Columbus Communications Jamaica limited

Response to NPRM
On
Resolution of Interconnection
Disputes in the Telecommunications
Sector

OPENING REMARKS

The views expressed herein are not exhaustive. Failure to address any issue in our response, does not in any way indicate acceptance, agreement or relinquishing of Flow's rights.

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Introduction

With respect to pre-contract interconnection disputes we note the revisions to the Act reduces the role of the OUR in such disputes when compared to the 2000 Act. Whereas in the 2000 Act this was a requirement "The Office shall make rules applicable to the arbitration of per-contract disputes" [S 34(1) (2)], in the revised Act the role is discretionary and subject to consultation with the Minister. During the initial period after liberalization when the OUR had an obligation to develop rules for such disputes it did not. Notwithstanding the reasons given by the OUR for not acting on an obligation, in the interest of transparency, it is important that the OUR clarifies why at this point in the development of the industry it deems it necessary to develop such rules.

The interconnection framework requires a dominant operator to publish a Reference Interconnection Offer (RIO). Currently the interconnection arrangements inclusive of rates are based on LIME's RIO. This is consistent with the requirement for a dominant carrier to publish a RIO. In seeking to ensure consistent interconnection arrangements across the market, the interconnection agreements of other parties are based on LIME's RIO.

Based on the above and in the interest of transparency we request that the OUR informs the industry of its reasons for making rules for interconnection disputes at this point.

Legal Framework

In the Act, the issue of pre and post contract disputes are addressed specific to interconnection. We note that in outlining the legal basis for establishing the proposed rules, the OUR referenced Section 4 of the Act and specifically areas relating to the regulation specified services

and facilities. Of note, Section 4 outlines the main functions of the OUR.

It is our considered view that the specified services mentioned in Section 4 is a general description of services to be specified later in the document. In the Act specified service is defined as "*a telecommunications or such other service as may be prescribed*." For example interconnection service is one of several other services that were later named in the Act. The rules TATT is proposing to develop are related to the provision of interconnection services. It is unclear why in addressing the issue of developing rules for interconnection services, the OUR deems it necessary to discuss specified services.

The Office in the Abstract to the NPRM correctly references the relevant sections of the Telecommunications Act that gives it the mandate to make rules to resolve interconnection disputes.

In seeking to establish a link between interconnection as a specified service and its mandate to regulate such services the OUR refers to Section 4(4) of the OUR Act. This section deals with the Office' power to determine rates for a prescribed utility service. According to the OUR in the OUR Act "*a utility service specified in the First Schedule"* which Schedule states it to include *"the provision of telecommunication services*".

It is our considered view that with the significant changes in the telecommunications landscape since the OUR Act of 1995 was

passed, reference to telecommunications services as utility services is out of step with the reality of the industry today. We reiterate it is unclear why the OUR is seeking to establish this link between interconnection services addressed in the Telecommunication Act and specified utility services referenced in the OUR Act, we are requesting that the OUR clarifies this point.

Annex A

Before specifically addressing the contents of Annex A, we believe it is important to note that the existing legal and regulatory framework for the provision of telecommunications services has lagged the development of the industry. Since the OUR has to rely on the existing framework for the development of the rules, in all likelihood such rules will not be reflective of international best practices and current trends in dispute resolution in the sector.

The OUR does not specify the dispute resolution approach on which the rules are based. The proposed rules are court-like, and consistent with a traditional administrative adjudication approach. Based on past experience, which the OUR alluded in giving reasons why no dispute resolution rules were put in place since the onset of liberalization, CCJL questions whether the approach now being considered is consistent with market developments and trends in dispute resolution in interconnection disputes.

With the significant changes in the sector since liberalization in 2000, when the Act governing the sector was passed, consideration should be given to considering alternative methods such as arbitration and mediation. The traditional administrative adjudication approach has some significant drawbacks, for example they can be lengthy and the procedures cumbersome. Decisions from such proceedings may tend to be very narrow and fragmented as the decisions arise from specific claims defined by parties to the dispute.

Within the context of liberalization and the development of competition there is a trend towards using more flexible alternative dispute resolution approaches to resolving interconnection disputes, especially in cases where none of the parties is a dominant provider. This is seen for example in the EU Framework Directive that contemplates the use of alternative dispute resolution mechanism such as mediation at least as a first step in managing disputes. This trend is also noted into other markets such as the United States.

Complaints

While our comments are not exhaustive below we address some of the issues in Annex A to further highlight our concerns expressed above.

At item 4(2) the OUR proposes to resolve the issue relating to a complaint within fourteen working days. However the process outlined in subsequent sections [e.g. Sections 7.2, 12.1, 14.1, 14.2 etc.) would

far exceed the fourteen days mentioned here. This goes to the point relating to the length of such processes mentioned above.

Intervention by the Office in a Dispute

In paragraph 2 the Office states that where on its own initiative it intervenes in a dispute "*the Office shall give such directions as it thinks fit*." This seems very arbitrary and is inconsistent with good regulatory practice. We believe that as part of any rules the OUR should set clear guidelines to determine what conditions should be present for it to initiate a process to resolve an interconnection dispute, especially where none of the parties to the dispute is a dominant carrier.

While the Act gives the OUR the mandate to make rules "as it thinks fit", in acting on this mandate the basis for such action should be clear to the industry, and be the outcome of a consultation process.

Assessment of Dispute

In item 7(3) the Office states that where it intervenes in a dispute on its own initiative it will require the parties to give an indication of the nature and status of the dispute. It begs the question as to why the OUR is intervening in a dispute if it is not aware of the nature and status of the dispute. This underscores the point made in the preceding paragraph, that the OUR should set clear guidelines to determine what conditions

should be present for it to initiate a process to resolve an interconnection dispute on its own initiative. In general we find that the assessment process is very arbitrary. Good regulatory processes should be specified to ensure objectivity and transparency.

Matters to Include in the Notice of Request and Affidavit

In item 8(2) in setting out the process for filing it would be helpful if the process speaks to methods of filing e.g. whether via hard copy documents to the OUR or electronically. The process should also speak to the validation method for such filings.

Constitution of the Panel

The panel seems to be made up of only staff from the Office. International best practice indicates that in such procedures the panel should include experts that are not staff of the regulatory agency. We recommend that any such proceedings should be informed by international best practices.

Compliance with the Decision of the Panel

While we understand that due process would dictate that a party aggrieved by a decision of the Office have the right to be heard, the fact that a resolution could be further delayed until a determination is made, speaks to one of the major drawbacks with such processes, the length of time it could take to get to a resolution.

Dismissal of Notice of Request by Panel

If a request is frivolous this should have been detected before expending time and other resources in pursuing a dispute process. We believe this promotes inefficiency in the regulatory process, and contrary to good regulatory governance. A key objective of industry regulation is to promote cost and market efficiency. CCJL is of the considered view that this process does not. As indicated earlier clearer and well defined scope and terms of references of such procedures would serve to minimize such inefficiencies.

Withdrawal of Request

Refer to comments in the previous paragraph.

Conclusion

While not addressing all elements of the NPRM, we trust the above will serve to inform the process. We look forward to providing further comments in subsequent phases of the process.