



Response

to

Other Submissions

on

"Dominant Public Voice Carriers No. 2"

to

Office of Utilities Regulations

February 17, 2003

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1 Introduction

Digicel welcomes the opportunity to comment on Cable & Wireless Jamaica's ("C&WJ's") and the FTC's responses to the Office of Utilities Regulation ("OUR") Consultative Document on Dominant Public Voice Carriers no. 2, although reiterates that it is alarmed that the OUR should attempt to carry out a consultation on this matter at a time when many of the key issues are the subject of judicial review proceedings.

Digicel reiterates that its failure to respond to any issue raised by the OUR in its Consultative Document does not necessarily represent agreement in whole or in part with the OUR's position on that or those issues and states expressly that similarly any failure to address any particular issue raised by C&WJ in its response to the Consultative Document does not necessarily represent agreement in whole or in part with C&WJ's position.

2 Comments on the C&WJ response

2.1 Application of the OUR's own framework

Digicel would agree that the consultative document reflects a lack of clarity about the purpose and methodology to be used for the two stages in the assessment of dominance, namely market definition and dominance, and that the OUR has failed to provide quantitative analysis.¹ Digicel has stated that aspects of the proposal and the thinking do not set out a clear framework for the assessment and regulatory implications for the future of a finding of dominance. In addition, Digicel reiterates that it is surprised that the OUR should attempt to carry out a consultation on this matter at a time when many of the key issues are the subject of judicial review proceedings.

Digicel disagrees that the OUR has correctly followed the methodology for defining the markets and assessing dominance in respect of mobile termination. Rather, the OUR has (i) put forward its conclusions on the state of competition in various arbitrarily-chosen markets, without first having put forward its methodology or the benchmarks against which a finding of dominance is to be taken in particular market segments, and (ii) put forward its views on the relevant markets without adequate empirical evidence to justify such classifications.

C&WJ maintains that there is little analysis of the possibilities for demand and supply-side substitution and no detailed empirical evidence as regards fixed interconnection circuits, international transit and switching. For C&WJ then to maintain that a proper analysis was carried out of mobile termination is disingenuous, especially in view of its assertion that while the OUR "... does not, however, provide any detailed empirical

¹ C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 1-2 and 4.

evidence to support this conclusion [the conclusion that fixed and mobile systems were not effective substitutes, based on functionality and price levels of the services offered]² and "that no attempt has been made to define any markets, including the retail mobile service markets".³

As set out in its previous submission, Digicel submits that a preferable approach would be for the OUR to consult on how it envisages evaluating dominance in the telecommunications sector (i.e. the factors to be taken into account and how they are to be measured), the competition problems raised in the telecommunications sector in Jamaica and the sector specific remedies that it envisages imposing to correct them and to ensure effective competition, and finally the markets that it anticipates may require regulation.

Digicel agrees that the SSNIP test is relevant to determining the boundaries of a market, rather than any assessment of dominance following that determination. However, Digicel submits that the OUR has not adequately considered potential competition, in particular, by not addressing the other factors that are indispensable to a determination of dominance, i.e. the extent to which termination services are influenced by competitive pressures from other sources. Digicel considers that such sources include the links created by competition in the market or, in other words, the extent to which wholesale interconnection might be interrelated with the mobile and fixed retails markets.

Therefore, rather than focusing on the fact that certain markets have now been opened up to competition through the grant of licences as C&WJ suggests, which is purely self-serving, as many of the services theoretically available are not yet available, Digicel respectfully submits that empirical evidence is required of the extent to which fixed services are substitutes for, inter alia, mobile voice telephony and the links between retail and wholesale services. Digicel's view on this matter is informed by changing market conditions and the phenomenon of increased fixed-mobile substitutability. In particular, over the last year and a half, Digicel believes that Jamaican users have increasingly come to view a mobile connection as substitutable, and in many cases, superior to a fixed connection. Digicel believes that many new subscribers are entering the telecommunications market for the first time by way of a mobile connection only.

Furthermore, escalating fixed prices (as C&WJ rebalances its tariffs) is likely to see the substitutability-effect accelerated. Indeed, even C&WJ itself has reported that "despite the significant rate differential [between the standard peak per minute rate for an inter parish call and the highest rate in the market for a mobile to mobile call], the growth in the mobile market has been phenomenal, while that of the fixed line business has remained flat at best".⁴ In the vast majority of cases, a fixed connection is likely to be

² C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 3.

³ C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 5.

⁴ C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 11.

substituted by one or more mobile connections for the purposes of call termination, therefore, consumers now have a choice between having their call terminated on a fixed or mobile connection. As such, these two media can be described fairly as being in competition and consequently, the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections.

Digicel submits that there is a difference between theoretical market entry and actual market entry and furthermore, that potential future market entry by itself should not be used to determine that an incumbent is not dominant. In the telecommunications sector, there are two broad relevant markets to consider: services or facilities provided to end users (retail) and access to facilities necessary to provide such services to end users (wholesale markets). Within these two broad categories, there may be other distinguishable markets. The starting point is to characterise retail markets over a given time period, taking into account demand and supply side substitutability and having characterised the retail markets to then identify wholesale markets. This must be done prospectively for ex ante regulation and such characterisation and identification must be forward-looking, intended as it is to take account of foreseeable developments over a reasonable time period. Ex ante regulatory obligations should be imposed only if there is not effective competition and where competition law remedies are not sufficient to address the problem, furthermore, newly emerging markets should not be subjected to inappropriate obligations.

Nevertheless a "forward-looking" analysis does not mean ignoring the special and exclusive rights that C&WJ has historically held (and in some cases continues to hold), which may enable it to, for example, give more favourable network access to its co-operation partners than to other service providers in competition with them⁵. Even after C&WJ no longer holds any exclusive rights it has still kept and will preserve very important market shares in the sector.⁶ The ending of its legal monopoly will not end its dominance in the short-term as effective competition from alternative network providers takes time. In any event, it is recognised that the fact that an undertaking with a significant position on the market is gradually losing market share should not preclude a finding of dominance even though the market may be becoming more competitive.⁷

⁵ European Commission Notice Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector OJ 1991 C233/2 at paragraph 67.

⁶ Ibid at paragraph 80 and European Commission Notice on the Application of the competition rules to access agreements in the telecommunications sector framework, relevant market and principles OJ 1998 C265/2 at paragraph 64

⁷ European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services OJ 2002 C165/6 at paragraph 75.

In addition, Digicel agrees with C&WJ that burden of proof is on OUR to prove dominance not to jump to conclusions and then have the operators try to discharge any finding of dominance.⁸(see section A.4 second bullet point).

2.2 Mobile termination

As mentioned above, Digicel agrees that a two-step approach to any finding of dominance is appropriate, however, Digicel disagrees with the OUR's conclusion and C&WJ's concurrence that this means that each mobile carrier should be declared dominant with respect to the provision of call termination. Digicel submits that the relevant market is one for call termination generally and the fact that a number of regulatory authorities have found that call termination is a separate market on individual mobile networks does not excuse the OUR from not carrying out its own independent analysis and research. This is all the more the case in the light of the contrasting circumstances in the telecommunications markets in Jamaica and the EU: initial stages of transition from monopoly to competitive markets on the one hand and mature markets on the other.

A substitute product is not necessarily identical to, sold at the same price or even of the same quality as the product for which it is substituted and the ease with which substitutes can be obtained or provided must be taken into account in any definition of a market. Here, the OUR has carried out no investigations into the substitutability of mobile for fixed lines nor into SMS, voicemail and call-back services. While it may be appropriate to take into account that removal of legal barriers makes the potential for entry into certain markets a possibility,⁹ Digicel highlights the reality of liberalisation, which may be considerably delayed and hindered through the necessity of making sufficient investment in fixed or other assets; "pre-emptive strikes" by the incumbent shortly before competitors become operational; and "feet-dragging" techniques by the incumbent such as raising obstacles to access to the incumbent's infrastructure.

Prices are at the competitive level when no supernormal profits are being made in the long run and yet if the OUR wishes to impose price caps on mobile termination, it is respectfully submitted that it has not examined whether supernormal profits are being made in the long run as liberalisation has occurred too recently and the market has not reached a sufficient state of maturity to be able to say with certainty that prices will not vary without intervention. Furthermore, the OUR has not even addressed the fact that the application of the hypothetical monopolist test in the context of regulated prices can produce different market definitions from those which would be produced if the prices were at the competitive level or attempted to determine whether the regulated prices are currently at the competitive level.

⁸ C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 5.

⁹ Whether these be domestic fixed line transit, international transit and switching or fixed call termination. C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 4.

In relation to supply side substitution at the interconnection or wholesale level and retail level demand side substitution, C&WJ submit that there are no substitutes as it is impossible to substitute call termination on one network for termination on another because calls to a particular mobile user must be terminated on the network to which that user subscribes. However, Digicel submits that this confuses the distinction between wholesale and retail services, does not take account of their close associative links and the OUR has carried out no analysis of demand-side substitution at the retail level. Similarly, it is not "precisely because ... [SMS, call back, voicemail and paging] offer different functionality that ... price differentials can be sustained"¹⁰ because no empirical investigation has taken place and it is unclear, given that the market is only 18 months old, how far any alleged price differentials are sustainable.

Indeed, the other factors that are indispensable to a determination of dominance, such as, the extent to which termination services are influenced by competitive pressures from other sources, including how termination charges play an important role in ensuring the maintenance of subsidised handsets or low call origination charges, especially in a developing market such as Jamaica's, have not been accounted for. Similarly, in relation to SIM locking and multiple SIM cards, Digicel submits that empirical evidence and analysis of the likely timeframe for use of such technologies should be gathered and made by the OUR. Instead, the OUR and C&WJ are presupposing that interconnection for mobile call termination has little or nothing to do with call origination which is the main competitive arena for obtaining new and keeping existing mobile and fixed call subscribers.

A fundamental question raised by the OUR's Consultative Document and CW&J's response is whether the OUR wishes to reverse the effect of calling party pays in this newly developing market, especially given that such a principle has been allowed to develop in the EC and elsewhere over many years and the OUR appears to be seeking to reverse it within the space of 18 months!¹¹ The ultimate effect of a called party pays principle would be contrary to consumers' interests in that it would stifle the expansion of a technology for which there is clearly a demand, it would run contrary to the usual situation for fixed telephony without any justifiable reason and run counter to most commercial exchanges.

In addition, Digicel objects to C&WJ's reference to its advertising strategy as a campaign to encourage subscribers to think about the cost of calls that will be borne by another. Digicel submits that this is merely a cynical, pre-emptive strike against the OUR and C&WJ's competitors to enable it possibly to increase its rates if the new entrants do not follow suit. As C&WJ admits, a similar "consumer awareness campaign" was unsuccessful in the Netherlands and resulted in the incumbent actually raising its prices.

¹⁰ C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 8.

¹¹ C&WJ response to the OUR's second Consultative Document on Dominant Public Voice Carriers dated 20 December 2002 at page 9.

C&WJ does not take account of areas of competition other than price in its comments on "The effect of price movements for mobile termination", such as quality of service, network coverage, innovation and image. Digicel submits that it is not the case that each mobile operator's network is distinct and separate because price differentials between new entrants and the incumbent have not decreased. The OUR and C&WJ have not examined whether it is perhaps Digicel's efficiency, innovation, financial discipline, staff morale and incentivisation, state of the art equipment, brand image and quality of service, network coverage that might have enabled it to maintain a price differential with C&WJ. Digicel would highlight the fact that it is part of a group experienced in liberalising markets and with sound experience in managing start up businesses whereas C&WJ is an incumbent without a tradition of operating in this new competitive environment. The maintenance of any price differential in any event goes to show that the regulated price level is not the competitive one.

Leaving aside the question of whether a standard peak inter parish call rate and the highest mobile to mobile call rate are substitutable or comparable (such that a price comparison is relevant), which C&WJ appears to suggest even while disputing their substitutability, C&WJ laments the lack of growth of the fixed line business while providing no explanation for this stagnation. Digicel submits that this goes to show the increasing substitutability of fixed and mobile calls and calls on the OUR to investigate this trend.

In relation to C&WJ's section on "The effect of price differences", Digicel would request that C&WJ produce the source of its information and clarify how it explains the convergence of market shares of the four mobile operators, in the UK at least, in spite of price differentials. Digicel submits that price competition cannot be taken in isolation and as the "be all and end all" in telecommunications markets as other competitive arenas such as coverage, innovation and quality of service, to list but a few, are also arenas of great interest to customers.

Digicel submits that C&WJ's section B.6 is misleading in the sense that it appears to show a trend for market review of mobile termination in many EC Member States without clarifying that such market reviews have been mandated by the implementation of the new regulatory framework, and in addition that such reviews have been instigated and the new framework imposed more than a decade after liberalisation of the voice telephony markets. The mere listing of the EC Member States that have imposed or are considering imposing regulation on mobile termination rates is an attempt to dazzle the reader and the OUR with the strategies taken by other regulators. Instead the OUR should be striving to analyse the Jamaican situation independently, taking account of international experiences where relevant of course, but ultimately reaching its own decision, first because there is a strong correlation between greater inward investment and responsible, effective regulation, which in turn translates to increased employment opportunities and second because of the differences in market maturity.

Differences in approach by regulators are permissible in view of the transitional state of the Jamaican market and the need for the OUR to adopt an unhurried, considered and light-handed approach to regulation. Permissible differences in approach however do not

go so far as condoning the precipitous adoption by the OUR (egged on by C&WJ) of heavy-handed regulation on new entrants without a proper investigative and consultative process having been carried out. After all, the OUR should note that Oftel referred mobile termination to the Competition Commission for an in-depth market investigation despite its lengthy market review and has not attempted to impose regulation with unseemly haste.

3 Conclusions - C&WJ response

For the reasons set out above, Digicel does not agree with C&WJ's conclusions that the appropriate market definition is that for mobile termination on individual networks and submits that no empirical evidence has shown that (in Jamaica) there are no viable alternatives on the demand or supply sides for such termination. Furthermore, it is not the case that regardless of size and market position each mobile operator is, in the absence of regulation, able to set its termination rates independently of its competitors as these will have a bearing on the advantages that operators can pass on to consumers, such as subsidised handsets, and therefore on the take-up of the technology. Whether or not Digicel's mobile termination charge is significantly greater than that of C&WJ does not mean that Digicel is under no price constraint as compared to C&WJ but may merely be the reflection of the greater satisfaction that customers obtain from contracts and pre-paid arrangements with an innovative and customer-focused new entrant in this developing market.

Digicel consequently submits that an interventionist attitude on the part of the OUR in setting cost-imposed termination rates is inappropriate given the historical strength of C&WJ and the risk of it leveraging its position and cross-subsidising new services in the absence of an effective cost accounting system and mechanism for interim relief.

4 Comments on the FTC's response

4.1 The FTC's preliminary remarks

Digicel would add that the job of the regulator is not only to mimic the effects of the competitive process and to protect the consumer from being exploited, but also to ensure that the pressure for effective competition in a newly de-regulated industry is not undermined in the long-term through premature and heavy-handed intervention. Ex ante regulatory obligations should be imposed only if there is not effective competition and where competition law remedies are not sufficient to address the problem, furthermore, newly emerging markets should not be subjected to inappropriate obligations.

While it is not in dispute that based on currently deployed technology each operator controls call termination on its own network, at this stage of the development of the market, the competitive struggle is taking place between networks for the sign-up of customers. Digicel respectfully submits that the FTC has confused the distinction

between wholesale and retail services and has not taken account of their close associative links when it states that there are no effective constraints in respect of call termination because it is impossible to substitute call termination on one network for termination on another because calls to a particular mobile user must be terminated on the network to which that user subscribes.

Any approach based on segmenting the market so that every single operator is regarded as the controller of a bottleneck facility does not make sense as an operator having ten customers only, must be regulated, since it would control the price of call termination to those handsets. The Telecommunications Act 2000 does not appear to take this approach as it calls for determinations of dominance and imposition of ex ante controls to be made rather than imposing such regulations directly. Given the liberalisation of the market using the Calling Party Pays system ("CPP"), each operator should control the price of call termination on its network. As an illustration, referring to the OUR's obligation to have regard to the principle of cost-orientation in determining an operator's call termination charges, Section 29(5) provides that "... *if the operator is not dominant...*" then the OUR may look to other approaches such as reciprocity. This appears to suggest that the Telecommunications Act 2000 does not take the approach that each operator is the controller of a bottleneck facility as it leaves open the question of whether an operator is dominant.

Q3.1 Should each mobile carrier be declared dominant in relation to the provision of call termination?

As a preliminary remark, Digicel respectfully submits that the OUR and the FTC have carried out scanty or no analysis of the possibilities for demand and supply-side substitution in relation to the scope of the call termination market and have provided neither the principles of cost recovery that they deem appropriate to the market or detailed empirical evidence of excessive charging in relation to cost. Digicel respectfully submits that this is unacceptable in so far as its legal rights and obligations will be changed materially if the conclusions in the Consultative Document are adopted.

4.2 Definition of the market

In the telecommunications sector, there are two broad relevant markets to consider: services or facilities provided to end users (retail) and access to facilities necessary to provide such services to end users (wholesale markets). Within these two broad categories, there may be other distinguishable markets.

Before concluding that there is in Jamaica a market for mobile call termination, Digicel respectfully submits firstly, that the OUR and the FTC have not adequately considered the definition of the market and the extent to which Jamaican users view a mobile connection as substitutable for a fixed connection. Digicel's view on this matter is informed by changing market conditions and the phenomenon of increased fixed-mobile substitutability.

Indeed, Digicel believes that many new subscribers are switching away from fixed telephony, and in other cases, are entering the telecommunications market for the first time by way of a mobile connection only. Escalating fixed prices (as C&WJ re-balances its tariffs) is likely to see this substitutability-effect accelerated. Even C&WJ itself has reported that the growth in the mobile market has been phenomenal, while that of the fixed line business has remained flat. In Digicel's view, in the vast majority of cases, a fixed connection is likely to be substituted by one or more mobile connections for the purposes of call termination, therefore, consumers now have a choice between having their call terminated on a fixed or mobile connection. As such, these two media can be fairly described as being in competition, and consequently, the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections.

4.3 Constraints from competitors

Digicel submits secondly that the FTC and the OUR have not adequately addressed the extent to which termination services are influenced by competitive pressures from other sources, including the extent to which wholesale interconnection might be interrelated with the mobile and fixed retails markets and how termination charges play an important role in ensuring the maintenance of subsidised handsets or low call origination charges, especially in a developing market such as Jamaica's. Indeed, the OUR and the FTC appear to presuppose that interconnection for mobile call termination has little or nothing to do with call origination which is the main competitive arena for obtaining new and keeping existing mobile and fixed call subscribers. As such, Digicel invites the OUR to specifically quantify the efficiency gains within Jamaica from existing handset subsidies.

A fundamental question raised by the OUR's Consultative Document and the FTC's response is the approach to be taken to the Calling Party Pays principle. Although this principle may mean that receivers of calls are less aware of the pricing components of calls made to them than might be the case were there in effect in Jamaica a principle of Called Party Pays or a two part pricing structure, it is precisely this principle that is permitting the development of the mobile market. To seek to stifle this development by premature regulation would run counter to the interests of those whom the OUR and the FTC profess to seek to protect. In any event, lesser forms of regulatory intervention such as pre-recorded notice of call charges have not been adequately considered.

Third, it would appear that neither the FTC nor the OUR has carried out investigations into the effect of SMS, voicemail and call-back services as tools for avoiding call termination charges. The FTC submits merely that it is unaware of substitutes but provides no evidence of having considered the question in detail. While Digicel agrees with the FTC that technological developments are likely to lead to changing market conditions, Digicel respectfully submits that it may not be in "interacting with the public" that the FTC may find out about these developments, but rather by discussion of the possibilities with experts, including any likely timeframe for use of technologies such as multiple SIM cards. Digicel's own personnel are available both to the FTC and the OUR for this purpose.

Fourth, as set out in Digicel's previous submission, it would appear that neither the FTC nor the OUR have adequately considered the level of pricing. Prices are at the competitive level when no supernormal profits are being made in the long run. If the OUR wishes to impose price caps on mobile termination, with which it would appear that the FTC agrees, it is respectfully submitted that this would first require examination of whether supernormal profits are being made in the long run. However, it is too early to say with certainty that prices will not vary without intervention. Furthermore, the OUR has not even addressed the fact that the application of the hypothetical monopolist test in the context of regulated prices can produce different market definitions from those which would be produced if the prices were at the competitive level or attempted to determine whether the regulated prices are currently at the competitive level.

Fifth, Digicel respectfully reiterates that any current "trend" for market review of mobile termination in many EC Member States has been mandated by the implementation of the new regulatory framework. Such reviews have been instigated and the new framework imposed more than a decade after liberalisation of the voice telephony markets. The OUR must analyse the Jamaican situation independently, taking account of international experiences where relevant of course, but ultimately reaching its own decision on what is required in Jamaica at this stage in the development of the market, first because there is a strong correlation between greater inward investment and responsible, effective regulation, which in turn translates into increased employment opportunities and second because of the differences in market maturity.

Differences in approach by regulators are permissible in view of the transitional state of the Jamaican market and the need for the OUR to adopt a considered approach to regulation. Digicel respectfully points out that in the UK, Oftel referred mobile termination to the Competition Commission for a lengthy and in-depth market investigation despite its own careful market review and has not attempted to impose regulation with unseemly haste.

4.4 Conclusions – FTC response

For the reasons set out above, Digicel submits that the relevant market is one for call termination generally. Digicel does not agree with the FTC's conclusions that the appropriate market definition is that for mobile termination on individual networks and submits that no empirical evidence has shown that (in Jamaica) there are no viable alternatives on the demand or supply sides for such termination. Furthermore, it is not the case that regardless of size and market position each mobile operator is, in the absence of regulation, able to set its termination rates independently of its competitors as these will have a bearing on the advantages that operators can pass on to consumers, such as subsidised handsets, and therefore on the take-up of the technology.