



Response

to

OUR's Consultative Paper

"Dominant Public Voice Carriers No. 3"

by

Digicel

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1 Summary

1. Digicel welcomes the opportunity to respond to the OUR's third consultation paper in relation to dominance in the Jamaican telecommunications market, and notes that any possible determinations by the OUR in respect of dominance will have very significant implications for the continuing development of this market, for the incentives of operators, and ultimately, the welfare of consumers. Digicel would caution against any approach whereby the current market is viewed as static and incapable of further development, leading to regulatory intervention solely aimed at limiting mobile termination rates. Digicel believes that in a market such as telecommunications, concerns about allocative efficiency, specifically any pricing above marginal cost (to the extent that it occurs), must be balanced against the need to encourage dynamic and productive efficiency in a sector that is continually evolving.¹
2. Regrettably, Digicel believes that the OUR has already determined which carriers are dominant, and this is apparent from the comments made in the Abstract to the Consultation Paper. In addition, the opening sentence of the Consultation Paper is predicated on a misinterpretation of the OUR's statutory function. It is not correct to state that the Telecommunications Act 2000 (TA) requires the OUR to determine which public voice carriers are dominant, but rather, whether there are any dominant voice carriers - excepting of course, the position of C&W, which was deemed to be dominant when the market was first liberalised.
3. The fact that the OUR has, without any empirical analysis, already made up its mind on the issue is especially apparent in the second paragraph of the Consultative Document, where it states that " *The continued existence of dominant carriers in the*

¹ In that way, mobile communication is in danger of being treated like a traditional public utility like water or electricity, even though the nature of the underlying service is continually evolving and improving.

Jamaican telecommunications market 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. " That sentence alone raises several difficulties, not least being the obvious element of pre-judgement. In addition, it begs the question, what evidence does the OUR have that service in Jamaica is below that of competitive markets? Incidentally, it would also be helpful to know which markets are being referred to. In relation to the level of prices, there is equally a dearth of information, and as such, the conclusion is equally tenuous.

4. Equally troubling, the OUR seems to have adopted a theory of collective dominance, given that it has already decided that more than one carrier is dominant. Yet, that is not discussed or analysed in the Consultative Document, or in its prior publications.² It also raises difficulties as to the overall coherence of the OUR's approach, since in previous documents, the OUR appears to favor any approach that treats all mobile operators, irrespective of size, as being dominant in the market for call termination on their own network - which of course is a truism³. In other words, the collective dominance approach is based on more than one player controlling the same market, yet the OUR's preferred approach is one based on a separate markets for call termination.

5. Digicel maintains all of its objections and reservations to a process which appears to be confused and imprecise. Digicel also notes that despite a further request from Digicel to confirm what are the likely consequences of a determination of dominance, the OUR has, once more, avoided specifics and replied in generalities. Even the time-table published by the OUR in this Consultative Document is confused, and appears to be contrary to the OUR's declared intention in its Consultative Document, Dominant Public Voice Carriers No. 2.

² In Dominant Public Voice Carriers No. 2, the OUR, in that Abstract refers to a position of dominance being one held by a single company, or with an interconnected company. However, that is not the same as collective dominance, a concept that was created by EU competition law.

³ But ultimately, is not very helpful in terms of defining the relevant market, leading to the incongruous conclusion that all mobile operators, irrespective of size are dominant.

6. Given all of the above, and the general confusion surrounding this whole process, Digicel, interprets the OUR's statements to mean that it will not make a determination of dominance until April 2005, the date by which the OUR would have completed its data collection and assessment of competition in the market. This is the only rational interpretation that can be given to the OUR's intentions as currently articulated.

2 Dominance and the Telecommunications Act

7. Digicel does not wish to make any elaborate comments on the OUR's justification for previously regarding C&WJ as a dominant carrier under the Act.⁴ However, in relation to the operation of price caps, the Consultative Document engages in an elaborate discussion of this issue, but it does not clarify whether or not it is the OUR's intention to regulate the retail prices of any carrier determined to be dominant, by means of a price cap. Obviously, while any such attempt at regulation would, once more, be a conscious and deliberate violation of the terms of the terms of the Ministerial Direction of 9 April 2002, Digicel believes that it has a legally protected procedural entitlement to be informed in advance⁵.

3 Judicial Review and the Role of the FTC

8. Digicel notes the OUR's quotation of Digicel's comments in relation to the link between this consultation, and the judicial review proceedings relating to the OUR's previous efforts to regulate Digicel's mobile termination rate. Digicel's comments were made in good-faith and it regrets the frivolity with which the OUR has responded. While the link between the two is abundantly clear, Digicel will, once

⁴ However, Digicel does note with interest the OUR's statement at paragraph 1.8 in relation to the claimed subsidy between domestic and international services. There, the OUR states that "...if, the prices of these services were to be determined in competitive markets, the overall benefits are expected to be greater relative to the costs." Regrettably, this type reasoning has not informed the OUR's thinking on ADCs, where it has proposed that prices for international services be artificially manipulated despite recent liberalisation

⁵ Digicel notes that the issue of the Direction and its legal effect is before the High Court of Jamaica, but would also wish to place the OUR on notice that deliberate and intentional violations of the law by an agency of State raises the possibility of substantial liability in damages under the doctrine of statutory malfeasance.

more, explain its position. Currently, judgement of the High Court of Jamaica is awaited in relation to the following matters:

- i. whether the OUR has the legal power to regulate Digicel's mobile termination rate, directly or indirectly;
 - ii. whether, if it has such legal authority, the OUR followed the correct procedures before purporting to regulate Digicel's mobile termination rate, specifically, absent any designation of dominance, or consultation of the FTC as required by the Act,
 - iii. whether, notwithstanding the above, the OUR is legally permitted to regulate mobile termination rates, despite a clear and unambiguous Ministerial Direction that mobile termination rates not to be regulated, and,
 - iv. even if the Ministerial Directive was not a legal impediment, the OUR acted unreasonably in the methodology it used to determine the regulated rate for mobile termination, specifically, by relying only on data supplied by C&W, and by refusing to apply a mark-up to reflect the positive network externality.
9. Given that the OUR is now proposing to engage on the issue of dominance, with pre-determined conclusions, it is clear that the outcome of this litigation will have a direct bearing on any action that the OUR intends taking as a result of its conclusions on dominance. Perhaps this is the reason for the lack of clarity as to what will follow from the intended determination of dominance. However, this does not excuse the sort of formulaic reply reprinted by the OUR at page 12 of the Consultative Document, where it states that: "*After the decision on determination of dominance is taken, the Office expects that all of the consequential actions required by the Act will be activated and complied with.*" As apparent, none of these consequential actions are specified or explained, and neither is the assertion that

certain acts would be required by the Act, rather than just being permitted, and in turn being appropriate to the state of development of the market.

10. Given all of the uncertainty, Digicel will proceed to participate in this consultation exercise on the express expectation that there will be no determinations in relation to dominance at least until April 2005, the time when the OUR indicates that it will determine the degree of effective competition in the market. Digicel believes that it has a legitimate expectation that this will be so, based on the lack of clarity in this Consultation Paper, but more importantly, the direct representations by the OUR to interested parties in its Dominant Public Voice Carriers No. 2: Guidelines for Assessing Dominance in Telecommunications Markets.⁶ Specifically, the OUR cannot make any findings of dominance without first going through a proper data collection phase, which in turn must be prefaced by meaningful consultation on what are the appropriate metrics for determining dominance.

4 Role of the FTC

11. The role of the FTC in consultations is an issue on which there has been serious and continuing disagreement between Digicel and the OUR. Digicel regrets that this is so, especially given the obvious statutory mandate for consultation with the FTC, above and beyond interaction with interested or affected third parties. Quite simply, while the public must be given the opportunity to make submissions, the FTC must be consulted. If it was sufficient for the FTC to simply receive a copy of the consultation paper and to be afforded the opportunity to comment, then why would the statute use a different form of words in relation to interaction between the FTC and the OUR?

12. Regrettably, the OUR has relegated the FTC to the same status as a member of the public, even though the FTC is the statutorily constituted expert in competition

⁶ In particular, its statement at page 32 that the data collection phase should pre-date any determination of dominance.

matters. Again, this is a matter on which some guidance can be expected from the High Court, again underscoring the important link between this consultation and the judicial review action concerning the OUR's previous attempt to regulate Digicel's mobile termination rate.

5 Purpose and Regulatory Implications

13. Digicel notes the OUR's reply to Digicel's question concerning the likely consequences of any determination of dominance, and regrets that the OUR has chosen not to provide a substantive response. In Digicel's view, the most basic requirements of procedural fairness are not observed where the intended target of regulatory intervention is not notified in advance, at least in general terms, of the likely consequences, or of the alternatives being considered by the regulator. Regrettably, Digicel must once more point out a violation of Section 4 of the TA.

6 Periodic Re-examination of Markets for Effective Competition

14. Given the absence of clarity of the OUR's intentions, Digicel has in this response provided the OUR with its understanding of the possible timing of future regulatory action directed at Digicel. However, Digicel notes that it is the OUR's intention to make a determination on dominance by June of this year. Yet, it is still unclear what methodology will be used to assess dominance. In particular, how can the OUR proceed to make any determination unless it has first identified the relevant market, and then proceeded to apply some sort of approach to determining dominance?

15. Equally important, how can the OUR proceed to make a determination as to dominance without specifying what indicators or proxies will be used to determine market power? For example, will it use the volume of minutes terminated on each network, or some other measure. In other words, how can there be a determination

of dominance by July when there has been no prior data collection phase? Instead, the OUR proposes to publish a data collection position paper in July, with an initial request for data in July/August. Yet, the determination on dominance will pre-date the data clarification stage.

16. The sequence of events leading to a determination of dominance is crucial, since without the necessary inputs the determination is likely to be flawed. Presumably, that is the reason why, in Dominant Public Voice Carriers No.2, the OUR published Guidelines for Assessing Dominance in telecommunications Markets, the OUR indicated that:

' The analytic procedure is a two-step framework involving:

The definition of the relevant market

An assessment of dominant position

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

Market share data (sales value and volume);

Product functionality;

Prices and Costs:

Inputs;

Principal Competitors; and

Market entry conditions

Additionally, the OUR would also wish to acquire information on the past conduct of the entity being assessed for dominance ⁷

17. Notwithstanding the above, it now appears from the timetable published by the OUR at paragraph 2.9 of the Consultative Document that the OUR intends to make determinations of dominance in advance of the data collection phase. Given that the basic methodology proposed by the OUR is logical and supported by international

⁷ Consultative Document: Dominant Public Voice carriers No. 2, p. 31

practice (which the OUR itself refers to), then Digicel can only interpret the timetable as having been compiled in error, and without reference to the OUR's previously declared intentions⁸. Any plans to make a determination of dominance by June 2003, are impossible given that the data necessary to support conclusions will not be available by then. In any event, even as the OUR identifies in its proposed timetable, it would be necessary to consult the public on the issue of data collection, since the choice of measurement used will have a significant impact on any eventual finding of dominance.

18. Digicel is concerned that such fundamental confusion should abound at this late stage in the process, and for its part suggest that some of these difficulties are arising, at least in part, from the fact that dominance is a competition law concept, underscoring the need for substantive a priori consultation with the FTC, which to-date has not occurred, despite the statutory requirement.⁹

7 Mobile Termination

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

19. At paragraph 2.12, the OUR rejects 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 such analysis is provided.

20. Separately, in relation to the definition of the relevant market, it is not for Digicel to convince the OUR that there is not a single market (fixed and mobile) but rather it is for the OUR to make the case, if it can, that there is no such unitary market. As such Digicel would support the opinion of C&W, reprinted in paragraph 1.1 of the

⁸ While the proposed methodology appears sound, Digicel would add that it still objects to the OUR's approach to determining dominance, and in particular, the duty on the OUR to explain whether it is relying on some concept of collective dominance, as now appears to be the case, and how this can be reconciled with its previous approach which appeared to attribute market power to all operators controlling network termination.

⁹ Dominance is a legal concept and has its origins in EU competition law.

Consultative Document, to the effect that the burden of proof lies with the OUR, not Digicel, or any other carrier.

21. Finally, the OUR seems to attach some adverse significance to Digicel's argument that termination revenues play an important role in ensuring the affordability of handsets. Digicel would like to invite the OUR to give it an example of any activity in Jamaica where prices are equal to marginal cost. In any event, Digicel maintains its position, and wishes to add, that as new technology is rolled out in its network, new handsets will be necessary in order for customers to access these services. This concern goes directly to Digicel fundamental objection to rigid utility type regulation in a sector where the underlying services and products are continually evolving. Any approach to regulation that has an excessive focus on allocative efficiency and the equation of price to some proxy for marginal cost (whether it be LRIC or otherwise) is likely to result in static investment and a failure to adopt new technology over time. Ultimately, Jamaican consumers and the overall Jamaican economy will suffer.

8 Likely Impact of Excessive Mobile Termination Charges

22. The OUR cite a litany of possible adverse welfare effects associated with "excessive" pricing for mobile termination. In relation to those facts, Digicel notes that the OUR provides no evidence of discontinuation of fixed line contracts, no evidence of the extent of customers making a disproportionate (undefined) amount of FTM calls, no evidence of excessive churn, and no evidence of excessive (undefined) use of the 'high cost' mobile network. In addition, the OUR, like all regulators should have cited the potential drawbacks associated with regulating mobile termination rates, including; the real possibility that the regulated price will be sub-optimal, the costs of the regulatory intervention, and more importantly the incentive effects in terms of continuing investment in the Jamaican telecommunications markets. As such, the OUR has failed to balance the case for and against regulatory intervention.

In addition, the OUR is proposing to arbitrarily select one aspect of Digicel's service, namely call termination (off-net) when Digicel call termination services should be analysed in aggregate, including call termination on its own network. Using that approach, the average price across Digicel's total output should be analysed. As such, Digicel strongly disagrees with the OUR's speculation that the fact that a mobile operator has a lower on-net tariff is a possible violation of the Fair Trading Act. An operator doing so is engaged in rational price discrimination, the welfare enhancing effects of which are well documented in economic literature. As such, Digicel is satisfied that such a practice benefits from the efficiency defence built into the Fair Trading legislation in Jamaica.

9 Fixed Line and International Telecommunications Markets

23. Digicel does not wish to comment on the specific findings made by the OUR in relation to whether various competitor offerings to C&W constrain C&W's retail pricing, except to repeat a point that it has previously made in relation to the test used by the OUR, and to express those concerns in relation to the finding of a lack of substitution between fixed and mobile telephony.

24. Specifically, while the OUR is using a recognised test (SSNIP) that has been widely used in commodity markets, Digicel would question whether or not such an approach is reliable or appropriate where a substantial feature of these markets is a regulated price or a price that is below cost. In other words, the analysis seeks to determine the relevant market by observing what a 10% price increase by a hypothetical monopolist would result in. However, since C&W's fixed line price and tariffs may be below cost (by more than 10%), a SSNIP test is never likely to result in the product definition being widened.

25. As such, the OUR's conclusion at paragraph 3.11 that mobile services should not be considered as substitutes for fixed telephony, might not be as robust a conclusion as the application of the SSNIP test would suggest, a conclusion which, by reason of

its own experience in the market, Digicel also has reason to doubt. Obviously, this also has implications for the OUR's definition of the relevant market for purposes of call termination. As such, Digicel requests that the OUR re-examine the appropriateness of using a SSNIP test in these circumstances.

10 Entry Barriers and Competitive Constraints

26. Digicel notes the OUR's analysis in relation to the advantages enjoyed by C&W as a vertically integrated provider of telecommunications services across all markets, and agrees that absent appropriate safeguards, C&W may be able to compete unfairly. The most obvious current example of such a practice is C&W's continuing delay to permit direct mobile interconnection to other carriers, or, in the alternative, to waive the application of transit charges on its fixed network.

11 International Facilities

27. The OUR seeks to determine the extent to which international satellite connections can be considered as an effective substitute for submarine cable systems. Currently, Digicel arranges its own satellite connections from Jamaica, and believes that for basic data and voice transmission, satellite offers an effective substitute. However, there are bandwidth limitations and quality constraints that apply in the case of satellite, which do not apply to cable, as well as a residual risk to satellite connectivity posed by adverse weather conditions. As such, Digicel agrees that satellite and cable are not perfect substitutes, and as such, Digicel itself has sought to arrange for diversity through C&W. As such, Digicel believes that C&W should, for the foreseeable future, be obliged to offer international interconnection, though a switched minutes offering, as well as being obliged to offer international circuits on its cable systems as part of its RIO offering.

12 Conclusion

The Consultation Document published by the OUR still fails to adequately address questions raised by Digicel in its response to the second consultation document. Digicel urges the OUR to provide answers to these questions, along with those raised in this response before proceeding any further in the process. Additionally the timetable published by the OUR in this Consultation Document is unclear as it raises questions about the methodology being used in the process; if data will be collected before a determination notice is issued. This is a fundamental issue which underpins the methodology of the process and Digicel seeks clarification from the OUR on this matter.