
Office of Utilities Regulation

**RECONSIDERATION OF OFFICE DECISION: DETERMINATION NOTICE:
TEL 2004/11) “ASSESSMENT OF RIO-5 AND TARIFF SCHEDULE RIO/5A”**

BEFORE THE OFFICE OF UTILITIES REGULATION
OF JAMAICA

3rd Floor, P.C.J. Resource Centre, 36 Trafalgar Road, Kingston 10, Jamaica
West Indies


FINAL DECISION

Adoption Date: March 20, 2007



OFFICE OF UTILITIES REGULATION

March 19, 2007

DOCUMENT TITLE AND APPROVAL PAGE																	
DOCUMENT NUMBER: Tel 2004/11.1																	
DOCUMENT TITLE: RECONSIDERATION OF THE OFFICE'S DECISION "ASSESSMENT OF RIO-5 AND TARIFF SCHEDULE RIO/5A"																	
<p>1. PURPOSE OF DOCUMENT</p> <p>This document provides the Office's Decision on Cable & Wireless Jamaica's application for reconsideration of its decision in Assessment of RIO-5 and Tariff Schedule RIO/5A</p>																	
<p>RECORD OF REVISIONS</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 15%;">Revision Number</th> <th style="width: 60%;">Description</th> <th style="width: 25%;">Date</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">1</td> <td>Consultation on Reference Interconnect Offer (RIO-5) Document No: TEL 2004/09</td> <td style="text-align: center;">July 20, 2004</td> </tr> <tr> <td style="text-align: center;">2</td> <td>Determination on Reference Interconnect Offer 5 (RIO-5) and Tariff Schedule 5A Document No: TEL 2004/11</td> <td style="text-align: center;">November 19, 2004</td> </tr> <tr> <td style="text-align: center;">3</td> <td>Decision on Application for Reconsideration of Assessment of RIO-5 and Tariff Schedule RIO/5A Document No: TEL 2004/11.1</td> <td style="text-align: center;">March 19, 2007</td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>			Revision Number	Description	Date	1	Consultation on Reference Interconnect Offer (RIO-5) Document No: TEL 2004/09	July 20, 2004	2	Determination on Reference Interconnect Offer 5 (RIO-5) and Tariff Schedule 5A Document No: TEL 2004/11	November 19, 2004	3	Decision on Application for Reconsideration of Assessment of RIO-5 and Tariff Schedule RIO/5A Document No: TEL 2004/11.1	March 19, 2007			
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<p>APPROVAL</p> <p>This document is approved by the Office of Utilities Regulation and becomes effective on March 20, 2007.</p> <div style="text-align: center; margin-top: 20px;">  </div> <p>J Paul Morgan Director General</p> <p>March 19, 2007 Date</p>																	

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STATEMENT BY THE OFFICE:

This matter comes before the Office of Utilities Regulation (OUR) for its consideration of an application for reconsideration ("AfR") of Decision Document No: TEL 2004/11, the "Assessment of RIO5A and Tariff Schedule RIO/5A issued on November 19, 2004. Subsequent to the issuance of its decision the Office received an application from Cable and Wireless Jamaica Limited (C&WJ) dated December 3, 2004 requesting reconsideration of aspects of its decision.

In particular C&WJ has pursuant to Section 60(4) of the Telecommunications Act 2000 ("the Act") requested that the Office reconsiders:

Determination 4.11

"The words "or ultimately terminating outside Jamaica" in clauses PSTN Termination Access Service 1.1.4 and PLMN Access Service 1.1.4 is to be removed".

C&WJ offers as grounds for this request that the Office's removal of the words in question ("*or ultimately terminating outside Jamaica*") amounts to the imposition of a form of indirect access. It argues that this constitutes a material error of law in that Section 36 of the Act sets out a particular guideline for the imposition of Indirect Access on a dominant public voice carrier and since the Office was at the time of the decision engaged in public consultation on Indirect Access it could not impose this requirement without satisfying itself on reasonable grounds of its necessity.

The Company argued in the alternative that if the Office finds that the removal of the words does not create indirect access, this in itself, would constitute a material error of law and fact as Section 36 (2) of the Act defines Indirect Access as "*the method whereby customers are able to select the services of any service provider who uses a public voice carrier's network to provide specified services*". Since with the removal of the words, C&WJ's customers would be able to select the international service of another provider via dialing a particular number this would be tantamount to a form of Indirect Access more commonly known as Carrier Selection.

Determination 3.1

"All the charges in Part 1 of RIO 5A are approved with the provision that where applicable, they shall be split 50/50 between the interconnection seekers and the interconnection provider (even in cases where the

interconnection seeker construct the joining service) in keeping with the interconnection principle of equal responsibility and the recognition that interconnection is beneficial to all parties.”

C&WJ claims that Determination 3.1 constitutes a material error of law and fact. In support of this claim C&WJ argued that Section 33 (a) of the Act requires that the Office shall be guided by certain principles including that ‘costs shall be borne by the carrier whose activities cause the costs to be incurred’ and so in a case where an operator seeks to enter solely in the market for the termination of international incoming voice traffic, this does not fall within the parameter set by the statute and so the Office’s reliance on the argument that interconnection is beneficial to all parties is outside of the statutory principle. C&WJ also contended that the OUR failed to factor into its decision the reality that in some instances carriers interconnect with C&WJ and failed to pass even one minute of traffic and that instead of been beneficial to C&WJ such arrangements imposed a burden.

Taking note of the inclusion of the word ‘that where applicable, they shall be split 50/50’, C&WJ has indicated that the Office offers guidance on the circumstances in which the 50/50 split would be applicable.

With specific reference to determination 3.1 C&WJ has indicated that its request is that the Office either:

- Restate the determination to clearly outline the applicability of the 50/50 split;

Or

- In the event that the Office is taking the position that the determination is that the 50/50 split is applicable to all interconnection, then a full reconsideration of the determination should be undertaken on the basis that it constitutes a material error of fact and law.

Determination 4.2

The Office has determined that Clause 10.2 shall be modified to read: By C&WJ or the Telco in the event that the Jamaican dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this agreement, in order to reflect such currency devaluation or revaluation.

With respect to the above determination C&WJ request is that for the avoidance of doubt it should read:

“In the event that the Jamaica dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of the this Agreement, the parties reserve the right to vary charges in order to reflect such devaluation or revaluation”.

The Office posted the request for reconsideration on its website at www.our.org.jm and published a notice requesting comments from interested parties. No response was received to this invitation for comments and since shortly thereafter the Office initiated a public consultation on Indirect Access which was one of the principal issues in C&WJ's request for reconsideration, the decision was delayed to await that outcome. Unfortunately the decision on indirect access is still pending and the meantime CWJ has reiterated its request for a decision on its application for reconsideration.

Decisions on Reconsideration Requests

The Office has therefore given further consideration to each request and now issues the following response.

1. CWJ has requested that the Office reconsiders Determination 4.11 and remove, *“The words “or ultimately terminating outside Jamaica” in clauses PSTN termination Access Service 1.1.4 and PLMN Access Service 1.1.4.* The Office, as reasoned in its decision, takes the position that a provision in a RIO that seeks to determine the service that another carrier can offer on its network is on the face of it, anti-competitive and is likely to breach the provisions of the Fair Competition Act, 1993, with particular reference to Part III which inter alia prohibits provisions of agreements that lessen or are likely to lessen competition and the abuse of a dominant position in a market.

The Office disagrees with C&WJ's argument that by this determination it is imposing an obligation to provide a form of Indirect Access. Indeed, the Office rather than imposing an obligation on C&WJ, is simply insisting that C&WJ cannot use the terms and conditions of its RIO to control activities on the network of interconnection seekers. The Office therefore refutes the assertion that it has committed either a material error of law or of fact with respect to Determination 4.11 and therefore reaffirms the decision. The Office also notes that the Act does not preclude Indirect Access but only allows the Office to mandate particular forms and therefore where it occurs naturally the Office has no need to mandate it.

Having regard to all of the above the Office denies C&WJ's request and reaffirms Decision 4.2.

2. C&WJ asserts that determination 3.1 constitutes a material error of law and fact in that, it specifies a 50/50 split. The Office finds it curious that C&WJ is now challenging a position that has been well articulated in earlier RIO determinations notably, Determination No: Tel 2002/01 (Assessment of Cable and Wireless Jamaica's Reference Interconnect Offer) and is in fact consistent with the Company's previous proposal regarding Joining Services (**See Determination 3.2: "The Office holds to the position set out in the consultative document with regard to ISLs and accepts C&WJ's proposal that the costs of the joining services should be split 50-50....."**). In any event, the Office takes the view that a 50/50 split is not at variance with the provisions of the Act given that interconnection is mandatory and the law specifically states (Section 29(2)(a) that:

"interconnecting carriers shall be equally responsible for establishing interconnection and doing so as quickly as it is reasonably practicable"

To be clear, in the case of joining services which are critical to the provision of interconnection it can be argued that since both parties are obliged to act to fulfill the requirement of the law it can hardly be properly concluded that one carrier is responsible for causing costs to be incurred. Nonetheless, the Office's determination on this matter was in fact informed by the assumption that traffic would be passed in both directions and so the instances cited by C&WJ with respect to one way traffic was not discussed in the consultation. In view of this the Office will ensure that consideration is given to this scenario in the consultation on a new RIO.

C&WJ has further requested as an alternative to a full reconsideration that the Office restate the determination to clearly outline the applicability of the 50/50 split. The Office does not consider it practical or feasible to enumerate the instances in which a 50/50 split would not be applicable. Rather, the principle of the Office's determination is that the 50/50 split applies generally for joining services and the exception applies in such instances as where an interconnecting carrier requests or provides a facility that is beyond what is necessary to meet normal interconnection requirements between the parties. Nonetheless, the Office will not object to any variation of this approach that is mutually agreed between parties.

Having regards to all of the above the Office denies C&WJ request for reconsideration and reaffirms Decision 3.2

3. C&WJ has requested a modification of Determination 4.2 which relates to the eventuality of a devaluation or revaluation against the US dollar. The determination as stated allows either party to unilaterally and automatically vary charges in the event of a devaluation or revaluation against the US dollar in excess of 5% in any six month period. It appears to the Office that the effect of the restatement as proposed by C&WJ is that both interconnecting parties would have to agree to the variation. The Office is not in principle opposed to this proposal but envisages that it may still lead to dispute if the parties cannot arrive at an agreement.

Having regards to all of the above and to minimize the possibility of deadlocks, the Office accepts C&WJ's request for a modification of Determination 4.2 and directs that it shall be amended to read:

Determination 4.2

In the event that the Jamaica dollar devalues or revalues against the US dollar by five percent or more in any six month period concluding during the term of this Agreement, either party reserves the right to vary the charges in order to reflect such devaluation or revaluation. Notwithstanding, any such change shall only become effective after approval by the Office.