks is currently the subject of consultation. Should the consultation result in a declaration of dominance in mobile, the Office will conduct an assessment of cost-based termination charges for this sector."

to a letter of less than 2 pages, how can writing a consultation on one of the most complex areas in telecommunications take just of two weeks or 10 working days? For that matter how does this fit with allowing a reasonable amount of time for the FTC to comment on the OUR's draft document on dominance which it proposes to publish on May 31st.

The titles of the OUR's documents appear to suggest a slanted interpretation of the requirements of the Telecommunications Act by continually calling them consultations on "Dominance". The Act states that the Office shall determine which public voice carriers are to be classified as dominant public voice carriers for the purposes of this Act. It is clearly the case that a carrier cannot be classified as dominant if it is not dominant. That would be an absurdity. Notwithstanding this, the Office has throughout the process been consulting using the title "Dominant Public Voice Carriers". An open minded approach would have been exhibited if the Office had approached the process in terms of for example a "Consultation on Possible Mobile Markets", and subsequently a consultation on "Whether Market Power and Dominance is exhibited in Mobile Market X" provided an economic mobile market of some description had been properly identified after due process. However, taken in combination with other language that has been used by the Office in its documents we believe that the document titles which have been used are a further indicator of pre-judgement on behalf of the OUR.

4.5 OUR's duty to give persons the opportunity to make submissions and to be heard by the Office

4.5.1 Recent correspondence between Digicel and the OUR

Digicel wrote two letters to the OUR on March 31 2004 and April 8 2004. Digicel's first letter sought a reasonable period of time to respond to the consultation. In its response on 5 April the OUR extended the deadline but insufficiently in Digicel's view. The OUR also indicated in that letter that only the results of the subscriber survey were not a part of the aforementioned consultation and that this was specifically why only 3 weeks had been allowed for responses initially – this despite indisputable evidence to the contrary. It therefore seemed to be without reasonable doubt that the only thing that could affect the OUR' previous views with respect to market analysis and dominance was the subscriber survey. If the OUR had been genuinely consulting on the whole of the issues of market analysis and the assessment of dominance it would have provided sufficient time (at least 3 months) to respond.

However, the OUR then said in its letter to Digicel of 21 April 2004 that it was consulting on the whole of the issues of market analysis and the assessment of dominance. A consultation on matters of these complexities would in Digicel's view normally allow several months for responses. This indicates that the OUR has chosen to give the industry insufficient time to respond to the consultation despite the necessity of more time for responses being highlighted to it. We therefore believe that the current document on Dominance cannot be held to be a valid consultation on this basis.

4.5.2 No Opportunity to Make Comments on Comments

Digicel also notes that the OUR has not included in its timetable any provision for comments to be made on responses submitted to the OUR's latest document on Dominance which was dated 30 March. This is surprising. Previous experience leads Digicel to believe that it has a legitimate expectation that the OUR would provide this opportunity.

5 OUR'S 'ASSESSMENT OF DOMINANCE IN MOBILE CALL TERMINATION'

5.1 Summary of the OUR's Approach to Market Analysis and Assessments for Dominance

Digicel believe that there is strong evidence that the OUR's approach to market definition and assessments of dominance is extremely flawed for the following reasons:

- The OUR in the past has acknowledged the importance of data collection to the process of assessment of competition in markets yet it plans to initiate this process only after a declaration of dominance. Digicel have checked with the FTC which has confirmed the importance of data collection to this process. It is possible that the FTC has not clearly communicated the OUR's failings in this regard in whatever limited consultation between the two parties has taken place.
- The OUR has relied on very limited data in coming to sweeping conclusions. Digicel is not aware of any data collection process in conducting this review.
- What data the OUR has referred to has been misinterpreted on several occasions, in particular with respect to Digicel's pricing.
- There is strong evidence to suggest that the OUR has blurred the concepts of market definition or dominance and the manner in which an assessment of both should be conducted.
- There are clear factual errors and misconceptions in the OUR's document.
- There is no reference or attempt to address numerous important criteria normally considered vital in any standard competition analysis.
- The OUR has not engaged in adequate consultation with the FTC on issues of market definition and dominance.

5.2 OUR's approach to market analysis and assessment of dominance

Digicel is concerned that the OUR has attempted to conduct market analysis and an assessment of dominance without a clear understanding of the procedures involved in such a complex undertaking. This could be due to the level of resources which have been applied to this task by the OUR or that the OUR needed to seek external expertise; failure to consult properly with the Fair Trading Commission (FTC)[8] or because insufficient time was provided by the OUR to provide more substantive comments. Whatever the reasons, we believe that the approach taken by the OUR would not be acceptable in terms of a competition analysis in the European Union or the United States, two jurisdictions which have been referenced to a significant extent by the OUR in the document.

5.3 Data Collection

A fundamental requirement of carrying out thorough and reliable market analysis is that of data collection[9]. Digicel is satisfied that this is an irrefutable fact and is one which would be backed by the FTC. We also note that the OUR itself has continually reiterated this point. In this regard we would remind the OUR of its own comments in past publications:

1. *"Although the guidelines outline the factors that ideally* ***should*** *be assessed, the analysis of dominance is often constrained by the actual availability of evidence".* (Digicel's emphasis added) – August 2003. Digicel is not aware of any attempts made by the OUR to collect any evidence as a part of a legitimate exercise to undertake an analysis of

[8] Despite the OUR's assertion that it has consulted 'extensively' with the FTC, Digicel notes that to date the public record shows just one very small submission from the FTC on the most important pending issue since mobile market liberalisation. Digicel would respectfully contend that this small submission on such an important issue does not constitute 'extensive' consultation.
[9] A significant part of all regulatory authorities tasks in relation to the current European wide market analysis and assessment of dominance was the data collection process. Digicel have contacted several of these authorities all of whom have confirmed that that is the case.

possible economic markets within the mobile sector.[10] We should be grateful if the OUR could clarify what requests for information it believes that it has made and in what contexts.

2. *"Subsequent to issuing a Determination Notice on Dominance….the OUR intends to embark on an industry-wide data collection process that will enable it to assess the competitiveness in the various telecommunications market on an on-going basis".* – June 2003. It seems clear from this remark that the OUR regard data collection as an important part of assessing competition (and by implication dominance to which it is inextricably linked), so it is quite inexplicable why it would propose designating anyone as being dominant before such a process had been completed.

3. *"Prior to undertaking this procedure* (which refers to a definition of relevant markets and an assessment of dominance) *the OUR should collect and collate the evidence required to do the analysis…*Including…*prices and costs"* – November 2002. In relation to both issues it appears that the OUR has not followed its own advice.

As can be seen, the OUR itself has consistently made the point that data collection is an important part of market analysis. Nevertheless, the OUR seems to have relied almost solely on the results of a consumer survey to back up its analysis. In this regard we would point out that consumer surveys, while useful up to a point, should only account for a proportion of any market analysis process[11]. Moreover, Digicel believes that even the consumer survey would

[10] The OUR asked for a limited amount of information as a part of a different exercise to look at C&WJ's Reference Interconnection Offer. There was no obligation on Digicel to provide information for that exercise but nonetheless Digicel was prepared to consider provision of it subject to knowing what the information asked was being asked for and as long as Digicel could be given a reasonable period of time to assemble it. The OUR never responded to Digicel's queries in this respect.
[11] See the European Independent Regulatory Groups (IRG) paper on 'Principles of Implementation and Best Practice on Effective Competition in Electronic Communications Markets as decided by the IRG' 19 February 2001.

need to be substantially amended to provide a robust set of information about consumer behaviour which could be used as a basis for informing a market analysis. Certain key questions are missing from the existing market research including questions about consumer knowledge about the cost of making particular calls to particular providers. The industry could have pointed out such pertinent issues to the OUR if it had consulted on the form of the consumer survey. It seems especially appropriate that the OUR should have consulted on the form of the survey given that this is the first time that the OUR has carried out a survey in this area.

Indeed, given that the OUR has never attempted to conduct a complete assessment of the mobile sector before it would also have been appropriate for it to have consulted on the kinds of information that would be needed from market players to analyse the mobile sector for the possible existence of economic markets. For example, the OUR should have consulted on whether volume and/or value sales were the better measure in the context of an analysis of the Jamaican mobile sector. The information gathered from market players would then need to be scrutinized carefully and cross referred with information gleaned from a robust consumer survey. This would be further informed by other observations about the telecommunications sector.

The OUR has referred extensively to pricing in its 'Dominance' documents, and in particular, retail pricing. However, Digicel notes that at no stage in the entire process has the OUR requested pricing data or information from Digicel as a part of a mobile market analysis exercise. This could explain why the OUR's references to Digicel's prices in a number of instances are factually incorrect and shows a lack of understanding as to the various pricing structures Digicel has had in place since it came into the market. We will refer to the issue in greater detail in our section on pricing.

5.4 Demand and Supply Substitutability

In assessing economic markets within given industry sectors it is agreed by competition and regulatory bodies worldwide that important factors to consider are demand and supply substitutability and potential competition.

The hypothetical monopolist test/SSNIP[12] test is one possible means of assisting an assessment demand and supply substitutability. It cannot be used in isolation and if this test is applied it must be applied up to the point where it can be determined that a relative price increase within the markets postulated will not result in consumers switching to substitute products or services or to suppliers in other areas. The relevant products and services are all those which are sufficiently interchangeable or substitutable. Sufficiency is measured in terms of several things including the characteristics which make them suitable for satisfying the needs of consumers; the conditions of competition; and the structure of supply and demand in the market in question[13].

In order to define a product or service market it is necessary first to group together products or services which are used by consumers for the same purposes. The perceptions of consumers play a role in this regard. It must also be remembered that the perceptions of consumers in one country cannot be taken to be the same as perceptions of consumers in a different country. This could be for example due to cultural differences or differences in market structures.

It is not necessary for products or services to be provided at the same price for them to act as demand side substitutes. Lower quality services or products sold at a lower price could be effective substitutes to a higher quality product sold at higher prices. As already indicated it is the reaction of customers in response to a relative price increase that matters. Thus, for example, if a particular mobile

[12] SSNIP – Small (5-10%) but Significant Non-Transitory Increase in Price
[13] Tetra Pak

telecommunications service which is perceived in some way to be of less value is increased, customers might still move to a higher priced mobile service if the additional price is perceived to be offset by the higher value attributed to that service. The additional value might exist for example as a result of quality of service differences among other possible factors. In this case both the lower and higher priced services form a part of the same market.

Digicel would have liked to provide a fuller explanation of demand and supply side substitutability to demonstrate more clearly what a reasonable approach in terms of an analysis would entail. Unfortunately there was insufficient time to do so given the limited time provided for responses to the OUR

5.5 Difficulties of Market Definition in times of Great Change and the Impact of New Entrants

The OUR is aware of the continuing tremendous changes that are occurring in the Jamaican mobile sector in terms of the growth of subscriber numbers. AT&T is about to enter this rapidly changing market place. This was not envisaged or taken into account at any stage by the OUR in its 'Dominance' documents. It is unreasonable for a regulator to attempt to define markets given such volatile market conditions. This is because it is intrinsically much more difficult to determine what the optimum market conditions are and because the ramifications of regulatory intervention in this kind of environment are extremely uncertain. We believe therefore that the OUR will be gambling with the future of the telecommunications industry in Jamaica if it tries intervening at this juncture.

Digicel therefore urges the OUR to reconsider the timing of its attempted interventions in the mobile sector. It would be more sensible in terms of market developments, and more practical in terms of the prospect of the OUR's chances of being able to arrive at the correct market definition, if the OUR were only to consider starting such a process when AT&T has had some time to become established in the market place. At that point the additional market turbulence generated by the entry of AT&T will have had some time to subside to an extent.

The impact of new entrants would have been explored more fully if Digicel had been given sufficient time to provide a response.

5.6 OUR's confusion about how to Define Markets and Assessing Markets for Signs of Dominance

One of the key considerations given by the OUR in the market definition process is that of countervailing buyer power. Digicel is not aware of any precedents where buyer power is considered at the market definition stage. That is because buyer power is independent of the process of market definition and is not a determinant of whether a particular market exists or not. Buyer power should only be considered when looking at a previously defined market to determine whether it can act as a constraint on an operator's pricing behaviour. It should therefore only be considered in the assessment of whether market power or dominance exists. However, paragraphs 2.34 to 2.36 for example are about buyer power and cannot therefore be a part of a market analysis. Despite this the OUR has incorrectly included them in the market analysis section. The fact that the OUR does not appear to have discerned the place of considerations about buyer power seriously calls into question the OUR's understanding of the concepts of market definition and dominance.

In chapter 2 the OUR has effectively defined at least three distinct markets: the market for termination on C&WJ's network; the market for termination on Digicel's network and the market for termination on Oceanic's network. Further we note in paragraph 2.16 that the OUR states that *" …..termination charges on networks with small market shares are also unconstrained. Under these circumstances, it seems to be desirable that termination charges for all mobile operators are regulated."* This seems to suggest that the OUR believes that there will also be a market for termination on AT&T's network either immediately or shortly after launch and therefore that AT&T will also be regulated. This sentence is also strange in that it makes an unsubstantiated allegation about market power in the section of the OUR document which is meant to be dealing with market analysis.

If the OUR has satisfied itself that these are the correct market definitions then it is difficult to comprehend why continual cross references (eg paragraphs 3.8 and 3.13) are made between prices in three distinct markets in chapter 3 which is meant to be dealing only with *"Market Power and Dominance in Mobile Voice Call Termination Markets"*. If it were true that the correct market definition was for call termination on each mobile operator's network then each operator has 100% market share. Therefore, it would not be relevant to consider prices between these three markets any more than it would be appropriate to consider the difference in the prices of apples and umbrellas to determine whether the price of apples constrains the price of umbrellas. The cross referencing of termination prices on each network throughout this section means that the OUR is still looking at market analysis and suggests that it is not clear about the difference between market analysis and the assessment of market power.

In paragraph 2.8 the OUR states *"In Oftel's review of mobile wholesale voice call termination markets[14], based on its definition of the relevant market, its initial conclusion was that there is a separate market for termination on each mobile network operator's network. Thus implying that each mobile network operator is dominant (and effectively, a monopolist) in the supply of voice call termination service on its network."* It is simply incorrect to state that where a market is found there is implied dominance. Yet again this reveals that the OUR's grasp of the difference between market analysis and assessments of dominance is not sufficient. It also reveals, we believe, an intent by the OUR to determine mobile operators as dominant, instead of the OUR attempting, as it is supposed to do, to investigate and assess fairly all the arguments contradicting as well as in favour of a particular economic market definition.

[14] See Review of Mobile Wholesale Voice Call Termination Markets, EU Market Review, 15 May 2003 at http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/ctm/ctm0503.pdf.

In paragraph 2.16 the OUR states that *"It is also important to note that since voice call termination (facilitating real time telecommunications service) to a particular customer is a bottle-neck in contacting a specific customer, termination charges on networks with small market shares are also unconstrained. Under these circumstances, it seems to be desirable that termination charges for all mobile operators are regulated."* Yet again Digicel has to point out that the OUR does not seem to understand market analysis. This paragraph suggests the existence of a completely new market: a market for mobile termination to each customer. This finding is unheard of anywhere in the world. Even the most rudimentary market analysis reveals that network operators do not discriminate on charging by individual subscriber. There is no economic market for termination for calls to each customer. It is even more notable that after stating that there is market for each customer the OUR goes on to ignore any possible logic in its statement and says that this means that each mobile network operator's termination costs should then be controlled. In other words, although the market is x, we think that we should regulate market y. According to the new market that the OUR has just postulated any regulatory controls on prices in the event of dominance would have to be on a subscriber basis ie the OUR would have to determine an individual rate for termination for every mobile subscriber in Jamaica.

Referring once again to the OUR's paragraph 2.16 " …..termination charges on networks with small market shares are also unconstrained. Under these circumstances, it seems to be desirable that termination charges for all mobile operators are regulated." Again this is an attempt to assess market power. But this has been included in the section on market analysis and not market power assessment.

There are several examples where the OUR reverts back to reassessing the market definition under the banner of a dominance assessment eg:

Paragraph 3.10 - *"If only one voice call termination market existed, ODJ's off-net MTM termination rate would be constrained by the rate charged by other mobile carriers" .* In fact this reference is doubly confused as the paragraph only mentions retail rates but calls them termination rates.

and

Paragraph 3.12 - "In fact, mobile operators have maintained their termination charges at levels higher than 10% above other operators and have increased their market share*". The OUR has, in its section on market analysis concluded that each mobile network operator has 100% of the market on its own network. Given that analysis there should be no question of the OUR then proceeding to discuss in the section on market power increases in market shares as this would not be possible. The fact that it has done so indicates that the OUR is confusing market power assessments with market analysis.*

5.7 OUR's Market Analysis

This section considers the OUR's attempts to analyse the mobile market in a paragraph by paragraph format. Digicel does not believe that the OUR's analysis with respect to the mobile market withstands reasonable scrutiny. We have already highlighted some places where there is confusion between market analysis and assessments of market power.

Digicel would add at this point that it would have provided fuller views on how properly to analyse markets if it had been given sufficient time to respond to the consultation.

In paragraph 2.11 the OUR states that "The effect of the CPP regime in the domestic mobile voice call retail market (i.e. the market for calls to mobiles) is that, mobile network operators have no incentive to lower the price of calls to their mobile networks from other networks". *Yet this was contradicted by the OUR's own Director General Mr J Paul Morgan who said, as reported in the "Observer" on 15 July 2003, when referring to Digicel's forthcoming reduction for fixed to mobile calls that* "it is the prospects of a competitive market where Digicel had to react to the market".

Digicel does not see that on even the most liberal interpretation of these words, there can be any doubt that the OUR's Director General was persuaded that Digicel had been forced to lower its fixed to mobile prices on 1 September 2003 as a result of competitive forces. We think that it is reasonable to assume that the mobile sector was therefore considered to be wholly competitive for at least the quarter following ie until December 2003. Any work carried out by the OUR prior to this time in respect of mobile market analysis and assessments of dominance in the mobile sector can therefore have little weight.

5.7.1 Irrelevant Considerations

The OUR includes several references in its document which are not relevant to an assessment of whether there are markets for mobile call termination or to assessments of dominance. The OUR is not permitted to use irrelevant considerations to justify its views but has clearly sought to do so.

Para 2.1

In this paragraph which is in the section of the document entitled *"Market Definition"* the OUR first starts by making a vague statement which is irrelevant to whether there are economic markets in the mobile sector in Jamaica. The OUR states simply that *"High mobile termination rates relative to estimated costs are of concern in several countries."* The OUR then inexplicably relies on 'concerns as expressed by an institute in another jurisdiction by stating that *"In March 2003, the Office of the US Trade Representative (USTR), ……indicated that one of its regulatory concerns in a number of countries is, the high charges for terminating calls to mobile and fixed-line networks in these countries".* It is, without question, entirely irrelevant to a process of market analysis to quote a mere concern that has been expressed by a foreign jurisdiction about a number of third party countries. The inclusion of this paragraph becomes yet more incomprehensible when it is realized that the USTR was not even referring to Jamaica. Surely if the OUR wished to rely on this report to some extent it should have noted that the USTR did not regard Jamaica as one of the countries it had concerns about. This demonstrates that the OUR is clearly using irrelevant considerations to try and make its case, which in turn indicates clear bias.

Para 2.2

The OUR states that the report says that *"…high wholesale cost of completing calls onto mobile networks in foreign countries continues to hinder U.S. telecommunication suppliers seeking to offer competitively priced services."*
Again this is irrelevant to an analysis of mobile markets in Jamaica. If the OUR is unsure whether this is the case it should consult the FTC which will, we are sure, confirm what we say.

Paragraph 2.2 appears almost to be the expression of some internal disagreement within the OUR about a separate matter ie international settlement rates. As such, Digicel is not convinced that this should form any input to an assessment of dominance in any mobile termination market, however defined.. However, its inclusion forces us to address the point. As the OUR knows, it has recently been trying to increase international settlement rates. However, international settlements rates into Jamaica will be forced lower if incoming international mobile termination prices are reduced as settlement rates are usually not much higher than termination rates. Recently the OUR has suggested that settlement rates might, presumably in an efficient and competitive market, be only around 0.8 US cents above termination rates. Therefore the inclusion of paragraph 2.2 is not only irrelevant but also conflicts with the OUR's policy in another area. While it is interesting to note this apparent conflict within the OUR it appears highly inappropriate to use this document to publicly air one side of that conflict. It also seems disingenuous of the OUR then to use this as an attempt to justify regulating the mobile sector.

Another point to note about this reference to US concerns about settlement rates in paragraph 2.2 is that it is a self-serving US report, in conflict with Jamaican national interests. Digicel believes that it is the declared policy of the Jamaican government not cow-tow to large overseas jurisdictions who seek to impose their own policies and agendas on Jamaica.

Combining all these points it can be seen that the OUR's reference with respect to US concerns on settlement rates in paragraph 2.2 of the OUR's document is quite irrelevant with respect to mobile market analysis.

Para 2.3

The OUR states *"As indicated in the report, some WTO members (example, UK and Italy) are beginning to address this issue"* with respect to termination rates. This also appears to have little relevance to the issue of market analysis and the assessment of dominance in Jamaica. However, Digicel is yet again forced to address the comment. It is interesting to note that the OUR has again made no attempt to assess whether the UK and Italian mobile sectors are in any way comparable with Jamaica. Digicel has therefore been forced to try and carry out the OUR's work for it in this respect.

Digicel knows that no price controls were introduced on mobile termination in the UK until 14 years after market liberalization. Digicel believes that no controls were introduced in Italy until at least 6 years after liberalization. If the OUR is trying to determine how long after market liberalization it might be reasonable to consider analysing the mobile sector in Jamaica for the existence of economic markets, the only pointers that might be drawn from the UK and Italian experience are that looking at regulatory intervention in the mobile sector should not be considered for somewhere between 6 years and 14 years after liberalization.

Further, in paragraph 2.3 the OUR states that *"In Peru, after placing a cap on mobile termination rate in 2000 based on benchmarking, the regulator is reportedly seeking domestic costing information on wholesale charges ."*. Again, this reference is wholly irrelevant to an assessment of mobile markets and dominance in Jamaica.

It is hardly a revelation, if it is true, that Peru is *"reportedly seeking domestic costing information on wholesale charges"*. Is the OUR seriously suggesting that mere request for this information in another country can be used as evidence that there is a market for mobile call termination in Jamaica and of dominance in that market? If not, why has this reference been included at all? Peru and Jamaica are not even remotely comparable. Peruvian FTM termination rates are over 3 times as expensive as FTM termination rates in Jamaica as can be noted on our section on pricing analysis.

As this comment from the OUR was so vague we have referred to the web site of the Peruvian regulator which can be seen at www.osiptel.gob.pe. In January 2004 the Organismo Supervisor de Inversión Privada en Telecomunicaciones ("OSIPTEL") issued a working paper on the regulation of local fixed to mobile calls entitled *Regulación de las Llamadas Locales Fijo-Móvil* which can be obtained from OSIPTEL's web site.

We quote from that document:

4. RIESGOS DE LA REGULACIÓN Y MEDIDAS ALTERNATIVAS.
"*Como se ha sugerido anteriormente, la intervención regulatoria que se está proponiendo podría afectar al mercado móvil peruano, el cual ha venido desarrollándose en forma muy dinámica. En primer lugar, la regulación de las tarifas fijo-móvil implica un cambio en el esquema normativo vigente para este*

servicio, lo cual podría influir negativamente en el actual clima de estabilidad jurídica y en las expectativas sobre el retorno de las inversiones de las empresas operadoras.

En segundo lugar, una medida de regulación como la propuesta podría afectar los ingresos futuros de las empresas y, por lo tanto, la rentabilidad esperada de sus inversiones. Ello podría significar una desaceleración de las inversiones presentes y futuras que estas compañías han proyectado ejecutar.

En tercer lugar, el alto crecimiento que ha venido experimentando la tasa de penetración del mercado móvil peruano está sustentado en apreciables montos de inversiones que están siendo ejecutados por diversos agentes. Debido a ello, una eventual disminución del flujo de inversiones impactaría negativamente en el crecimiento de este mercado.

En cuarto lugar, una supuesta retracción de la inversión en el mercado móvil podría significar también la posibilidad de que se degrade la calidad del servicio existente en los diversos servicios de este mercado.

Finalmente, para sortear los riesgos descritos en los párrafos precedentes, es preferible que OSIPTEL no regule directamente las llamadas fijo-móvil y, en su lugar, que sean las empresas operadoras las que disminuyan sus tarifas en forma voluntaria hasta el nivel del promedio internacional que se ha tomado como referencia. De esta manera, se evitaría la posibilidad de un ambiente de inestabilidad que comprometa las inversiones y el actual crecimiento del mercado."

Translated - OSIPTEL says that the regulation of fixed to mobile charges would have negative effect on the Peruvian mobile sector that has been developing dynamically since liberalisation. In particular, OSIPTEL stated that regulating local fixed to mobile termination rates:

- would mean a change to the non-regulatory interventionist principles for this service which could have a negative impact on the stable regulatory regime and the expectations on return of investment;
- could affect the future income of mobile telecommunications companies and their expected return on investment that could signify a decrease in the present and future investment of mobile telecommunications companies;
- could impact on the growth of the mobile telecommunications market in Peru due to the fact that any decrease in the income of mobile telecommunications companies could result in a decrease in investment in the sector that is being undertaken by mobile telecommunications companies in Peru as a result of the increasing penetration rates of mobile telecommunications services; and
- could impact the quality of service in the mobile telecommunication sector as a result of the fact that any decrease in the income of mobile telecommunications companies could result in a decrease in investment.

In conclusion in the following document

"AYUDA MEMORIA

Informe de Regulación de las Llamadas Fijo-Móvil

OSIPTEL – Enero, 2004"

OSIPTEL concludes

"Es por eso que OSIPTEL presenta una alternativa para que las tarifas fijo-móvil disminuyan hasta el nivel de 0,0049 dólares por segundo incluido IGV, lo cual representa cerca de un 30% de reducción tarifaria en un período de 18 meses. Este nivel objetivo corresponde a la tarifa fijo-móvil promedio en un grupo de países latinoamericanos, e implica la implementación de un proceso gradual de reducción tarifaria que comprende tres etapas, cada una de ellas con una duración de seis meses."

Translated - As a result of these risks OSIPTEL concluded that it was preferable that mobile telecommunications companies voluntarily undertake to lower the fixed to mobile rates over a period of eighteen (18) months to the average benchmark rate for Latin American countries of USD$0.294 (Digicel has converted the per second rate to a per minute rate for the OUR's convenience).

Since the OUR has chosen to highlight the Peruvian situation and appears to have relied on it to some extent to support its position on mobile termination rates Digicel believes it would it be interesting if the OUR expressed its views about these recent remarks from the Peruvian regulator. Is the OUR now willing to take account of the approach to regulation in Peru in the context of dealing with the Jamaican mobile termination market however defined?

Para 2.4

The OUR states that *"The report gives data on proposed and actual termination rates in some important markets and notes that retail mobile rates in the U.S. (which include origination, termination, and, often, long-distance charges as well) are offered at below $.07 per minute."* The OUR's source for saying that retail mobile rates are below $0.07 is a document from the Office of the United States Trade Representative. In turn that document quotes its source for this figure as being T-Mobile's web site for the USA. An entirely different regime for mobile calls charges applies in the USA. T-Mobile has told Digicel that subscribers to T-Mobile's packages pay both for outgoing and incoming calls. Digicel has spoken to the USTR about the 7 US cents figure and the USTR has confirmed that this figure is applicable to both incoming and outgoing calls. Of course, in Jamaica, customers are not charged for receiving calls. This makes it meaningless, for the reasons explained in more detail below, to compare the cost of making a call in the USA with the cost of making a call in Jamaica where only the calling party pays. The OUR will also note, for example, that Oftel made no attempt to compare domestic mobile charges in the USA with those in calling party pays (CPP) countries for this very reason when it carried out international benchmarking research. Oftel's documents can be seen on Ofcom's web site at www.ofcom.org.uk.

As stated, Digicel spoke to T-Mobile USA about its mobile packages. These typically consist of a fixed monthly charge which attracts a certain volume of bundled minutes at no additional cost. These minute bundles cover the cost of both incoming and outgoing calls. Thereafter incoming and outgoing calls are chargeable at a certain rate. In order to carry out any kind of meaningful comparison between CPP countries and the USA it would be necessary as a minimum to:

a/ assess and then add the average cost of making a call to the average cost of receiving a call and;

b/ establish how many minutes above the inclusive bundle the average customer consumes and multiply this by the cost per minute.

A rough idea of the average cost of each minute of usage could then be calculated. The information in b with respect to usage outside the bundle is however simply not available from US carriers as it is highly confidential commercial information. The OUR must know however that simply quoting the price of calling from one of the T-Mobile USA packages is pointless in terms of drawing comparisons with prices in CPP countries, and irrelevant in terms of making an assessment of appropriate termination rates in CPP countries. T-Mobile's packages would simply not be commercially viable if the customer were not also charged for incoming calls and probably not even then if the customer did not also consume additional minutes at higher per minute prices outside the inclusive bundle. Even if we assume that the cost of receiving calls was 7 US cents and the cost of making calls was 7 US cents, and make no allowance for the average cost when minutes outside the bundle are also taken into account, that means that the average cost per minute of the mobile package in question is at least 14 US cents. Once the cost of outside the bundle minutes is taken into consideration the average per minute cost is likely to be at least several US cents more than this per minute.

Moreover the wholly erroneous reference to the USTR document in an attempt to support market analysis in Jamaica reveals to the great concern of Digicel that the OUR has appeared to refer to any anecdotes or figures which superficially may support the OUR's case without carrying out even the most rudimentary checks for relevance. It seems clear that this figure has been thrown in casually only because it might support an attempt to find a market for mobile call termination. We believe, drawing, on the bias in the OUR's document generally, that if the figure had on the face of it pointed against a finding of a market for mobile termination, it would have been checked for relevance or not have been included at all. <u>This is yet another clear indication that the OUR has not approached the issue of market analysis and dominance with an open and inquiring mind but has already pre-judged the issue.</u>

Just below paragraph 2.4 the OUR has included a table from the USTR which includes among other things a <u>proposed</u> mobile termination rate from the UK regulator. Digicel has looked at the rates in proposals from the UK regulator and believes that this was a reference to a proposed rate for 2005/2006. This figure does not shed any light on mobile market analysis in Jamaica for numerous reasons:

a/ a proposal is not a decision;

b/ exchange rate corrections now mean that a figure of around $0.085 (after taking account of anticipated inflation – in other words nominally the rate is higher than this) would better reflect that proposal for 2005/2006;

c/ the proposed figure, if implemented, would come into play 20 years after market liberalization in the UK and 7 years after the introduction of the first price controls in the UK. In contrast the Jamaican mobile market has been liberalised for only 3 years;

d/ the existing weighted average mobile termination rate in the UK after 20 years of market liberalization and 6 years of price controls is 14.5 US cents[15]. In other words despite all the time that has passed, drastic intervention in mobile termination pricing by the UK regulator, and much greater economies of scale available to large UK mobile operators which keeps their costs lower, mobile termination rates in the UK are still higher than those in Jamaica.

On the other hand, if the OUR is merely suggesting by its reference to UK rates in paragraph 2.4 that the mobile termination rates in Jamaica should to the equivalent of 8.5 US cents (after taking account of inflation) within 17 years Digicel takes note of this idea. Clearly, however, that is a point too far in the future to be discussed at this time. Of course, Digicel's current fixed to mobile termination rates are already at this level.

Para 2.30

The OUR states *"In relation to the termination of incoming international calls on mobile networks, between December 2003 and January 2004, the Office became aware that, certain mobile carriers served notice of their intention to increase international call termination charges on their networks. In an environment where telecommunications costs continue to fall increasing the charge for termination without a commensurate increase in cost is indicative of market power."* It is incumbent on the OUR to look below the surface to investigate whether there was anything untoward about mobile operators desire to increase incoming international termination. There is nothing untoward.

Digicel has attempted to raise its international incoming termination rates to prevent the continuance of an unfair arbitrage opportunity which had arisen for

[15] Provided by Ovum.

C&WJ and other carriers connected at C&WJ's international gateway. Prior to the time at which it was able to terminate international incoming traffic itself Digicel had to accept a below cost incoming international termination rate. When Digicel commenced its own international incoming service it became apparent just how excessively low that rate had been. In effect it appears that Digicel was probably subsidising international traffic which was being brought to the Digicel network other than via Digicel's own international facilities. Digicel's latest rate notifications with respect to terminating international traffic are an attempt to ensure that a fair proportion of the revenues from international incoming traffic flow to Digicel and do not simply enable C&WJ and traders using the C&WJ network for bringing international traffic to Jamaica to make disproportionately high returns on traffic which is passed to Digicel.

Para 2.31

The OUR states "The situation of converging settlement rate and termination charge created the possibility of a collapse of the existing competition in the Jamaican market for incoming international calls between December 2003 and January 2004. This arose from the ability of carriers with both domestic mobile and international licences to set both the call terminal charge to their network as well as the rates to be paid by foreign carriers (settlement rates) for the termination of international calls." This demonstrates a misunderstanding of market dynamics. The OUR has in its recently published document entitled "Notice of Proposed Decision on Settlement Rates as of April –2004" stated that "the minimum charge between between settlement rate and the termination charge could be as low as US$0.008 per minute".

The "situation" that occurred with respect to settlements arose simply because those companies bringing traffic into Jamaica for ultimate termination on Digicel's network were no longer certain of making massive profits on those minutes; the possibility of which had arisen because of the unfair arbitrage opportunity and which in turn had generated an inefficiently large market for the reselling of

Jamaican termination on the international market. Those companies which can efficiently compete in the market will flourish if they can sell on Jamaican mobile termination at a competitive price. Everyone, network and non network competitors, start on a level playing field with the same termination price. If competitors cannot survive because of an inability to add value they should not be in the market. Consequently recent events with respect to international settlements have no relevance to market analysis in the mobile sector nor therefore to mobile termination rates.

Para 2.32

The OUR states *"For example, if the international settlement rate and the international termination charge are equal, carriers with both domestic and international carrier licences could not cover the cost of termination plus their cost interconnection (conveyance and switching)."* However international settlement rates and international termination rates are not equal.

Para 2.33

The OUR *states "The above situation of rising call termination charges occurred in the context of full liberalization, where call back is allowed. This demonstrates that call back (whether in the ad hoc manner described above or through some kind of commercial arrangement) is also not a constraining influence in the markets for terminating incoming international calls."* The OUR seems to be suggesting that in the event of an increase in incoming international mobile termination rates there are incentives for call recipients in Jamaica to call back to the source in an attempt to keep the cost of the call down. Customers will do this if the retail cost of calling abroad from Jamaica is cheaper than the retail cost of calling from abroad to Jamaica. However, whether that is the case will be dependent on a range of factors including the retail mark ups made by overseas originating carriers which are outside the control of Jamaican operators. Moreover the OUR surely cannot be suggesting that mobile operators should in principle be forced to charge below cost prices for terminating incoming international calls. Mobile operators attempt to raise prices to enable them to cover their costs is not relevant to an analysis of the mobile market in Jamaica.

Table of Termination Rates below Para 2.4

Digicel notes that despite the fact that all the termination rates which are actually in existence in the table provided by the USTR are higher or significantly higher than termination rates for Jamaica, no comment has been made on this by the OUR. This indicates bias as the only reasonable inference that could have been drawn was that Jamaican mobile termination rates are competitive.

Para 2.5 and 2.6

In paragraphs 2.5 and 2.6 the OUR mentions the most recent investigations in the UK in respect of the mobile sector. The OUR states that *"Oftel concluded that each mobile network operator had market power in relation to mobile termination to its own network"*. Digicel has to underline its great surprise and concern that the OUR can draw significantly more conclusions from the UK experience other than that in the event that at some point in the future Jamaica mobile termination rates do not continue to fall steadily as currently, there might be some merit in taking a preliminary look at the mobile sector. It is not possible to determine that a market in one country can be said to exist just because it exists in another especially when the mobile sectors in Jamaica and the UK have such different characteristics. The UK mobile market was liberalised in 1984. Two other network operators came into the market in 1993 and 1994. No price controls were introduced until 1998 and then only on Vodafone and O2, fourteen years after they started operations. There are moreover far greater economies of scale in the UK. In spite of all this, even after 7 years of price controls on mobile termination charges in the UK, UK mobile call termination rates are still higher than in Jamaica.

Para 2.11

The OUR states that *"the effect of the CPP regime in the domestic mobile voice call retail market (i.e. the market for calls to mobiles) is that, mobile network* *operators have no incentive to lower the price of calls to their mobile networks from other networks (fixed or mobile)"*. Fixed to mobile rates fell dramatically in September 2003 and have continued to fall steadily in real terms since then. Digicel's FTM and MTM termination rates have fallen very significantly and steadily in real terms since it entered the market as can be seen from our section on pricing. We've probably mentioned this enough at this stage.

Para 2.12

The OUR states *"In relation to domestic fixed-to-mobile and off-net mobile-to-mobile calls….lowering these charges would give the competitors an advantage in the retail market since this would lower their costs. This implies that the effect of CPP regime enables mobile public voice carriers to price voice call termination services above cost without being constrained by competition or potential competition."* As previously indicated, fixed to mobile and mobile and to mobile termination rates in Jamaica have been declining significantly and steadily . According to the OUR's own logic mobile operators would not permit this if they could avoid price decreases. The only conclusion that can be drawn is that the cost of mobile termination is being driven down by competitive forces.

Para 2.13

The OUR states *"Based on the CPP regime, for off-network and fixed-to-mobile calls, since the calling party pays for the call, but does not choose the network on which its call is terminated, the calling party has no alternative to the purchase of call termination service from the network on which the called party subscribes. This means that all mobile network operators have market power when setting its call termination charges."* This is simply incorrect.

Just because a calling party has to purchase call termination services from the network on which the called party subscribes this does not mean mobile network operators have market power when setting call termination charges. If for example, calling parties are sufficiently aware of the prices they are being charged for calling the mobile number in question and modify their behaviour such that an increase in call termination prices would have no impact in terms of profitability then there can be no market power.

Modifications to behaviour would include, for example, calling to a second mobile handset owned by the same person which uses another service provider; calling the handset of someone else in the household in order to contact somebody in that household (since most households in Jamaica have 3 mobile handsets according to the answers to the OUR's own research - see question 4); calling a number using a mobile phone borrowed from somebody else in the household; calling the household fixed line from another fixed line; and calling the office fixed line from a fixed line. Most mobile calls are made and received at home or in the office according to the OUR's own survey so this pressure can be exerted. Moreover it may be that the total percentage in terms of volumes of calls made to people who are at home or in the office is far higher, and the average length of calls made to people in homes or offices is longer than other calls. This would mean that a high proportion of total calls could be completed via fixed to fixed or on-net mobile calls. We are unable to determine this however as the necessary questions have not been asked and the necessary data has not been collected from service providers. In respect of calls made 'on the road' to other people 'on the road' it may well be that the 9% of customers who own multiple handsets make the majority of these calls by volume and/or value. In other words, most of these calls might be made on-net. Again, this requires investigation.

Para 2.14

The OUR states "Numbering rules that do not allow number branding …..may also contribute to consumer ignorance. Market power is enhanced if consumers are unable to identify which network they are calling. The extent to which such consumer ignorance exists increases the mobile network operator's ability to raise termination rates without being affected by an adverse reaction from consumers."*. The OUR's own survey appears to render this point is entirely* *invalid. Either that or the survey itself cannot be taken as valid given the number of questions that appears to rely on consumers being able to distinguish between on and off net calls etc. A sizeable proportion of consumer survey has no value or the statement in 2.14 is not true – both cannot be correct.*

The only anecdotal evidence Digicel is aware of, simply from discussing the matter with members so the public, suggests that the opposite is true ie that callers either know before they call what network they are calling; or immediately establish this when making a call and then use the cheapest method to call the receiver back; or are called back by the receiver of the original call using the cheapest possible method. The OUR should carry out further market research in this respect. The OUR should investigate whether mobile users know which network they are calling and know how to minimise call costs. Moreover, Digicel understands that all households with telephone directories are able to determine from number range lists in the front of those directories which service providers the people they are calling use. Moreover a Digicel customer can, if necessary, always establish whether they are about to make an on net call or not by calling Digicel customer services free of charge.

Para 2.15

The OUR states *"where one operator has most of the customers, it has the incentive to set a high termination charge for entrants".* The mobile operators do not set high termination rates for new entrants so we do not see any point in including this statement. Nor is it necessarily the case that high subscriber numbers would provide these incentives. The OUR has to prove such an allegation and cannot make it based on no evidence.

Para 2.17

The OUR states that *"Based on Digicel's suggestion that features like call-back, e-mail and text messaging are substitutes for mobile call termination; the suggested constraint of buyer power on the price setting behaviour of mobile* *operators, and the claim that there is one call termination market, the Office commissioned an independent customer survey to determine the validity of these claims".* The OUR must be aware that a customer survey is insufficient by itself to test these claims. To analyse these issues properly, a full customer survey including key questions omitted in the OUR's last survey, as well as information from operators must be collected. Digicel has already pointed out some of the deficiencies of the consumer research which was carried out by the OUR recently. In this regard it seems a great pity that the OUR was not prepared to consult on how to make the research more fit for purpose. The industry could undoubtedly have added much value to the exercise and enabled more meaningful results to be obtained from it.

Para 2.18

The OUR states *"The smallest possible definition of the product market is wholesale mobile voice call termination for calls from a fixed or mobile telephone. Notably, this narrow definition of the market is attributed to the fact that, a call intended for a specific mobile subscriber cannot be sufficiently substituted by calls to other individuals."* As indicated previously, this kind of reasoning appears to be suggesting that there is an economic market for mobile termination for every customer. Digicel suspects that the cause of this incorrect wording is again that the OUR is unsure about how to analyse markets. Mobile networks do not differentiate by customer in terms of termination.

Ignoring this incorrect wording however and assuming that the OUR is talking about a market for call termination on each mobile network, Digicel wishes to point out that the OUR has chosen to ignore the fact that calls to a particular mobile network can be substituted for by calls to other handsets on other networks, fixed line phones, text messages, emails, and callback. The answers to question 27 are enlightening here. 55% of subscribers said that they used text messages to save on the cost of calls; 9% used email: 82% used call back. Digicel believes that this is further strong evidence that in combination these and other techniques mean that subscribers are putting substantial pressure on mobile call termination rates through their communication strategies. This is consistent with the significant and steady decreases in rates for mobile termination in Jamaica. Every conclusion that can be drawn from these results seems to be completely at odds with the conclusion of the OUR pertaining to market definition and the assessment of dominance.

5.7.1.1 Bypass

Digicel fails to understand why the OUR has ignored one of the most significant supply side constraining factors on mobile termination in the Jamaican market at present, namely bypass. In the past we note that the OUR has ignored this factor merely on the grounds that such activity is illegal[16]. The fact that an activity is illegal does not negate the impact it can have on a market if there is evidence to suggest that the activity still takes place. By way of example let us consider the issue of software piracy.

In the 2002 software piracy reportedly cost the global industry US $13.08 billion[17]with a piracy rate in China alone of 92%. In assessing whether or not there are competitive constraints on software prices in China would it be prudent to ignore this fact simply on the basis that it is illegal?

Digicel has estimated losses from illegal bypass operations that runs into the hundreds of thousands of US dollars in 2003 alone and this was only from operations we were eventually able to identify. Far from the situation improving in Jamaica, Digicel submits that it has actually deteriorated to the extent that Digicel has had to make significant investments to put in place a team purely dedicated to detecting bypass operations in order not just to try and reduce losses in this regard but also to protect the integrity of our network.

[16] See November 2002 consultation
[17] Eight Annual BSA Global Software Piracy Report

Although we have continually lobbied for the OUR to take the lead in combating bypass given its detrimental affects on infrastructure investors' earnings in Jamaica and the obvious negative impact that is likely to have on future investment making decisions, to date very little has happened in this regard. Consequently, we find ignoring the implications of bypass in the context of this particular consultation only adds insult to injury with respect to the whole issue.

Digicel submits that there is no theoretical or practical basis on which the OUR can reasonably ignore bypass when considering the issue of supply substitution on mobile termination.

Para 2.20

The OUR states that *"…the mobile operator has no incentive to lower terminating charges, even when faced with declining operating costs and increasing call volumes."* However, as indicated, fixed to mobile and mobile to mobile termination rates have been falling steadily and significantly in real terms. Digicel therefore fails to see any legitimacy in this statement.

Para 2.22

The OUR states *"It has been posited by one respondent to the consultation that text messages and e-mail are possible substitutes. Both can be classified as messaging services and do not reflect real-time communication."* The OUR should note that "real time" capabilities alone do not singularly define the product market: if consumers regard an email or text message as a substitute then it is in the same market. Market definition process should be neutral with respect to technologies being considered. In addition, while the OUR notes that text messaging is not currently offered across mobile networks, should this service be offered it may become a substitute.

Para 2.23

The OUR states *"Based on the December 2003-January 2004 survey, although 92% of the respondents indicated that they are aware of the text messaging feature, 47% indicated that they do not use this feature on a weekly basis. Additionally, 13% indicated that they use it weekly and only 27% indicated that they use this service daily. Even if this service was offered across networks, the Office does not consider that this would translate into a volume of use that would be sufficient to constrain the wholesale price of mobile termination and the retail price of calls to mobile subscribers."* However it may be that the 27% of customers who use SMS daily also generate most traffic to mobile networks and are using SMS to keep call costs down. If SMS were offered across networks therefore SMS might put considerable pressure on termination rates.

Digicel thinks it is also inappropriate for the OUR to suggest, based on no evidence that the introduction of cross network SMS would not have a significant impact in terms of the pressure that might be exerted in terms of mobile to mobile call termination charges. The OUR has to be open minded to the prospect that cross network SMS might have a significant impact in terms of the additional competitive pressures that could be applied to mobile call termination.

Para 2.24

The OUR states that "since 55% of the respondents in the household survey have only a mobile phone callers to these mobile subscribers have no choice but to use the termination service offered by the operator to which the called party subscribes.". *According to the OUR research 49% of all calls to mobiles are received at home. 8% of mobile calls are received in the office where the fixed line can instead be called. There may also be mobile phones connected to several mobile service providers in the office. Since, also according to OUR's research, there are three mobile phones per household, it may usually be possible for the pooling of mobile phones to take place and for the majority of all calls to be terminated on net or on a fixed line phone. In other words, in the* *majority of cases 57% (49% plus 8%) callers can put pressure on mobile termination rates.*

Para 2.25

The OUR states that "Since mobile and fixed call termination services are not regarded as substitutes, the other likely alternative to termination service offered by a mobile carrier is that offered by another mobile carrier. This would only be possible if callers to mobile networks could select or pre-select the mobile network operator that terminates a given call to any given mobile subscriber. This "competitive termination market" would require each mobile operator to share Subscriber Identity Module (SIM) information.". *For the reasons explained above, based on the OUR's own research, it may be possible for a caller on the majority of occasions to choose the mobile network they wish to contact somebody on because of the pooling effect of available mobile handsets and service providers used, or to call a fixed line instead.*

Para 2.26

The OUR states that "The evidence from the survey data suggests that only 9.1% of the respondents indicated that they consider the cost of others calling them when deciding on the purchase of a mobile telephone.". *We notice that the OUR has been very selective here about the information it has extracted from the survey. In answer to question number 29, 65% of respondents thought that the cost charged to others for calling the customer was "very important". The two statements can be easily reconciled and the reconciliation does not suggest that there is a market for call termination on each network, in fact quite the opposite. The OUR needs to consider why someone might not try and work out how much it would cost for others to call them when purchasing a mobile phone yet at the same time be very concerned about how much it does cost others to call them. A fuller look at this issue is included in our section on the consumer survey. However, the answer may be quite straightforward. It may be for example that purchasers of mobile phones know that callers will be able to establish how to* *keep calling charges down either by working out how to call on net or using fixed phones or by using some means other than voice calls to communicate. In this case the* recipients *of calls may not concern themselves as much with this matter as they know* callers *can undertake all action necessary to keep charges down. Moreover the purchase of a phone may not be tied to a decision about the choice of service provider as it may just be a replacement phone. It would only be relevant to ask a question about whether calling parties' costs are considered in respect of times when a consumer is choosing a service provider.*

Para 2.27

The OUR states "Termination charges remained as high as $10.268 per minute (between April 2001 and August 2003).". *This statement is an illustration of the bias that is endemic in the OUR's approach. Jamaican mobile termination rates are very low by international standards as can been seen from our section on pricing. What is even more remarkable is that Jamaican mobile termination rates are so low after only 3 years of liberalisation when most of the other countries illustrated in the comparative benchmarks which can be seen in our section on pricing liberalised their mobile sectors long before this.*

Para 2.28

The OUR states *"If the substitution between voice calls (for example, a fixed to fixed (FTF) call for a FTM call) was strong then the FTM termination charge would be constrained by the retail price of FTF calls."* . FTM prices have been declining significantly and steadily in real terms as can be seen in our section on pricing. Therefore competitive forces (including possibly FTF calls) clearly are constraining the price of FTM calls. The OUR cannot ignore the facts in this respect. The OUR goes on to state *"Further, if these calls were substitutes for each other, it would suggest that fixed telephony is a substitute for mobile telephony. However, this is not so, partly due to the convenience of making or receiving a mobile call at any given location in the coverage area while in transit and the fact that only 11% and 8.2% of the household and corporate respondents* *respectively, indicated that they would be prepared to replace their fixed line with a mobile line.”*. Digicel has demonstrated that the prices of calls between fixed and mobile phones are falling significantly and steadily due to competitive pressures. It may be a fallacy to suggest that people would give up their fixed phones if mobile and fixed phones were substitutes: people might use mobile phones for voice calls but retain the fixed line for internet access for example.

Para 2.29

The OUR states in respect of call back cost reducing strategies employed by customers *that “If sufficient subscribers engage in this action, it is argued that FTM call termination rates would be constrained. But, the OUR has no evidence that this is so.”*. Digicel has looked at the OUR’s own customer survey which appears to be saying that 82% of customers do engage in call back. That is clearly sufficient in terms of numbers to constrain FTM charges. Why therefore has the OUR chosen to ignore its own research? The OUR goes on to state *“However, if this was the case, Digicel could not have maintained its FTM retail rate at 71% above the lowest FTM retail rate for over two years.”* As has already been explained, if the OUR’s market definitions were correct it would be irrelevant to compare FTM termination prices for one network with another. Moreover C&WJ’s approach with respect to the pricing of FTM calls at the outset of mobile market liberalization does not seem credible and may even point to below cost pricing by C&WJ. .

It is no secret that C&WJ has continually pushed for lower mobile termination rates. This is a classic dominant dual operator strategy of implementing below cost mobile termination while at the same time charging inflated fixed origination and termination costs, in order to attempt to undermine competition in the sector in which it faces competition. It can then cross subsidise its mobile arm by from the fixed side of the business. The OUR might have been able to substantiate such a case, had it involved external experts in assessing C&WJ cost modeling to carry out an assessment of whether C&WJ's costs had been properly allocated..

Para 2.36

This paragraph in the OUR's document is about buyer power and cannot therefore constitute part of a market analysis. Despite this the OUR has incorrectly included it in the market analysis section. In the paragraph the OUR states that *"According to the corporate survey data, 78.2% of the respondents indicated that they are not members of a closed user group."* In the questionnaire used to obtain these results a closed user group is described as *"a group of people, such as a family, who care about the charges paid by other members of the group".* This definition is simply not adequate to arrive at a meaningful answer in terms of buyer power. What does "care about" mean? It could be interpreted in all sorts of ways. The issue that the OUR should have been trying to get to the bottom of was whether closed user groups made most or all of their mobile calls on-net. The OUR goes on to state *that "since corporate mobile customers are estimated to be significantly less than residential customers, they are not expected to exert much influence on prices in the relevant market".* There is a fundamental flaw here. The OUR has to look at least at volumes and not just subscriber numbers to make an adequate assessment about the effect that closed user groups could have on prices. The OUR has not collected the necessary data however so this kind of assessment is simply not possible.

5.8 OUR's Assessment of Market Power and Dominance

In this section, Digcel considers the OUR's attempt to assess whether mobile carriers have a dominant position in the markets postulated by the OUR: mobile termination on each mobile carrier's network. As with the section on market analysis, we do not believe that the OUR can have given sufficient attention to writing this section of its document as it does not stand up to a reasonable *critique. We have previously highlighted the confusion between market analysis and assessments of market power.*

Para 3.6

The OUR states that *"In relation to the termination of calls, the Office is not aware of the existence of a technology that allows a caller from a fixed line (for example) to select the network on which he/she wishes to terminate a call to a mobile phone, even if the call is to a mobile phone with multiple SIM cards."*. This paragraph is a further attempt at market analysis and as such should not be included in this section of the OUR's document. We are forced to address the point however. The OUR is aware that about half of all calls to and from mobiles are received and made from home or the office. There are multiple mobile handsets and presumably service providers used in each household. These handsets can be pooled for use by members of the household. This means that it may be possible to choose which mobile network to call in these cases.

The OUR has a section entitled "excessive prices and profitability" (paragraphs 3.7 to 3.9). The OUR may be interested to note therefore that the UK Competition Commission stated in December 2002 as a part of its reports on references under section 13 of the UK Telecommunications Act 1984 on the changes made by Vodafone, O2, Orange and T-Mobile for terminating calls from fixed and mobile networks that *"the profitability of each MNO* (Mobile Network Operator) *over the past few years is not critical as an indicator of competition in any particular part or parts of the wholesale or retail market."*. The OUR refers considerably to the UK situation throughout its document where it can find something that might appear to support its attempt to find mobile operators dominant. It is noteworthy that it has chosen to ignore something that contradicts this. Moreover, as we explain in our section on pricing there clearly is no excessive pricing or profitability in the mobile sector.

Para 3.7

The OUR states in respect of mobile termination costs that "Since the only information that is available to the Office on the cost of mobile call termination is that supplied by C&WJ, the Office decided to use this as a proxy for the industry." *It is illegitimate for the OUR to attempt to use C&WJ's termination prices as a proxy for those of other mobile operators. There are several reasons for this including: the fact that C&WJ's costs are not the same as those of new entrants; the fact that costs of new entrants will inevitably be higher; and because C&WJ would have had the incentive, as explained previously, to understate its costs of mobile termination as a way of trying to reduce competition in the mobile sector.*

Para 3.8

The OUR states "C&WJ's charge for FTM calls is $7 per minute. Because C&WJ's fixed network business unit's retention for a FTM call remains at J$1.732 per minute, its mobile termination rate is $5.268 pm. On the other hand, Digicel's peak fixed to mobile retail rate up to August 2003 was J$12 per minute . This means that Digicel's termination charge was J$10.268 when C&WJ's fixed retention charge is deducted. This implies that Digicel earned **excess profits** of $5.00" *Digicel is appalled that the OUR can make such a serious and groundless allegation based on such inadequate analysis. The analysis of profitability involves complex modelling and cannot be concluded in such a succinct, simplistic and theoretically flawed manner. There are numerous possible reasons for the price differential between Digicel's FTM retail rates and C&WJ's such as: different costs; cross-subsidisation by C&WJ; and C&WJ economies of scale; none of which suggest that there is any kind of excess profitability. The OUR pursues this illegitimate approach for the same reasons when it states "* When compared with the OUR's estimated maximum mobile termination charge of $6.929 per minute[18], this suggests that Digicel earned **excess profits** *(supposition)* of $3.339 per minute above the cost of terminating traffic from C&WJ's fixed network".

[18] See Appendix 1.

Para 3.9

We are pleased to note that the OUR acknowledges in paragraph 3.9 that *"Notably, as at September 1, 2003, Digicel reduced its retail charge for FTM calls to $7 per minute.".* As the OUR's Director General acknowledged, this was a competitive response. It further illustrates that there is no legitimate basis for investigating mobile call termination rates in Jamaica. It seems ironic that essentially the most important fact in the entire document is afforded so little discussion. In fact it is merely 'noted' and forgotten. The OUR suggests Digicel is dominant in mobile termination on its own network. It suggests that Digicel faces no competitive pressure in mobile termination. It is incumbent on the OUR to reconcile these views with such a massive reduction in prices.

Para 3.10

In paragraph 3.10 which is headed *"Mobile Termination Rates for MTM Domestic Calls"* the OUR states that *"ODJ's off-net MTM* (termination) *rate increased from $15.00 to $19.70 per minute on November 29, 2002. This increase was more than 11% in excess of the peak rate charged by other mobile carriers. ODJ has maintained this rate for a period in excess of one year. If only one voice call termination market existed, ODJ's off-net MTM termination rate would be constrained by the rate charged by other mobile carriers. Further, this rate took effect when ODJ's coverage was limited to three of fourteen parishes and its customer base less than 100,000. This suggests that market power is, to a significant extent, not dependent on coverage and subscriber base."* Firstly, Digicel notes that these figures are incorrect. They refer to retail rates and not mobile termination rates. If the OUR has approached its analysis believing that some MTM termination rates are $19.70 this must have severely coloured its views. Unfortunately, the whole paragraph becomes meaningless because of the OUR's mistake so Digicel cannot comment further. Digicel would simply note that it is clearly important for the OUR to get its facts straight before reaching conclusions.

Para 3.11

In paragraph 3.11 the OUR states *"even before this judgment, Digicel indicated on November 5, 2003 that it intended to increase its international mobile termination charge to US$0.1661 compared to the OUR's estimated cost of US$0.1108."* . Digicel points out that there is a factual error. The rate notification was for 13.8 US Cents. The OUR then states that *"This is approximately 50% above the estimated cost.".* Digicel has already demonstrated that the figures that the OUR have generated are simply incorrect so this "50%" figure is meaningless. Nor is not clear how the OUR has arrived at a figure for estimated cost of US$0.1108. We assume that it was derived from some costs taken from C&WJ. Digicel has already demonstrated that it is not reasonable to use C&WJ's costs in this analysis so we will not pursue the point further.

In paragraph 3.11 the OUR then says *"The action created an immediate danger to the telecommunications market in that there was a real possibility of a collapse of competition in the market for incoming international calls.".* Digicel has already explained that the OUR is talking about what was effectively entirely or substantially an artificial and inefficient market arising from an unfair arbitrage opportunity. The OUR's sweeping ending statement based on the above that *" This action and its likely consequence of eliminating competition and potential competition are clear indicators of market power and dominance."* is therefore clearly untrue.

Digicel is in any case very perplexed that the OUR is criticising the prospect of implementing termination rates which are below those that are required to support the OUR's and Government's desired policy with respect to international settlements by ensuring that a fair proportion of the relevant revenues flow into Jamaica. The OUR itself has suggested that the difference between settlement and termination rates should perhaps be only 0.8 US cents.

Para 3.12

In paragraph 3.12 the OUR comments on Digicel's views: "a mobile termination service provider is unable to raise its termination charges by 5-10% greater than the market price without fear of losing its customers to its competitors. As demonstrated above, this has not been the case. In fact, mobile operators have maintained their termination charges at levels higher than 10% above other operators and have increased their market share." *Firstly Digicel reiterates that there are several reasons why there could have been price differentials in the past which had nothing do with market power including C&WJ's incentives to price below cost and C&WJ's greater economies of scale. Secondly, the OUR are alleging that mobile operators have 100% of the market (market for call termination on each operator's network). If this were true it would not be possible to increase market share. Suggesting that subscriber growth illustrates market power in an economic market for call termination on each mobile operator's network reveals a misunderstanding of the issues. Digicel therefore has to point out that what is at issue is here is whether a price increase, based on a reasonable starting point and not a starting point which used below cost prices, meets with increased profits. Quite simply the OUR has no idea whether this is the case or not because it has not collected the necessary information, nor carried out an adequate analysis. Subscriber growth could, for example, be due entirely to factors such retail pricing strategies, marketing, and quality of service.*

In order to help the OUR to assess what price differentials can be supported due to factors such as quality of service and brand the OUR could carry out, for example, among other things, a survey which asks questions (which are answered by statistically significant numbers of people) and which indicate whether particular mobile operator's services are seen as superior in certain respects other than in terms of a price comparison with its competitors. Insufficient numbers of people have answered the OUR's consumer survey in these areas to draw substantive conclusions although the only indications appear to point in the direction of Digicel being seen as a superior provider. It can be understood in this context that just because non-price factors affect a consumer's *purchase decision, this in no way suggests that termination charges do not impact on a customers buying decisions. Consumers clearly do pay close attention to prices as is clearly indicated in the results of the OUR's customer survey.*

Para 3.14

In paragraph 3.14 the OUR states *"As at May 2002, Digicel had attracted over 400,000 subscribers within thirteen months of operation. By September 2003, Digicel's subscriber base was estimated to have increased by more than 100,000. However, if there were a single competitive national termination market in which customers choose a mobile provider partly based on the cost of terminating calls on that network, would Digicel have been able to maintain a growing customer base over the period and an increasing share of the mobile telephony access market given that its FTM charge remained at 71% above the lowest FTM charge?".* Digicel believes that this paragraph amounts to purposeless speculation and therefore an irrelevant consideration. There are a host of reasons why Digicel may have been growing its subscriber base such as quality of service; customer care; branding; retail pricing and marketing which have nothing to do with mobile termination rates. We believe that evidence in this regard is provided in a number of areas in the consumer survey.

Furthermore, the OUR should perhaps remind itself of a paper presented by Franklin Brown at the First Organisation of Caribbean Utility Regulator's Conference in trying to identify why Digicel's market share was increasing. In his paper entitled 'Mobile Interconnection: Experience From Jamaica' he noted that "*The Jamaican case also reflects a situation where there was an aggressive new entrant which took advantage of an unmet and underestimated pent-up demand for mobile services and competed against a weak incumbent and other struggling new entrants*".

Such a comment sounds like a resounding endorsement of Digicel in the Jamaican market in being able to fill an obvious void and cater to a market that was previously being neglected. It is therefore disappointing to note that the OUR in its consultation document has tried to turn this fact around as evidence of Digicel being dominant.

Para 3.15

In paragraph 3.15 the OUR states that *"Increased competition between mobile service providers for subscribers is expected to reduce the on-net MTM retail rates. But, competition for subscribers is not likely to reduce the off-net and FTM call termination rates."* . The OUR has no basis for making this statement which is clearly untrue. FTM off net rates have been declining significantly and steadily as can be seen in our section on pricing. Moreover, Jamaican customers may usually be able to avoid MTM off net calls for the host of reasons that have been discussed previously. The OUR then repeats *"The fact is termination on one mobile network cannot be substituted for termination on another network."* Digicel has explained how rapidly mobile termination rates are falling. So the OUR's statement makes no sense. It goes without saying therefore that the OUR's statement that *"Therefore, all mobile carriers are dominant with respect to the voice call termination service offered."* is without foundation.

Para 3.17

In paragraph 3.17 the OUR states that *"There is no supporting evidence that indicates the existence of a national market for mobile call termination."* . We note that the OUR is again trying to reverse the burden of proof here. It is for the OUR to prove that markets do or do not exist. The OUR cannot legitimately come to conclusions based on not having evidence about contrary view points, especially when it has not made a serious attempt to establish whether counter arguments are true. We note the OUR's statement that *"a profit maximizing monopolist (in this case, the mobile operator) is expected to maintain high prices or increase its price in excess of cost, over time."* . Since mobile termination prices are in fact declining significantly and steadily this indicates that mobile operators are doing the exact opposites of what the OUR thinks that they should be doing. The OUR should consider why this is the case. It points a complete absence of any kind of market power in the mobile sector.

Para 3.19

In paragraph 3.19 the OUR states that "Even without the information from the recent survey, given the existence of the CPP regime and the economic and technical characteristics of call termination services, mobile operators pricing of termination services is unconstrained by competition. To avoid the anticompetitive effects of differential and above cost termination rates, it is desirable that termination charges for all mobile operators are regulated to reflect cost based pricing consistent with the requirements of the Act." *This paragraph is fatally flawed on a number of levels. The OUR is suggesting that a conclusion could be drawn that a market for call termination on each mobile operator's network could be drawn even without the consumer research that could have been carried out. Clearly this is not the case. Even the research which was carried out was insufficient in terms of consumer research: proper research on customers would have had to be carried out by asking the market research company to ask consumers additional key questions, in addition to collecting relevant information from operators which never occurred. Secondly, there is nothing inherently anti-competitive about differential termination rates. Differential rates could reflect legitimate cost differences or strategies employed by the incumbent. Thirdly there is no reliable indicators that mobile termination rates in Jamaica are above cost. In fact by international standards, Jamaican mobile termination rates are very low. Fourthly, as attempting to intervene in the current market would be unjustified it would damage the public interest and frighten away investors and should clearly be avoided.*

5.9 The European Commission's Approach to the Assessment of Dominance

Digicel would point out that the European Commission recommends that the following (non exhaustible) criteria should be considered in assessing dominance in the telecommunications sector[19]:

- Overall size of undertaking
- Control of infrastructure not easily duplicated
- Technological advantages or superiority
- Absence of or low countervailing buyer power
- Easy or privileged access to capital/financial resources
- Product/services diversification (e.g. bundling products or services)
- Economies of scale
- Economies of scope
- Vertical integration
- A highly developed distribution or sales network
- Absence of potential competition
- Barriers to expansion

Digicel note that not a single one of these criteria have been discussed in the OUR's document save countervailing buyer power and even that has wrongly been considered in the context of the market definition process. In many cases proper analysis of the above criteria requires significant data and information input in order to make an informed decision.

5.10 Inappropriateness of comparing C&WJ rates with Digicel's

[19] "Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services", 2002/C 165/03)

If we are assessing market power in two separate markets, Digicel fail to see the relevance of comparing its termination charges with that of C&WJ. As part of this process, we note that the OUR's has attempted to crudely assess Digicel's profitability over the course of paragraphs 3.7 to 3.11 (less than 2 pages) for three different services, namely, FTM, MTM and ITM. The methodology, logic and assumptions applied to this task is flawed on so many levels, several of which have been explained already or are referred to in our section in pricing, that it is as such, meaningless.

If the correct market definition is one of mobile termination on each operator's network, the analysis should not proceed to arrive at a conclusion of dominance by making continually cross references between markets the OUR has itself already decreed as distinctly different. Despite this the OUR proceeds to conduct analysis on 'excess pricing and profitability' in relation to Digicel's and ODJs termination charges using costs from another 'market' as a proxy for the costs of these operators. This is an inadequate approach to a very complex issue for several reasons:

- The OUR has produced no evidence that Digicel should incur the same costs as C&WJ. No account has been taken of factors like GSM versus TDMA network, differences in terms of costs of capital; differences in company wage structures and other operating expenditures; nor the fact that C&WJ is a dual (fixed and mobile) operator which affords it economies of scale and scope not enjoyed by Digicel
- We note that C&WJ submitted only 'an estimate of its costs'. Notwithstanding the fact that these 'costs' have nothing to do with Digicel, we would point out that no other party nor it appears the OUR itself has had input into how these costs have been calculated. In this regard, from the outset of this regulatory process since 2000 C&WJ had incentives to depress mobile termination prices to take advantage of their position as a dual fixed and mobile operator. Notwithstanding the fact that even an

accurate assessment of C&WJ's costs is not relevant to Digicel or ODJ for that matter, the fact that C&WJ has an incentive to misrepresent its mobile termination costs makes the OUR's approach in terms of making comparisons doubly flawed.

The significant fact that C&WJ is a dual market player with both fixed and mobile networks (mix of TDMA and GSM) is ignored in the OUR's analysis of FTM rates[20]. As an established market player for many years in both markets it would reasonable to assume that C&WJ's costs of termination are likely to be lower than the costs of a relatively new market entrant still in the process of rolling out its GSM network. In a very short period of time (3 years since market entry) Digicel is only now beginning to enjoy cost efficiencies and benefits from scale economies and has progressively been able to pass on these benefits to customers in form of higher quality of service, greater customer care and lower prices. The customer satisfaction rating of Digicel implicit in the OUR's consumer survey is testament to this fact.

Perhaps the most striking feature of the OUR's analysis however, is that although it regards Digicel to be dominant in termination on its own network the OUR provides absolutely no explanation of why Digicel's mobile termination rates have fallen significantly for all services in real terms since the market was liberalized. In the case of fixed to mobile calls, prices have even fallen significantly in nominal terms in a country that is currently experiencing very high inflation. If Digicel holds a monopoly in the market and faces no competitive pressure then it would seem to be a highly irrational decision not to continue to at least reap the same profits in real terms going forward much less actually initiate a program for reducing nominal prices as well.

There appears to be only two possible explanations for these price reductions (i) the markets have been incorrectly defined as termination on each network and

Digicel is facing competitive pressure in terms of demand substitutability or (ii) if the market has been defined correctly then Digicel's price reductions can only be explained through strong countervailing buyer power i.e. it lacks market power.

CHAPTER 6 – PRICING ANALYSIS

Digicel wishes to advise the OUR that all Charts in the 'Pricing' section are confidential. This is because they contain either confidential pricing information or use data, which Digicel had to purchase from a third party. Further any numeric references, including percentages, to Digicel's mobile termination rates should be treated as confidential.

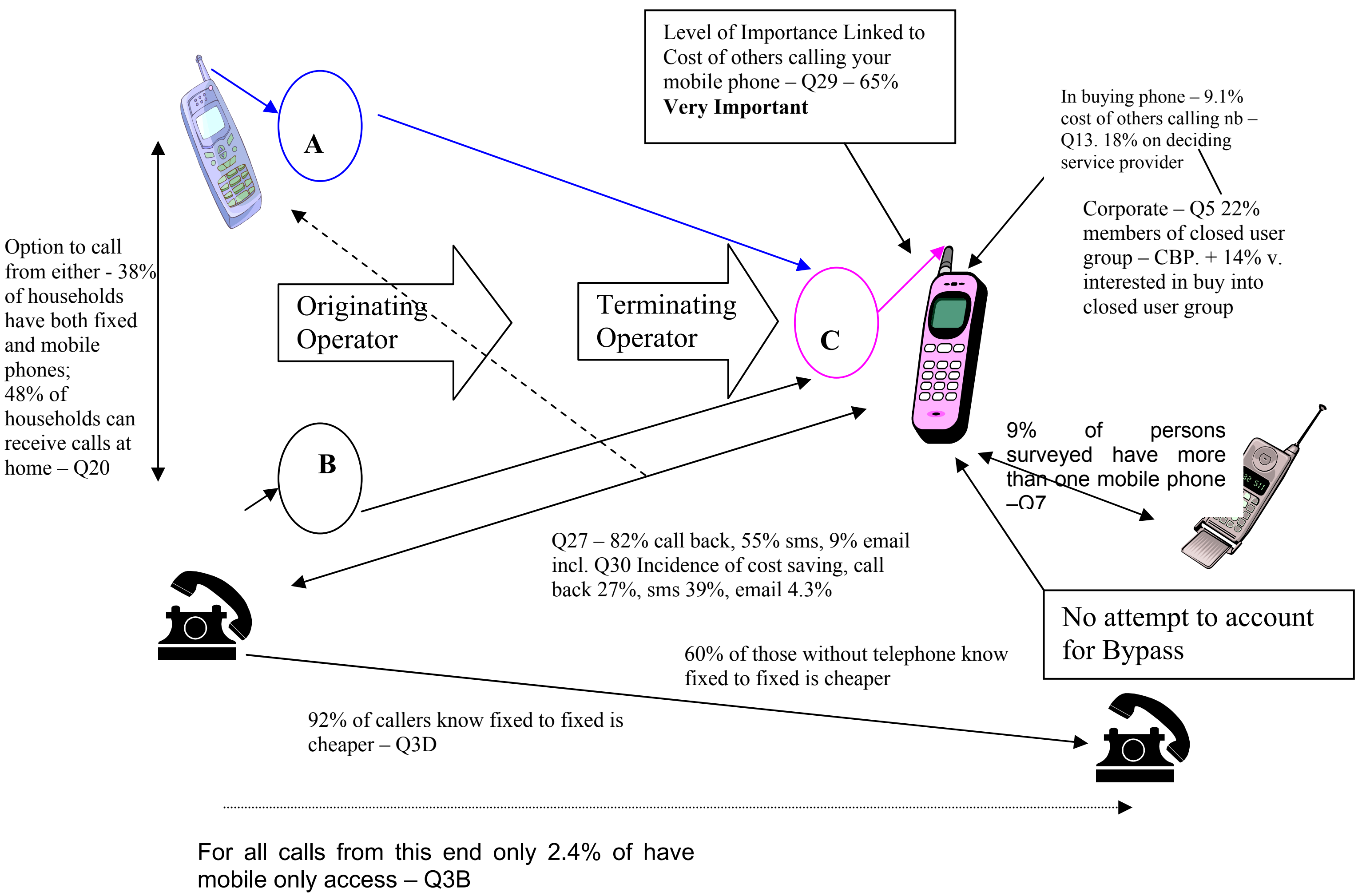
The confidentiality request of course does not extend to the Fair Trading Commission, as full disclosure of contents will be required for them to make effective representation in relation to the matter at hand.

6 CONSUMER SURVEY

Digicel notes that in the latest consultation document the OUR used a diagram to support its position that the correct market definition was one of mobile termination on each network. Digicel believes that in light of the limited information which has been gleaned from the consumer survey which is deficient in some respects, the OUR should have revisited this diagram to try and identify if there was evidence that supported their position or if they found evidence to the contrary which would have been a balanced approach to considering the issue.

Digicel has included some of the most pertinent evidence to highlight where competitive pressures are being applied to mobile termination rates in a standard CPP environment in Figure 1 below.

Figure 1



Of course, in Jamaica, as previously discussed in our section on pricing, with respect to fixed to mobile calls pricing constraints are even more prevalent given that operators actually compete on the retail rate due to the fact that each mobile operator establishes its own retail rates in accordance with the bands established by the OUR.

As already stated Digicel contends that the OUR has taken a biased approach with respect to the evidence they have extracted from the consumer survey (albeit that the survey has some flaws). The table below provides a summary of these points and includes counter arguments that Digicel believes should have been considered by the OUR if it had sought to take a balanced approach in respect of the limited information gathered.

Where OUR has referred to survey	Other factors to consider from survey
"It does not seem probable that 22% of corporate customers who are members of a closed user group could constrain prices pricing"	• Corporate customers use significantly higher volumes than residential customers so 22% could be quite significant in terms of overall market • A further 14% indicated desire become part of closed user group • Consider cumulative factor
98% of subscribers prepaid – "Given the extremely skewed distribution of subscription type it seems reasonable to conduct this analysis by concentrating on the behaviour of prepaid"	• OUR's assumptions seems reasonable but should note that post-paid customers are likely to be higher volume consumers
"As much as 43% of the calls to household respondents are received on the road"	• However, 49% receive calls at home • 11% of customers can receive their calls on at least 2 different handsets while on the road • Consider cumulative factor
SMS – "47% indicated they do not use feature on weekly basis"	• Yet 55% say they used text messages to contact others • From Q28 it can be calculated that of this, 39% make half or more of all their calls using texts • In addition 39% of all respondents said they used texting **specifically for cost saving purposes** • 8.6% use texts for 100 % of their calls • Consider cumulative factor
"9% of the respondents indicated that they consider the cost of others calling them when deciding on the purchase of a mobile telephone" Table supporting this fact used also in appendix table 1.4	• The OUR comment has to be reconciled with the fact that from Q29 65% said they regard the costs to others calling your mobile to be **very important** • Why has the OUR neglected to mention that in choosing a service provider 18% consider costs of others calling them – this is far more relevant fact than choosing a phone

With respect to Call Back acting as pricing constraint – "But, the OUR has no evidence that this is so". Inexplicably no figures from the survey quoted	• The survey provides evidence which for some reason was ignored. Q27 clearly shows 82% use call back as a contact method • Also 27% indicated that it was specifically used as a method of cost saving • Consider cumulative factor

As can be seen from the table above the OUR has ignored relevant data that has been gathered from the limited consumer survey. The points that should have been considered with respect to the issue at hand are for the most part self-explanatory from the table and the diagram above, however, Digicel proposes to deal with a couple of these issues in more detail.

Cost of others calling you 'very important'

It seems evident that failure to refer to the limited information gathered with respect to this particular issue has been deliberate simply because it would seriously undermine the case the OUR is trying to put forward with respect to dominance and market definition. The OUR seems to rely heavily on the revelation that 9.1% of new phone buyers take into account the cost of other people incur when making a call to them. Digicel would contend that this in itself is evidence of a constraint on its termination pricing behaviour, however, even stronger evidence is provided by the fact that 18% of respondents said that they take this factor into account when switching service provider. Why has the OUR failed to refer to this very strong indication of competitive pressure?

The 18% figure is also significantly more relevant than the 9% figure because many individuals who are buying a new phone have already determined what service provider they are happiest with and are merely upgrading their handset. Furthermore an overwhelming 65% of respondents said that the level of importance linked to the cost of others calling your mobile phone was 'very important'. Digicel fails to understand how the OUR could have ignored this point. As has been made clear by Digicel a proper analysis of the market requires an in depth analysis after a series of rounds of data collection. However, if one was looking for prima facie evidence of competitive constraints on mobile termination, this is very significant information.

Of course the OUR should have tried to reconcile the fact that 65% of consumers regard the costs to others as being very important with the fact that 18% of consumers take it into account when switching service provider. Following a simple line of reasoning it is easy to establish the fact that the 65% is the key figure. The question with respect to the 18% was '*Main things looked for when you decide on a service provider*'. For the 65% the question was '*Level of importance linked to cost of others calling your mobile phone'.* On the face of it both figures are very relevatn, however, it is highly likely that in response to the latter question customers that have been with the same service provider for years and are satisfied with them have not considered the issue as to what factor they would take into account in the event that they were looking to switch service provider. However, the latter question is completely unambiguous in the sense this is something that customers know now and is not dependent on whether something does or does not happen. Clearly if these 65% of customers saw a level of phone charges to individuals calling them that they deemed to be too high, they would give greater consideration to switching service provider but while that is not he case there is no need for them to give this serious consideration at this time.

It is also quite possible that while the 65% deem such costs to be very important, they also believe the people that are calling them are rational enough to choose the method of communication that which minimizes those costs i.e. they call fixed to fixed or make on net mobile calls, or use call back, or SMS or email. If such substitutes were not available then this 65% of customers may indeed choose to switch. The OUR, however, failed to ask any detailed questions on consumer activity with regards to what consumers do to minimise their cost

Irrespective of the reasons for the apparent anomaly between the two figures the OUR cannot possibly simply ignore that 65%[21] of consumers regard the level of importance linked to cost of others calling their mobiles is crucial. Consumers are constantly observing and accounting for this fact. By comparison they will not buy a new phone everyday or switch service providers for that matter.

Call back

The limited consumer survey provided a fair degree of compelling evidence that consumers not only knew what call back was but engaged in this activity to a considerable extent. Question 27 revealed that massive 81.8% of respondents use call back as a method to contact other parties. In addition an exceptionally high number of respondents (33%) that use this method use every single call for this purpose. In fact the OUR has failed to mention a single statistic from the limited survey that pertains to call back instead stated in paragraph 2.29:

"*If sufficient subscribers engage in this action* (call back), *it is argued that FTM call termination rates would be constrained.* ***But the OUR has no evidence that this is so***".

Firstly not only do the OUR have evidence that a substantial number of consumers use this 'action' but they do so to an extremely high degree. Can the OUR please explain how it can have disregarded evidence as provided in a survey the OUR itself commissioned? Secondly, it should be noted that call back acting as a competitive restraint on mobile termination rates is not restricted to just fixed to mobile termination rates.

Consider cumulative effects of competitive constraints

[21] The fact that 13.2% regarded it to be somewhat important is highly significant in itself

The OUR has made no attempt to consider what the accumulative effects of the competitive constraints identified in the consumer survey might be. For example, it is possible that the effect of call back alone, the effect of text messaging alone, the effect of people having more than one mobile handset alone, the effect of corporate countervailing buyer power alone, the effect of consumers having access both to fixed and mobile lines at the same time etc. may all in themselves be sufficient to prevent Digicel from increasing termination rates by 5 to 10%.

However, even if individually these factors could not constrain Digicel's pricing behaviour, although the evidence with respect to call back alone is probably enough to prove that this is the case, the OUR should have considered the impact of all these factors together acting as a competitive constraint. 65% of consumers say that not only do cost of others calling their mobile mean something to them, but it is something that is 'very important' to them. Some of them might use call back, others might buy an extra handset, some may use text messaging, others know their friends will call them on the fixed line. Digicel's sales and marketing department are fully aware of such realities and we are forced to compete accordingly, the evolution of our pricing in mobile termination is a testament to this fact.

Other Information

Digicel believe that there is other evidence in the limited consumer survey to support its position. If it had been afforded sufficient time to respond it would have dealt with these issues in this document. Nevertheless, the evidence still appears heavily stacked in favour of a determination that deems Digicel to be a non dominant operator if one were to base ons conclusion almost entirely on the results of a consumer survey. This could have been more conclusively proven if all the appropriate questions been put to consumers in the survey.