

DOCUMENT TITLE AND APPROVAL PAGE

1. DOCUMENT NUMBER: Tel 2004/02

2. DOCUMENT TITLE: OBSERVATION OF APPEAL TRIBUNAL'S ORDER ON SETTLEMENT RATE DECISION

3. PURPOSE OF DOCUMENT

This document provides notice of the Office's compliance with the Telecommunications Appeals Tribunal's directive that the Office stays any further directive it proposes to issue on April 1, 2004.

4. RECORD OF REVISIONS

Revision Number	Description	Date
1	Decision on Settlement Rate	January 23, 2004
2	Modification of Decision on Settlement Rate	February 20, 2004
3	Observation of Appeal Tribunal's Order on Settlement Rate Decision	March 31, 2004

5. APPROVAL

This document is approved by the Office of Utilities Regulation and becomes effective on April 1, 2004.

On behalf of the Office:

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J Paul Morgan
Director General

March 31, 2004

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Date

OFFICE OF UTILITIES REGULATION

Notice of Decision on Settlement Rates as of April 1, 2004

BACKGROUND (INITIAL DECISION)

On January 23, 2004 pursuant to its duty under Section 3 (a) of the Office of Utilities Regulation Act 1995 and Sections 4(f), 4.4, and 50 of the Telecommunications Act 2000, to encourage and promote competition among carriers and service providers, the Office of Utilities Regulation (the Office) issued an interim Decision on international settlement rates. Based on representations from various sector interests and its own assessment of responses to and the effects of the Decision and consistent with its undertaking to conduct monthly reviews, the Office issued "Modification of Decision on Settlement Rate" (the modification) on February 20, 2004 amending and staying certain aspects of the Decision.

The Decision was prompted by events which unfolded subsequent to the judgment of the Supreme Court of Judicature of Jamaica in suit M-074/2003-Office of Utilities Regulation vs Minister of Commerce Science and Technology. Immediately after the issuance of the judgment, certain carriers responded by serving notice of their intention to increase call termination on their networks. The Office took the view that such actions posed an immediate danger to the fledgling competition that had emerged in the telecommunications market and could lead to the virtual collapse of such competition.

In particular, the Office assessed that as a result of the ability of carriers with both a domestic and an international licenses to set both the terminal charge to their network (termination rate) as well as the rates to be paid by foreign correspondent carriers (settlement rates) for the termination of international calls, locally licensed international carriers with no domestic network could be forced out of the market.

Furthermore, the Office expressed the view that Jamaica had failed to see the full benefits of the precipitous decline in settlement rates (from US\$ 0.625 in 1998 to around US\$ 0.07 at December 2003). This resulted from practices such as 'whip-sawing' in the negotiations between local carriers and foreign correspondent carriers as well as the apparent failure on the part of foreign correspondent carriers to pass on the benefits of settlement rate reductions to foreign consumers in the form of reduced retail charges. As a consequence Jamaica was not seeing the level of increases in volumes that would normally be expected consequent on lower prices and therefore the benefits of liberalizing has not been fully realized, if at all.

The Office's action was also informed by the receipt of two policy directives from the Minister of Commerce, Science and Technology. These were issued pursuant to Section 6 of the Telecommunications Act 2000. The directives specifically required the Office to:

- intervene in the mobile market with a view to stimulate competition;
- with immediate effect, to undertake and implement such regulatory intervention in the market for international voice services as will establish an appropriate international settlement rate at which licensed operators shall provide such services, whilst continuing to maintain sustainable, effective competition among carriers and service providers;

- require from licensees as per Section 4(1)(f) of the Act such information as will allow the Minister to assess the effectiveness of this policy directive from time to time and to respond accordingly.

The Office had also received a number of representations from operators in the international market seeking its immediate intervention in the market to resolve what was considered to be an incipient crisis in the sector. In view of all of this, the Office, after a series of consultations with interested parties in which it sought and received oral and written submissions and having considered the interests of the sector, the requirement for immediate action and the available regulatory options available to it, decided to take interim steps to stabilize the market whilst it conducted further investigations and consultations to determine the measures that should be adopted over the long term.

In making its decision regarding the nature of the interim intervention that was required the Office took account of the following issues of concerns that were initially raised by various stakeholders:

- i. The need to provide for an appropriate margin between termination charges and settlement rates.
- ii. Whether the minimum settlement rates should be uniform for all local carriers.
- iii. The absolute level of the settlement rates.
- iv. The effective date of any decision, and
- v. The status of offshore carriers connected to local carriers and doing business on behalf of the local carriers with other foreign carriers.

Among the submissions made to the Office was a proposal that the establishment of any minimum margin between settlement rate and termination charge should not be standard across operators because of variations in technical and commercial advantages. In arriving at its Decision, however the Office had to be mindful of the statutory requirement to ensure that its decisions do not result in discrimination or the elimination of competitive advantages. Additionally, in outlining the Decision, the Office also underscored its intention to continue to work with the Fair Trading Commission pursuant to Section 5 of the Telecommunication Act to address any issue or claim of predatory pricing, abuse of dominance or any other anti-competitive behavior.

The initial decision (Tel 2004/02, January 23, 2004) taken by the Office is summarized as follows:

1. The minimum settlement rates for international calls terminating on a fixed network shall be US\$ 0.081
2. The minimum settlement rates for international calls terminating on a mobile network shall be US\$ 0.169
3. Cable & Wireless Jamaica's application for a termination rate of US\$ 0.05 for incoming international calls on the fixed network is approved.

4. The maximum termination rate for international calls for a mobile network is US\$ 0.138.
5. The effective time of the above decisions is 12.01 a.m. January 24, 2004.
6. All locally licensed international carriers are to provide the Office within five days of a calendar month information pertaining to:
 - a. Contract details with each correspondent foreign carrier indicating prices, volumes, points of handing over traffic and other terms of the contract for traffic terminated in Jamaica in the calendar month.
 - b. The volumes of traffic obtained from each foreign carrier for termination for fixed and mobile networks
 - c. Any other information that the Office may from time to time consider relevant and necessary to ensure competition in the market

Rationale Provided for Decisions

The Office outlined a number of reasons that informed the above decisions. With regard to the establishment of minimum margins, the Office took the view that in order to allow effective competition among local carriers the minimum margin above the termination rate should be set at the marginal cost of the most efficient operator. Given the lack of costing information on all carriers, however, it was impossible to determine this margin *ex ante* with any degree of accuracy. In this regard, the Office decided that it would rely on *ex post* empirical data.

For the fixed network, the information that was then available to the Office, suggested that with a termination rate of approximately US\$ 0.03 the settlement rate for traffic terminating on the fixed network cleared as low as US\$ 0.061 in December 2003. The Office was not able to ascertain at the time whether US\$ 0.061 was the lowest trading rate or if special circumstances had influenced this rate but for the purposes of its interim decision this was the best information that it had available. Hence, the minimum margin of US\$ 0.031 that was established by the Office. At the same time, the Office by that decision instituted such reporting mechanisms as would place it in a position to determine the margin of the most efficient operator.

A similar reasoning was applied with respect to the mobile network although the situation was somewhat different in that termination rates for international calls on these networks were not uniform. Prior to the issuance of the Office's decision, C&WJ and Oceanic Digital Jamaica Limited had given notice of a rate of US\$ 0.138 while Digicel had given notice of a rate of US\$ 0.135. The Office was not in a position to assess whether the proposed rates reflected cost but took the view that until it has assessed mobile termination rate it will set the minimum settlement rate for international calls to mobile networks on the basis of the higher of the proposed rate. Thus with the same assumption of the need for

a minimum margin of US\$ 0.031, the minimum settlement rate for international calls to mobile network was set at US\$ 0.169.

The Office also had a concern that a lack of arms length dealing between Jamaican licensed international carriers and connected offshore carriers could serve to undermine the interim regime that it had instituted. To guard against this a directive was included in the Decision requiring these licensees to treat and report transactions with connected carriers in the same manner as they do for other foreign carriers.

Stay of initial Decision

Subsequent to the issuance of the Decision, the Office received a number of submissions from sector interest groups either complaining about the impact of the decisions or making recommendation for further regulatory actions. Among the more popular of the complaints was that the effective date of the Decision failed to take account of the need to allow time for the adjustment of long term settlement contracts. There were also complaints that the termination charges approved by the Office were not cost based. Additionally, the carriers who do not own local network argued that the minimum termination charge set by the Office should not apply to them.

After taking into consideration all the submissions and its preliminary findings the Office undertook a number of additional initiatives. Firstly on 20 February it issued the Modification of Decision on Settlement Rate (the Modification), which stayed the decision on minimum termination of incoming international calls on fixed network and mobile network to April 1, 2004. The Modification also reaffirmed and modified the decision requiring carriers to submit detailed reports to the Office on a monthly basis. The Office also restated its intention to undertake further examination and analysis of market developments and that this would be informed by the data requested from carrier as well as any other relevant submissions. It was anticipated that, while the market situation is quite dynamic, the Office would have been in a position, based on the information supplied by carriers and its own assessment of the market, to indicate on April 1 whether the rates set out in the Decision would continue to apply and how it would treat with the various regulatory issues going forward.

In this regard, the Office has continued to monitor the market and to hold consultations with the various interested parties. The Office has also been engaged in consultation with representatives of the US State Department, the Federal Communications Commission and foreign international carrier all of whom had expressed concerns about the Office's decision.

Among the Office's findings is that the minimum margin between the settlement rate and the termination charge could be as low as US\$0.008 per minute. This would mean that the minimum settlement rates established for mobile and fixed should be adjusted downward to reflect this margin if the Office proceeded on the principle (enunciated in its January 23 Decision), that the margin should be that of the most efficient operator. Notably, however, the office has a concern that that where such margins exist by virtue of the existence of a locally licensed operator with a foreign affiliate it raises issues of competitive concerns to which further attention should be given.

The Office also made it clear at the time it issued its Decision that the studies that would allow for a determination on cost based termination had not yet been done but that these would be initiated. In this regard the Office is publishing with this Notice a timetable of how it proposes to treat with this matter in the coming period (see Appendix 1 attached hereto).

Implications of Subsequent Development on the Decision that was set for Publication on April 1, 2004

Subsequent to issuing the stay on the Decision as set out in the Modification of the Decision on Settlement Rate, the Office was given verbal notice by Reliant of an appeal it had lodged with the Telecommunications Appeal Tribunal. This was followed by a written notice dated March 26, 2004 served on the Office by the Tribunal. The notice advised the Office of an appeal by Reliant Enterprise Limited against the Office's Decision dated January 23. Pursuant to this notice, representatives of the Office attended before the Tribunal on March 30th, 2004. At that appearance the Tribunal DIRECTED that –

1. the decision which the Office intends to come into force on April 1, 2004 be stayed until 10.00 a.m. April 6, 2004 without prejudice to the challenge of the jurisdiction of the Tribunal on the matter;
2. the applicant Reliant
 - a. serve all parties to the appeal including the Tribunal with copies of the Notice and Grounds of appeal by March 31, 2004;
 - b. the Appellant's application for an extension of time together with an Affidavit setting out the reasons for the delay in filing the appeal be filed and served on all parties by March 31, 2004.

No Further Change to Existing Regime

In keeping with the Tribunal's directive the Office HEREBY notifies all affected parties that:

1. It will not proceed to issue any further decision until the matter has been heard and ruled on by the Tribunal.
2. the Office's Decision of January 24, 2004 and the Modification of Decision on Settlement Rate dated February 20, 2004 remain in full force and effect.

EFFECTIVE DATE OF NOTICE

BY ORDER OF THE OFFICE

SIGNED THIS 31st

DAY OF March 2004

**J. PAUL MORGAN
DIRECTOR GENERAL**

Appendix 1

TIMETABLE FOR CONSULTATION ON TERMINATION COSTS

The Office proposes to undertake a process of consultation to review Reference Interconnection Offer 5 (RIO5) which includes proposed termination charge for both fixed and mobile networks. In the case of the fixed network the Office has already made a determination of dominance and can therefore proceed to enforce cost oriented termination charges. Dominance as it relates to mobile networks is currently the subject of consultation. Whatever the results of the consultation on dominance in mobile, the Office still considers it important to determine reliable cost based termination charges for this sector. The time table below outlines the process and the time period over which the Office expects to be embarked on this exercise.

<i>Event</i>	<i>Date</i>
Publication of Consultation Document on network termination	Mid June 2004
Responses	Mid July 2004
Comments on Response	Mid August 2004
Second consultative document Responses	Mid September 2004
Responses	Mid October 2004
Comment on Responses	Mid November 2004 Mid
Determination	January 2004