
Office of Utilities Regulation

Dominant Public Voice Carriers

OUR's Comments on Responses



OFFICE OF UTILITIES REGULATION

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Note: European and US Court cases cited in this document are for comparative analysis only and do not constitute legally binding precedent in Jamaica.

ABSTRACT

This document represents a follow-up to the comments and clarifications stated in the third consultation document on the issue of dominant public voice carriers. The document includes comments on issues raised during this consultative process. Specifically, the document seeks to address issues raised by Cable and Wireless Jamaica Limited (C&WJ) and Mossel Jamaica Limited (Digicel). Although some of these issues were already addressed (orally and/or in writing) the Office considers it important to restate or make reference to those comments in this document. Parties to this consultation, telecommunications carriers and service providers, and any other interested parties are invited to submit comments (if any), by June 25, 2003.

This Consultative Document is not a legally binding document and does not constitute legal, commercial or technical advice of the Office of Utilities Regulation. This consultation is engaged without prejudice to the legal position of the Office and its duties under relevant legislation.

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COMMENTS FROM INTERESTED PARTIES

Persons who wish to express opinions on the OUR's comments are invited to submit their comments in writing to the OUR.

Responses to this Document should be sent by post, fax or e-mail to: -

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Fax: (876) 929-3635
E-mail: pwilliams@our.org.jm

Responses are requested by June 25, 2003. Any confidential information should be submitted separately and clearly identified as such. In the interests of promoting transparent debate, respondents are requested to limit as far as possible the use of confidentiality markings. Respondents are encouraged to supply their responses in electronic form, so that they can be posted on the OUR's Website.

Comments on responses

The OUR's intention in issuing these comments is to stimulate public debate on the important regulatory issues surrounding the dominance of public voice carriers and to observe reasonable standards of procedural fairness in the regulatory process. Any response to this Document will form a vital part of the public debate on the issue of dominance. The comments may take the form of either correcting a factual error or putting forward counterarguments.

Arrangements for viewing responses

To allow responses to be publicly available, the OUR will keep the responses that it receives on files, which can be viewed by and copied for visitors to the OUR's Offices. Individuals who wish to view the responses should make an appointment by contacting Lesia Gregory by one of the following means: -

Telephone: (876) 968 6053 (or 6057)
Fax: (876) 929 3635
E-mail: lgregory@our.org.jm

The appointment will be confirmed by a member of the OUR's staff. At the pre-arranged time the individual should visit the OUR's offices at:

3rd Floor, PCJ Resource Centre, 36 Trafalgar Road, Kingston 10

The individual will be able to request photocopies of selected responses at a price, which reflects the cost to the OUR. Also, copies of this document may be downloaded from the OUR's Web site at <http://www.our.org.jm>

Timetable

The timetable for the completion of this consultation has been revised and is summarized in the table below. This includes an indicative timing for the Determination Notice.

Timetable for the consultation:

<i>Event</i>	<i>Date</i>
OUR's Comments	June 18, 2003
Responses	June 25, 2003
Draft Determination Notice for FTC's Comments	June 30, 2003
Determination Notice	July 25, 2003

CHAPTER 1: C&WJ'S COMMENTS ON THE CONSULTATIVE DOCUMENTS (CD)

(1A) SECOND CONSULTATIVE DOCUMENT

1.0 In C&WJ's response to the second Consultative Document (CD) on Dominant Public Voice Carriers, it raised concerns and issues related to aspects of the methodology for assessing dominance, the markets to be assessed for dominance, facilities sharing and the use of competitive safeguards. Below is the OUR's comments on these concerns and issues.

Data Used to Compile the Herfindahl-Hirschman-Index (HHI)

1.1 C&WJ requested the source of the data used to compile the HHI in Table 1.1 of the second CD. The information referred to was supplied by mobile carriers.

SSNIP Test and Dominance¹

1.2 According to C&WJ, the purpose of the SSNIP test is to define markets. It also stated that, "The 12-month time period for assessing whether price increases can be sustained is only of relevance for assessing the scope of the market – it does not suggest that the firm being assessed is dominant." The OUR agrees that the correct purpose of the SSNIP test is to define the product and geographic scope of the market. However, a carrier's or service provider's ability to raise and maintain prices above those of its competitors for an extended period of time is an indication that that entity is able to act without effective constraints from its competitors or potential competitors, and this points to dominance.

1.3 C&WJ also said the Fair Competition Act (FCA) does not define an enterprise as holding a dominant position in terms of its ability to sustain price increases. The FCA states that "an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors." It is the position of the OUR that, if an enterprise is able to increase its price without being constrained by its competitors or potential competitors, this is an indication that that entity holds sufficient market power to be considered as holding a dominant position in the relevant market. However, the OUR is cognizant of the fact that regulation may limit the usefulness of price data.

Demand and Supply Side Substitutes

1.4 C&WJ assumed that the OUR included local, long distance and international circuits and switches as part of the same market. As noted in the Third CD local transit and switching services are not substitutes for international transit and

¹ See page two (2) of C&WJ's response to the second CD on Dominance.

switching services. Additionally, international transit and switch facilities cannot be used to supply local or domestic call services, nor can local or domestic transit and switch facilities be used to supply international call services.

Absolute and Relative Prices (Fixed Line Transit Service)

1.5 C&WJ argues "...that even if there are absolute price differences between the transit services offered over a fixed network and transit services offered by an alternative network, this in and of itself, does not mean that the two services are in separate markets." Instead, C&WJ said that "...the test should be whether changes in the *relative* price of fixed transit services would result in either demand or supply side substitution."

1.6 Even if the OUR were to consider using relative prices, this data does not exist, since C&WJ was the only carrier allowed to offer this service until September 2001. Further, subsequent to that time, no carrier has been able to offer a substitute service that effectively competes with the service of C&WJ.

Fixed Interconnection Circuits

1.7 C&WJ said that "...although price regulation currently constrains C&WJ's ability to act independently with respect to the pricing and supply of these circuits, it should be noted that all operators now have the ability to self-provide these circuits and this will therefore act as an effective constraint on C&WJ even if price regulation were to cease."

1.8 The Office notes C&WJ's comments on the market for interconnection circuits.

Fixed Network Termination

1.9 The Office notes C&WJ's suggestion that all licensees (fixed network operators) will be dominant in respect of fixed call termination once they launch their services.

Competitive Safeguards

1.10 C&WJ makes note of the following:

- (i) "The OUR despite not yet having made rules pursuant to Section 83 of the Telecommunications Act (the Act), may still rely heavily on the mandatory provisions of inter alia, sections 29 and 30 thereof. These provisions have been enforced for quite some time and are embodied in the Reference Interconnection Offer deposited with the OUR. This has resulted in effective regulation of the provision of access to network elements owned by C&WJ in that such access is provided on a cost basis, on a transparent and non-discriminatory basis;"

Comments: The Office wishes to note that Section 30 of the Telecommunications Act 2000 applies to a dominant public voice carrier. Further, notwithstanding C&WJ's obligation under Sections 29, 30 and 32 of the Act, the Office has an obligation under Sections 28(1) to determine "...which public voice carriers are to be classified as dominant public voice carriers for the purpose of this Act."

- (ii) "Another competitive safeguard which C&WJ wishes to highlight is the Price Cap regulation of all retail services offered by C&WJ, with the exception of retail mobile, Internet and PABX sales and rental. This provides an effective constraint on our retail pricing, and in turn an effective constraint on wholesale pricing which is based thereon;"

Comments: The fact that C&WJ views the Price Cap as a competitive safeguard suggests that C&WJ agrees that the services regulated under the price cap are not supplied in effectively competitive markets. Further, the issue at hand is: in the absence of regulation, would C&WJ be constrained by its competitors or potential competitors in the markets for the services regulated under the Price Cap?

(iii)

- (iv) "The Fair Competition Act (FCA) in no way limits the jurisdiction of the Fair Trading Commission in respect of competition issues within the telecommunications industry. The Fair Trading Commission (FTC) under section 5 of the FCA therefore has the power to not only investigate where the OUR believes it prudent, but to investigate of its own motion where it believes that an entity is engaging in anti-competitive practices, including abuse of dominance, discrimination or other anti-competitive activities. The absence of rules pursuant to Section 83 of the Telecommunications Act in no way inhibits its powers. Further, it is the view of C&WJ that the OUR should guard against over-regulation by producing rules and regulations in relation to issues over which the FTC also has jurisdiction;"

Comments: The Office notes C&WJ's comments as indicated at (iv) above.

(v) ...

- (vi) "The OUR has not yet completed its consultation on accounting separation started in 2000, despite several requests from C&WJ that this issue be taken forward. It is the sincere hope of C&WJ that the OUR will therefore not seek to rely on the failure to have "proper regulatory accounts" as a presumption that the said C&WJ seeks to extend its dominance in the international voice service market to the mobile voice service market."

Comments: In its statement at note (vi) above, C&WJ has admitted that it was dominant in what it calls “the international voice service market”. However, with the removal of the legal barriers to entry, the important question is: is C&WJ now non-dominant in the markets for international voice and network services? The industry information that the Office intends to start collecting on a regular basis as at October 2003 will assist the OUR in answering this question.

Facilities Sharing

- 1.11 C&WJ said that, “Facilities Sharing is dealt with under sections 54 and 55 of the Telecommunications Act. The Act specifically provides that carriers can request to share facilities of other carriers and that where disputes arise as a result of refusal to share, the aggrieved carrier can apply to the court for redress. C&WJ merely wishes to remind the OUR that there is no provision in the Act related to the power of the FTC or the OUR to make any determination in such matters, nor in any other related matters.”
- 1.12 The Office agrees with this position. As noted by C&WJ, the OUR may not be able to order carriers to share their facilities or offer co-location since it has no explicit basis in law, even though best practice would dictate that the Office should be allowed to issue such orders. However, the fact that disputes arising as a result of refusal to share must be referred to the court for redress means that litigation could be used to delay access to land or other facilities. In other words, litigation could be used to prevent increased competition by delaying access to land or other facilities.
- 1.13 In the case of a dominant public voice carrier, even though there is no provision in the Act related to the power of the FTC to make any determination in matters related to facilities sharing, it is the OUR’s understanding that the FTC could take action if access to an essential facility is refused or provided on a discriminatory basis.
- 1.14 According to C&WJ, it “...trusts that the OUR is not seeking to legislate through its determinations....”
- 1.15 The Office has no power or authority to make laws; that power resides solely with the Parliament.

Carrier Pre-Selection

- 1.16 The Office agrees that carrier pre-selection is only one form of indirect access and notes that the issues related to indirect access are being addressed in a separate consultation.

Numbering

- 1.17 C&WJ seems to be suggesting that numbering is inappropriate for consultation on dominance. However, in relation to the telecommunications industry, numbers and codes are finite resources and their allocation (current and historic) could affect the level of competition in telecommunications markets. Thus, the Office considers its inclusion in this consultation to be appropriate.

(1B) THIRD CONSULTATIVE DOCUMENT

- 1.18 Paragraph two (2) of C&WJ's response to the OUR's third consultative document (C&WJ's Response to the OUR's Consultative Document on Dominant Public Voice Carriers No. 3) states:

“Some of the concerns that C&WJ had raised and which the Company had expected the Office to address in detail in this Consultative Document, are, inter alia, the appropriate application of the SSNIP test, reconsideration of markets in which the OUR has declared C&WJ to be dominant and the matter of dominance by default and in unspecified markets.”

As listed above, the OUR addresses each issue in turn.

Appropriate Application of the SSNIP Test

The "hypothetical monopolist" test

- 1.19 The Small but Significant and Non-transitory Increase in Price (SSNIP) test or the "hypothetical monopolist" test is used in competition analysis in various competition and regulatory agencies to define markets. Although the Test has its weaknesses, it has proved to be a useful tool for market definition.
- 1.20 “In essence, the "hypothetical monopolist" test involves considering whether a hypothetical monopolist supplier of the product/service for which a market definition is sought could sustain a small but significant and non-transitory price increase above the competitive level. If the price increase is sustainable by the hypothetical monopolist supplier, the conclusion must follow that that product/service represents a market in its own right. If, on the other hand, consumers switch to other products/services (demand-side substitution) or producers switch from the production of other products/services to a substitute (supply-side substitution), it must equally follow that these other products/services are to be considered as being in the same market as the product/service provided by the hypothetical monopolist supplier. This

experiment can then proceed up to the point where no more substitutes are found for the product/service in question, at which point the market-definition exercise will have been completed.”²

- 1.21 There are two main concerns with the SSNIP test, the case where price is above cost and the case where price is regulated. In relation to price above cost, what is commonly known as the "cellophane fallacy," relates to the possibility that the reference price for the "hypothetical monopolist" test may actually be higher than the competitive level³. This may be the case when the monopolist supplier is already charging an inflated price relative to the cost for its product/service. Thus, the application of the SSNIP test in this case would lead to a market definition that is too wide. In cases where price is regulated, one could argue that the application of the SSNIP test may lead to the reverse of the "cellophane fallacy". That is, it may lead to a definition of the market that is too narrow.
- 1.22 There seems to be merit in these arguments, especially since it is recommended that the relevant price that should be used when conducting the SSNIP test is the competitive price. In relation to the tariffs for telephone access (business and residential), inter-parish and intra-parish calls, these have historically remained below cost as they have been cross-subsidized by the price of international calls, which remain above cost. In this context, it is not possible to identify the competitive price level. However, what the SSNIP analysis does is to illustrate the fact that, at current price levels the incumbent (C&WJ) has no competition. This view is supported by NERA:

“Although evidence that two products are substitute at current prices does not *prove* that they are in the same relevant market, failure to show that two products are substitutes at current prices does prove that they are *not* in the same market for the purpose of assessing dominance. At a minimum, therefore, any firm seeking to claim that they face effective competition from a rival product must be able to show that the product concerned is a substitute at existing prices.”⁴

² See http://www.oftel.gov.uk/publications/oftel_response/2001/smp0701.htm#detail

³ The "cellophane fallacy or trap" is observed in the [U.S.] Supreme Court's apparent market definition error in *United States v. E.I. DuPont DeNemours & Co.*, 351 U.S. 377 (1956). In that case, the Court defined a flexible wrapping material market which included cellophane, wax paper etc., rather than a cellophane only market, because of high cross elasticity of demand. The high cross elasticity occurred only after DuPont had exacted monopoly profits for decades and raised the price of cellophane so high that substitution of less desirable wrapping materials finally occurred. See <http://www.ftc.gov/opp/global/speech.htm#27>.

⁴ See the OFT report prepared by NERA: Market Definition in Monopoly and Dominance Inquiries, July 2001.

- 1.23 However, the OUR will concede that, without the regulatory barrier of sub-caps on access and usage tariffs, the relevant market may include GOTEL. Based on the definition of the market using current prices, C&WJ's market share would be 100%, while under what may be considered another plausible market definition that includes Gotel's telephone access service, C&WJ's market share would be approximately 99% as at the end of March 2003. This is still far in excess of the 50% threshold stipulated by the FTC for a presumption of dominance. In order to determine dominance in either the narrower or the broader market, the OUR also conducted an analysis of the barriers to entry and competitive constraints which is indicative of C&WJ's dominance in the market for fixed telephone access.

Reconsideration of Markets in which the OUR has Declared C&WJ to be Dominant

- 1.24 In its response to the third consultative document, C&WJ stated that it "...is concerned about the seemingly random selection of the markets for discussion. The OUR has listed several services and then in paragraph 1.3 once more assigned a blanket determination of dominance without any analysis beyond legal barriers in existence prior to 2000. C&WJ also notes that the markets referred to in this Consultative Document are not the same as those set out in the second Consultative Document. This inconsistency without explanation is cause for concern."
- 1.25 First, the OUR selected the markets in which initial investigations suggest, are concentrated and in which competition remain weak or non-existent.
- 1.26 Second, in relation to the claim that the OUR has "...once more assign a blanket determination of dominance without any analysis beyond legal barriers in existence prior to 2000", the OUR wishes to state that the documents published in this consultation do not constitute a determination on dominance. Please also see the OUR's comments in paragraphs 1.28 to 1.39 below.
- 1.27 Third, in the OUR's second consultative document, the OUR stated that, based on its analysis, C&WJ is not constrained by competitors or potential competitors in relation to interconnection circuits, domestic long distance/transit, international transit and local loop access. Additionally, the Office suggested that mobile network operators are dominant in relation to mobile termination and fixed network operators are not constrained by competition in relation to fixed termination. In relation to these markets and all other telecommunications markets included in this consultative process, the Office intends to make a declaration of dominance or non-dominance (as the case may be) depending on the completeness of the information available to it. Subsequent to this determination (July 2003), the OUR intends to embark on its first comprehensive review of the telecommunications industry starting in August 2003 and ending in

April 2005. At the end of this process, the Office will make a Determination on the degree of effective competition in the various telecommunications markets. Further, as the markets evolve and information becomes available, the OUR will consult on and make a determination on, and make further determination on dominance or non-dominance where necessary.

Dominance by Default in Unspecified Markets

- 1.28 Cable and Wireless Jamaica (C&WJ), in its response to the OUR's Consultative Document "Dominant Public Voice Carriers No. 2" stated that "... the Act provides that prior to the OUR determining which public voice carriers are to be classified as dominant it must invite submissions from the public and consult with the FTC. The burden of proof is squarely placed on the OUR to demonstrate a party's dominance. The OUR, throughout the consultative document seeks to make a blanket determination in undefined markets prior to consultation...". The claim relating to the OUR determination of "dominance by default was also made in C&WJ's response to the third consultative document. The OUR addressed this concern in its previous document but will provide additional information below to explain the basis for its position.
- 1.29 The Act (at Section 28(1)) clearly imposes a responsibility on the Office to make a declaration of those public voice carriers that are to be classified as dominant public voice carriers, for the purposes of the Act. The Act at Section 27 defines a dominant public voice carrier as being dominant within the meaning of Section 19 of the Fair Competition Act. It is the considered opinion of the OUR that the legal barriers to entry in various telecommunications markets as per the Act (particularly those restrictions on licensing of other public voice carriers to own and operate telecommunications facilities for the purpose of providing specified services, based on Sections 9 and 78 of the Act), were sufficient to accord to C&WJ the classification as a dominant public voice carrier in the markets for all specified services that are provided by these facilities. The existence of these barriers for more than a decade means that this position is likely to be entrenched. Therefore, the removal of these barriers does not mean the relevant markets are effectively competitive.
- 1.30 According to McNutt (2000)⁵ "Often a national monopoly⁶ may arguably be in a dominant position because of the history of the State and its responsibility for the provision of a public and universal (a public good argument) service." This position is consistent with the European Court of Justice's position "...that a legal

⁵ Professor Patrick McNutt was Chairperson of the Competition Authority in Dublin from 1996 to early 2000. He is now Partner and Head of Competition & Regulatory Affairs at Indecon Consultants in Dublin. He is a Research Associate at the University of Dublin. See <http://www.indecon.ie/mcnusp01.htm>.

⁶ The Court of Justice [of the European Communities] has held that an undertaking benefiting from a legal monopoly in a substantial part of the common market may be regarded as holding a dominant position, Case C-41/90 *Hofner & Elser* [1991] I 1979 para 28 and Case C-260/89 *ERT* [1991] ECR I -2925 para 31.

monopoly had a dominant position by definition”⁷. McNutt (2000) also stated, “...the responsibility of dominant companies that are still or were formally the holders of special and exclusive rights within the meaning of Article 82, is particularly strict given the extremely weak state of competition which is inevitable in the early stages of liberalisation and the transition to fully competitive markets.”

1.31 This is consistent with the OUR’s position that the legal barriers to entry in various telecommunications markets, particularly those restrictions on licensing of other public voice carriers to own and operate telecommunications facilities for the purpose of providing specified services, based on Sections 9 and 78 of the Act, and the resulting exclusive provision of those services for 18-36 months, were sufficient to accord to C&WJ the classification as a dominant public voice carrier in the markets for all specified services that are provided by these facilities.

1.32 These specified services include:

(a) Fixed Access

- (i) Business access: This includes installation, rental, relocation and reconnection of ordinary business lines and direct inward dialling (DID).
- (ii) Residential access: This includes installation, rental, relocation and reconnection of ordinary residential lines and direct inward dialling (DID).

(b) Domestic Retail Services

- (i) Intra-parish Calls: These are calls originating from a fixed access line (residential or business telephone) in one parish to a fixed access line in the same parish.
- (ii) Inter-parish Calls: These are calls originating from a fixed access line (residential or business telephone) in one parish to a fixed access line in another parish.
- (iii) Public Pay Phones
- (iv) Other Domestic Retail: These include call waiting, three way dialling, call forwarding, automatic busy redial, priority ring, automatic call back, selective call rejection, selective call forwarding, directory assistance and freephone services.

(c) International retail services

⁷ See <http://www.ciaonet.org/wps/saw02/>.

- (i) Outgoing International Calls: These are calls on a fixed access line and wholesale minutes (including sales to mobile service providers) to points outside of Jamaica.
- (ii) Incoming International Calls

(d) Fixed Network Interconnection Services

- (i) These carrier interconnection services are sold by C&WJ to other operators and downstream Businesses. They include switching, transmission, termination and other apparatus and system used in supplying telecommunications services.

1.33 The Court of Justice of the European Community has consistently held that an undertaking having a statutory monopoly over a substantial part of the common market may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgments in Case C-179/90 *Merci Convenzionali Porto di Genova* [1991] ECR I-5889 at paragraph 14 and in Case C-18/88 *RTT v GB-Inno-BM* [1991] ECR I-5941 at paragraph 17)⁸. The OUR is of the opinion that this would also be true, regarding statutory monopolies being viewed as dominant in the Jamaican context.

1.34 Further, the relevant markets would be the market for each individual service since only C&WJ could supply these services based on the licensing restrictions and the fact that there were no substitutes that facilitated real-time communication. For example, residential telephone access could not be supplied by: subscriber television operators, other fixed network operators, wireless network operators or any other operator. Additionally, telephone access allows for real-time two-way voice communication, which is not substitutable, that is, there are no close substitutes other than access via other telecommunications network facilities. Thus, the service that C&WJ provides would have constituted the relevant market. If the incumbent (C&WJ) charged a price above the competitive level, it would not be constrained by any competitor or potential competitor since entry was barred to this market. The same analysis could be done for all the services listed in paragraph 1.32 above. Thus, the market for each service would be the relevant market for that service and the incumbent would be the monopoly and dominant provider during the period of exclusivity⁹.

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http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=691J0320

⁹ The period of exclusivity lasted for 18 to 36 months.

Equating Liberalization to Effective Competition

- 1.35 According to C&WJ, “While legal barriers may have been sufficient prior to the year 2000 to justify a determination that C&WJ is dominant, it is clear that all markets are now fully liberalized and the current licensing regime is not a barrier to entry. Accordingly, at this point in time, the OUR should be examining and analyzing the facts, as dominance is not a matter of law, but a matter of fact.”¹⁰
- 1.36 Firstly, the OUR does not understand why C&WJ would claim that legal barriers before 2000 would make C&WJ dominant while those created by the Act do not. The OUR wishes to note that the Act maintained C&WJ’s exclusivity for 18-36 months from March 2000.
- 1.37 Secondly, the Office does not share the view that liberalization is equivalent to effective competition. The OUR’s opinion is that since the specified services have been exclusively supplied by the incumbent, firstly as a state monopoly for several decades and then as a private statutory monopoly, C&WJ’s dominance is likely to be entrenched. In some markets, there is likely to be limited or no competition or potential competition due to economic, technical or regulatory barriers.
- 1.38 Thirdly, the OUR holds the position that dominance is a matter of law and/or fact. In relation to dominance being a matter of law, the OUR’s position is consistent with the view in other jurisdictions that an enterprise having a statutory monopoly in a significant part of the relevant market may be regarded as having a dominant position in that market.¹¹
- 1.39 It is against this background that the Office has taken the position that an examination of the various telecommunications markets to determine if C&WJ is non-dominant is what is required. In relation to other carriers, the OUR is required to determine if these carriers have gained a dominant position in any telecommunications market.

Profitability of Business Segments Relative to Cost of Capital

- 1.40 C&WJ indicated that “...the OUR already has available to it [,] cost information for C&WJ that the Office has subjected to very vigorous review.” However, as stated in the third Consultative Document, to undertake a profitability analysis,

¹⁰ See page 2 of C&WJ’s response to the OUR’s consultative document on dominant public voice carriers no. 3

¹¹ See

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=691J0320

the Office would require accounting data that is based on a system of regulatory accounts, with appropriate levels of separation. The OUR is not aware that this data exist in a form that will allow a robust analysis of the profitability of each business unit or for specified services. For example, the primary source of cost data for the Office's calculation is CWJ's cost-accounting system, which provides estimates of fully allocated cost by service. Costs of access and installation are not reported separately for residential and business. This level of granularity would be required in order to conduct the required profitability analysis.

1.41 Section 4(5) of the Act requires the Office to:

“...make rules, subject to affirmative resolution, prescribing the system of regulatory accounts to be kept by a dominant carrier or service provider in relation to specified services.”

Where necessary, this requirement will be imposed on dominant carriers or service providers.

Market Power, the Act and the Constraint of the Price Cap

1.42 C&WJ stated that it “...is unclear as to the logic of this paragraph [1.10 of the third consultative document]. It states both that the legislation required price caps to be imposed as a means of constraining C&WJ's pricing, and also states that the legislation provided C&WJ with sufficient market power to price its services without constraints. The paragraph is further based on the premise that price caps are related to dominance. Neither section 46 or 81 of the Act ties the imposition of price caps to dominance or the lack of effective competition. Those sections only refer to the existing carrier.”¹²

1.43 Based on the Act, C&WJ remained the exclusive provider of specified services for a further eighteen to thirty-six months from March 1, 2000 and hence, a public voice carrier that, in the absence effective regulatory constraint, could act without effective constraints from competitors or potential competitors. Its exclusivity in relation to international carrier services and international voice services were preserved for a further three years from March 1, 2000. Therefore, in the absence of any price regulation, C&WJ would be able to set the prices of international carrier services and international voice services without effective constraints from competitors or potential competitors. That is, there could be no competitive constraints since C&WJ was the exclusive provider of specified services. As indicated by the FCA, if an enterprise occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors, it is dominant. The incumbent

¹² See page 3 of C&WJ's response to the third consultative document.

(formerly a monopoly established based on the previous telephone Act and for a period of exclusivity of 18-36 months subsequent to March 2000) maintained 100% share of all markets for specified services listed at paragraph 1.32 for several years with no threat of competition. However, the price cap (as prescribed by the Act) limits C&WJ's ability to abuse its market position by constraining the pricing behaviour of the Company.

- 1.44 C&WJ stated that: "...the implementation of a price cap regime as a means of general price regulations for consumer protection does not presuppose dominance in discrete markets. Dominance is an issue dealt with under Part V which deals with interconnection while Price Cap is an issue under Part VII which deals with consumer protection." The question is: what are consumers being protected from? According to Tetrault (2000), "Good price regulation mimics the results of efficient competition. However, price regulation may have additional objectives. The objectives of price regulation may be grouped into three broad categories: Financing ...; Efficiency ...; and Equity" The latter objective relates to the fair distribution of welfare benefits among members of society. Thus, consumer protection is an important but secondary objective of a price cap regime. The major objective of a price cap is to mimic the result of efficient competition. This means that the regulated entity should only be able to make a normal return on their investment under the price cap.
- 1.45 To meet the equity objective, the only direct protection offered to consumers is the sub-caps on fixed telephone access prices (line rental and installation), and inter-parish and intra-parish usage prices. Indirectly, the price cap regime protects the consumer by ensuring that the regulated entity does not make super normal profits from services covered by the price cap regime. From this perspective, the OUR agrees that an objective of the Price Cap is to protect consumers. However, the consumers only need this kind of protection if the regulated entity has sufficient market power to price specified services above the respective cost of providing such services.
- 1.46 The OUR still holds the opinion that the primary intent of the price cap (as prescribed by the Act) is to prevent the regulated entity (in this case C&WJ) from using its market power to charging prices that are above cost in order to earn super normal profits. In the absence of competition, without a regulatory regime such as the existing price cap, C&WJ could earn super normal profits. Hence, consumers and other customers (potential competitors) would not be protected from C&WJ's pricing behaviour without this kind of pricing regulation.

Dominance and the Reference Interconnection Offer (Rio)

- 1.47 According to C&WJ, Section 32 of the Act "...does not state that the existing telecommunications carrier is a dominant carrier. It simply imposes the same

obligation upon both categories of carriers. In this regard, C&WJ submitted the initial RIO pursuant to the obligation imposed on the *existing carrier*.¹³ While C&WJ agrees that Section 32 refers to two categories of carriers, C&WJ indicated that this section does not state that the existing carrier is dominant. The OUR agrees with this position. However, if the existing carrier is not in the category of other carriers (carriers that are not mandated to lodge a proposed RIO with the Office), the Office maintains that the existing carrier (C&WJ) is a “dominant carrier” as is indicated by the wording of Section 32. The Office invites C&WJ to demonstrate that it falls in the category of “other carriers” and not in the category of “dominant carriers”.

Periodic Re-Examination of Markets for Effective Competition

- 1.48 C&WJ said that it is not clear on the relationship between the Telecommunications Market Review Process and future determinations of dominance. 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.
- 1.49 C&WJ also said that it is not clear on how the market review process should operate. Based on the information collected, the OUR will carry out its assessment and publish its findings in the usual manner in a consultative document. At the end of the review period, the Office will issue a determination on the state of competition in the relevant market. At the same time, if the OUR identifies markets in which dominant carriers exist, or markets in which carriers were dominant but are no longer dominant, the required declaration (subsequent to consultation) will be made. A declaration of dominance or non-dominance may be made during, at the end of, or after the market review process, depending on the sufficiency of information available to the Office and the timetable for the consultation process.
- 1.50 C&WJ said that it is concerned that the data collection position paper will be issued in July and the first request for data will be issued in July or August. The OUR assures all carriers that, consistent with the Office’s obligations under the Act, sufficient time will be available to consider representations on matters relating to the data to be collected. Further, the Office wishes to state that some of the data that will be requested will be information that is kept by carriers and service providers in the normal course of their business. Additionally, the first data submission will not be due until October 2003.

¹³ See page four (4) of C&WJ’s response to the third Consultative Document on Dominance.

Cross-Subsidy of Residential Customers by Business Customers

1.51 According to C&WJ, it agrees that it is likely that business customers are more profitable than residential customers since there is cross-subsidisation of residential segments by business segments which is a legacy of the social, economic and telecommunications policies of the Government of Jamaica.¹⁴ This suggests that access prices (line rental and installation) and/or usage prices for business customers are greater than costs. This seems contrary to C&WJ's previously stated position that these services are priced below cost.

Dominance and Criminal Standards

1.52 C&WJ claims that the OUR is imposing criminal standards in relation to dominance by the use of the term "beyond doubt" in relation to a declaration of non-dominance. The Office wishes to note that the use of the term "beyond doubt" was not meant to have any legal connotation. It simply means that if the Office views entry barriers and competitive constraints to be significant in preventing and/or impeding competition, then there is doubt that the relevant market is competitive and will be competitive in a reasonable period of time.

Backhaul Circuits and C&WJ's Rio

1.53 According to C&WJ it "...refutes the OUR's interpretation of the Act in relation to its statement that C&WJ has an obligation to provide interconnection to its "international transit and switching facilities", and that this includes C&WJ's cable facilities. The only obligation for interconnection stipulated in the Act is to the public voice network of other carriers (Sections 29(1) and 30 (1) of the Act)."¹⁵ The Office agrees that C&WJ's obligation for interconnection stipulated in the Act is to the public voice network of other carriers. However, it should be noted that telecommunications networks offering international voice services are also public voice networks. Therefore, as per Section 29(1) of the Act, "each carrier shall, upon request in accordance with this Part [*Part V of the Act*], permit interconnection of its public voice network with the public voice network of any other carrier for the provision of voice services." Further, Section 30(1) applies only to dominant carriers. As noted by the Office in its Determination Notice on Cable and Wireless Jamaica's Reference Interconnect Offer (RIO-4)¹⁶, "The Act requires that C&WJ's interconnection charges be cost oriented." Also, in the same Determination Notice, the Office decided that directory assistance services offered by C&WJ must satisfy the principle of non-discrimination.¹⁷ In these and other instances, the Office directly applied Section 30(1) of the Act to C&WJ.

¹⁴ See page ten (10) of C&WJ's response to the third Consultative Document on Dominance.

¹⁵ See page four (14) of C&WJ's response to the third Consultative Document on Dominance.

¹⁶ See the Office's Determination Notice dated February 21, 2001.

¹⁷ See Determination 4.4.

This is consistent with the OUR's view that the legal barriers to entry in various telecommunications markets, were sufficient to accord to C&WJ the classification as a dominant public voice carrier in the markets for all specified services provided by these facilities.

CHAPTER 2: DIGICEL'S COMMENTS ON THE CONSULTATIVE DOCUMENTS (CD)

(2A) SECOND CONSULTATIVE DOCUMENT

2.1 In response to the second consultative document (CD) on dominant public voice carriers, Mossel Jamaica (Digicel) raised some issue on which the OUR wishes to comment.

2.2 "Digicel requests that the OUR justify the issuing of a Consultative Document involving mobile termination while legal action is still on-going."

Comments: This issue was addressed in the OUR's third consultative document (CD) and in a letter to Digicel dated December 23, 2002.

2.3 According to Digicel, it "submits that the appropriateness of the OUR's cost methodology for establishing mobile termination rates remains uncertain."

Comments: In the March 2002 CD (Document No.: Tel. 2002/02) the Office explained its methodology for establishing mobile termination rates. Further, in its Determination Notice issued in May 2002 (Document No.: Tel. 2002/04), the Office stated that the results of its assessment are in general agreement with international benchmarks (UK). The Office is guided by Section 33(2) of the Act, which states, "Where the Office has been unable to obtain cost information that it is reasonably satisfied is relevant and reliable, it may take into account comparable international benchmarks." 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.

2.4 Digicel stated "that the OUR has put forward its conclusions on the state of competition in arbitrarily chosen markets without clarifying the methodology against which a finding of dominance is to be made, without empirical evidence to justify the definition of those markets and without setting out clearly the practical implications of a finding of dominance."

- Comments:*
- (1) The OUR selected the markets in which initial investigations suggest, are concentrated and in which competition remains weak or non-existent.
 - (2) Where required, the OUR will present empirical evidence to justify its definition of the relevant market.
 - (3) In relation to the methodology that informs a finding of dominance, the OUR notes that the major concern relates to the definition of the relevant market. Briefly outlined below is the OUR's approach to market definition as well as a comment on the use of regulated prices.

Approach to market definition

- 2.5 In the context of an assessment of a dominant position in a market, the 'relevant market' is used to describe the product or products that make up the market and an assessment of the geographical scope of the market.
- 2.6 Consistent with the approach adopted by OFTEL, the OUR's approach to market definition as proposed in its second CD, concentrates on identifying the constraints placed on the price-setting behaviour of telecommunications network operators. Consistent with the definition of dominance in the FCA, the Office focuses on how far suppliers (and potential suppliers) could increase or switch production capacity or enter the market to supply, or supply more of, the relevant products. This is usually referred to as supply-side substitution. However, as also indicated in the OUR's proposed "Guidelines for Assessing Dominance in Telecommunications Markets," the OUR will also assess how far it would be possible for customers¹⁸ to substitute other services or products for those in question, also considering the geographical scope of the product market. This is usually referred to as demand-side substitution.
- 2.7 In assessing the pricing constraints on a carrier or service provider, the concept of the 'hypothetical monopolist' is usually a useful tool for identifying *close* demand-side and supply-side substitutes. This is the so-called "hypothetical monopolist test" or the SSNIP test. It is important to note that this test is not intended to be a representation of the actual market situation but is instead, an analytic tool used in trying to establish the boundaries to the relevant product market from a practical standpoint.

¹⁸ The word customer (as per the Act) means a person who is provided with a specified service by a service provider and includes end users of that service.

Market definition in practice: Regulated prices

2.8 According to OFTEL, “Where there are certain products that are subject to price control, there might be an issue as to the appropriate price level to be used in the assessment of demand-side and supply-side substitution. There is a risk that if the current price level is too high – ie because there is little competition for a particular product – an assessment of demand-side substitution based on this level might encompass products that would not in fact be close substitutes if the price were closer to the competitive level. Any assessment of market definition, whether or not the products concerned are subject to price control must therefore be aware of this potential difficulty. However, it is intended to proceed on the basis that the prevailing price levels provide a reasonable basis from which to start the analysis unless there is evidence to suggest that this is not in fact the case.”¹⁹ The OUR proposes to adopt this approach in relation to regulated prices. In this regard, before issuing a Determination Notice in relation to dominance, in defining the relevant market(s), the OUR will re-examine its application of the SSNIP test to regulated prices.

Call Termination and Origination

2.9 “Digicel submits that the relevant market is the one for call termination generally given the interrelations and competitive pressures acting between call origination and call termination.”

Comments: The market for call origination is distinctly different from the markets for call termination. Hence, it is not clear how the supply of call origination places competitive pressure on suppliers of call termination.

Demand Substitution and Call Termination

2.10 “Digicel requests that the OUR carry out detailed empirical investigation of technical possibilities for termination via other networks, of the extent to which users use other means to avoid specific termination charges or subscribe to a network on the basis of what it costs to be called and of the substitutability of SMS and other technologies.”

Comments: The OUR considers that this kind of empirical investigation may yield valuable information in relation to the telecommunications market in general. However, when considering the issue of dominance, the OUR is only obligated to do so in the context of the definition under the Fair Competition Act (FCA).

Under Section 19 of the FCA, “... an enterprise holds a dominant position in a market if by itself, or together with an interconnected company, it

¹⁹ See http://www.oftel.gov.uk/publications/ind_guidelines/mig0300.htm#Annex%20B.

occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.” That is, the analysis of dominance must take place in a defined relevant market and should demonstrate that an entity has sufficient market power that enables it to act (by itself or in concert with other entities) without constraint from its competitors or potential competitors. Thus, the FCA requires an analysis of the constraints imposed on the alleged dominant enterprise by other suppliers and potential suppliers. For the avoidance of doubt, this means 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.

Unlike the FCA’s definition of dominance, OFTEL’s definition of dominance requires it to conduct a detailed examination of constraints imposed on the alleged dominant entity by competitors, customers and consumers. OFTEL defines dominance as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately consumers.”²⁰

In conducting its analysis of dominance, the Office is obligated to consider effective constraints from competitors or potential competitors on an enterprise that is suspected as holding a position of dominance in a market. However, the Office will, where it considers necessary, undertake detailed assessments of the constraints imposed by customers²¹. Additionally, the Office will consider empirical or other evidence submitted by parties to this consultation. In that regard, the Office invites those parties that indicated their ability to supply information that is relevant to this consultation to do so.

Wholesale Interconnection

2.11 “Digicel submits that the OUR should carry out detailed empirical investigation of the links between wholesale interconnection and its influence on retail termination charges through the degree to which retail termination charges influence mobile network churn, the degree to which subscribers are sensitive to the cost of calling their mobile telephones, the degree to which private subscribers choose "friends and family" and corporate subscribers choose closed group type

²⁰ See http://www.oftel.gov.uk/publications/ind_guidelines/mig0300.htm#Annex%20B.

²¹ The word customer (as per the Act) means a person who is provided with a specified service by a service provider and includes end users of that service.

arrangements all of which factors might constrain the wholesale rates for termination.

Comments: As noted in the third CD, in relation to the link between wholesale interconnection charges and retail termination charges, the OUR may have ignored this link as it is not familiar with the service to which retail termination charges are applied.

- 2.12 Digicel “Submits that the OUR should consult widely on how the OUR envisages evaluating dominance in the telecommunications sector including the factors to be taken into account and how they are to be measured, the competition problems raised in the telecommunications sector and the sector specific remedies that it envisages imposing to correct them and to ensure effective competition, the markets that it anticipates may require regulation, and on the practical implications of a finding of dominance.”

Comments: See comments on Digicel’s response at paragraph 2.8 in the third CD and paragraphs 2.17 to 2.19 of this document in relation to the practical implications of a finding of dominance. In relation to the suggestion for the OUR to consult widely on the issue of dominance and how it intends to investigate dominance in telecommunications markets, the OUR has published three consultative documents, two of which contained its assessment of dominance in relation to mobile termination. Each document, the responses from parties to the consultation process and the reply comments have been posted on the OUR’s website. These documents are also available for viewing at the OUR. Additionally, a Public Notice inviting comments from any member of the public was issued. The OUR also stated the methodology for assessing dominance in its second Consultative Document.

OUR’s Work Programme

- 2.13 “Digicel laments the lack of transparency and fairness that results from the absence of an OUR work programme despite repeated calls for such a programme.”

Comments: The Office has since supplied Digicel with its budget and work plan for the current financial year (2003/2004).

FTC’s Participation

- 2.14 “Digicel laments the lack of participation by the FTC in a Consultative Document relating to competition concepts as opposed to purely regulatory ones.”

Comments: The Office wishes to note that the OUR is in consultation with the FTC on the matter of dominance in the telecommunications markets. The OUR has received and published the FTC's response to the first two CD. The FTC's responses were posted on the OUR's website and are also available from the OUR's Information Centre. Additionally, prior to publication, the Office will be sending a draft Determination Notice to the FTC for its comments.

Regulatory Intervention

2.15 Digicel said, it "Highlights the sensitivity of markets to regulatory intervention and cautions against the precipitous adoption of ex ante measures in relation to a young and developing market.

Comments: The OUR notes this comment.

(2B) THIRD CONSULTATIVE DOCUMENT

Proposed Telecommunications Market Review

2.16 At a meeting held at the OUR's offices May 1, 2003 at Digicel request, representatives of Digicel asked for clarifications in relation to the timetable for the telecommunications market review. The OUR clarified its position on this issue at the meeting but for the records, now sets out that clarification below.

Subsequent to issuing a Determination Notice on Dominance in July 2003²² (in the telecommunications markets where the OUR has sufficient information), the OUR intends to embark on an industry-wide data collection process that will enable it to assess the competitiveness in the various telecommunications markets on an on-going basis. The data collected will also assist the OUR in identifying carriers or service providers that hold dominant positions in telecommunications markets. Additionally, this information should also be useful in analysing applications for a declaration of non-dominance in these markets.

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. Also, as information become available, the

²² The previous indicative date was June 2003.

OUR will consult on and make a determination on dominance or non-dominance where necessary.

Obligations Of Dominant Carriers

- 2.17 Digicel also wanted to know what specific obligations would be imposed on carriers that are declared dominant. The OUR indicated that, the current consultation seeks to determine if there are dominant carriers in any telecommunications market. If dominance is identified, the consequences will be the subject of consultation.
- 2.18 In relation to this concern and for the avoidance of doubt, the OUR lists *some* of the main consequences that *could* flow from a declaration of dominance:
- Price Cap as per Section 46
 - Competitive Safeguard as per Section 35
 - (i) Separation of account;
 - (ii) Keeping of records;
 - (iii) Provisions to ensure that information supplied by other carriers for the purpose of facilitating interconnection any uncompetitive purpose;
 - (iv) Such other provisions as the Office considers reasonable and necessary for the purpose of competitive safeguard rules.
 - Interconnection principles related to dominant public voice carriers are set out in Section 30 of the Act;
 - Each dominant carrier shall lodge a RIO with the Office as per Section 32 of the Act;
 - Where applicable, the Office may also make rule subject to affirmative resolution, imposing on a dominant carrier, the responsibility to offer a particular form of indirect access to its network to other interconnection providers; and
 - The Office may also make rules subject to affirmative resolution, prescribing the system of regulatory accounts to be kept by a dominant carrier or service provider in relation to specified services.
- 2.19 As stated above, if dominance is identified in any market, the consequences of an enterprise holding such a position will be the subject of consultation.