Office of Utilities Regulation

(Reconsideration Decision on Determination Notice: TEL 2004/10)

RECONSIDERATION OF THE OFFICE'S DECISION ON "ASSESSMENT OF DOMINANCE IN MOBILE CALL TERMINATION"

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

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Adoption Date: May 1, 2007

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OUR

OFFICE OF UTILITIES REGULATION

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DOCUMENT NUMBER: Tel 2007/04
DOCUMENT TITLE: RECONSIDERATION OF THE OFFICE'S DECISION ON "ASSESSMENT OF DOMINANCE IN MOBILE CALL TERMINATION (Tel 2004/10)"

1. PURPOSE OF DOCUMENT

This document provides the Office's Final Decision on the "Assessment of Dominance in Mobile Call Termination".

RECORD OF REVISIONS

Revision Number	Description	Date

APPROVAL

This document is approved by the Office of Utilities Regulation and becomes effective on May 1, 2007

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On behalf of the Office:

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J Paul Morgan
Director General

May 1, 2007
....
Date

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STATEMENT BY THE OFFICE:

This matter comes before the Office of Utilities regulation (OUR) for consideration of application for reconsideration ("AfR") of Decision Document No: TEL 2004/10, the "Assessment of Dominance in Mobile Call Termination". One party filed an AfR by the statutory deadline namely, Mossel Jamaica Limited (trading as Digicel). Digicel also amended its initial submissions on five separate occasions. Submissions were received from Digicel on September 16, 2004, September 17, 2004, October 11, 2004, October 13, 2004, October 20, 2004 and November 3, 2004.

Provisions were made for Digicel to make amendments to its initial submission until November 22, 2004. This deadline was communicated to Digicel in the OUR's letter of November 17, 2004.

In general, the Office rejects the application, except as discussed below, and provides clarification on certain issues as discussed in this Decision.

CHAPTER 1: BACKGROUND AND REQUEST FOR RECONSIDERATION

1.0 The Office of Utilities Regulation (OUR) has a duty to "...determine which public voice carriers are to be classified as dominant public voice carriers for the purposes of the Telecommunications Act [2000]" (Section 28(1)). Dominance is as defined in Section 19 of the Fair Competition Act, 1993[1].

1.1 Based on the Telecommunications Act 2000 ("the Act"), if a carrier or service provider is declared dominant, certain provisions of the Act become specifically applicable and for which there must be strict compliance. These include the following:

- 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;
- Each dominant public voice carrier shall, pursuant to Section 30(2) "...keep separate accounts in such form and containing such particulars as will enable the Office to assess whether that carrier provides interconnection services in accordance with the principles specified in subsection (1)."

Additionally, the consequences that may flow include the following:

- Price Cap as per Section 46
- Competitive Safeguard pursuant to Section 35 prescribing the following:
  - (i) Separation of account;
  - (ii) Keeping of records;
  - (iii) Provisions to ensure that information supplied by other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose;
  - (iv) Such other provisions as the Office considers reasonable and necessary for the purpose of competitive safeguard rules.
- Where applicable, the Office may also make rules subject to affirmative resolution, imposing on a dominant carrier, the

[1] As stated at Section 19 of the FCA, "For the purposes of this Act 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."

responsibility to offer a particular form of indirect access to its network to other interconnection providers.

1.2 **Responses to the Consultative documents**

a) Dominant Public Voice Carriers, March 2000
Responses were received from:
i. Cable and Wireless Jamaica Limited
ii. Mossel Jamaica Limited (trading as "Digicel")

1.3 The OUR also issued other consultative documents that addressed the issue of dominance in mobile call termination and issued a final consultative document dedicated to this issue in March 2004.

b) Assessment of Dominance in Mobile Call Termination - March 30, 2004
Responses were received from:
i. Digicel
ii. AT&T Corp.

1.4 **Determination**
The Office issued its Determination Notice: Assessment of Dominance in Mobile Call termination (Document No: TEL 2004/10) on September 2, 2004 (see Decision on assessment of dominance in mobile call).

1.5 In this Decision the Office expressed the "...opinion that the existence of effectively competitive telecommunications markets should lead to higher quality of service and prices that are more reflective of costs. The existence of dominant carriers in the Jamaican telecommunications markets suggests that the existing quality of service is likely to be lower than in effectively competitive markets and/or higher prices than in effectively competitive markets. To protect the interest of the customers, the OUR believes that regulations should be imposed where it is prescribed by the Act and it is demonstrated that these are justified, and that such regulation should reflect the level of competition in the relevant markets.

1.6 Equally, the OUR must have due regard for the interest of carriers and service providers and seek to promote rules that create, maintain and enhance a competitive environment, as excessive regulation can reduce the incentive to invest and to innovate. Therefore, the Office should ensure that these functions are balanced, since a failure to do so could have detrimental welfare effects."

1.7 The document concluded that:

a) The relevant product markets are the markets for wholesale mobile call termination service in Jamaica. The analysis points to the fact that there are no effective demand and supply side substitutes for call termination on any given mobile network.

Consequently, in **Determination 3.0**, the Office stated:

Mobile voice call termination to each mobile operator's network constitutes a separate market. That is, the current relevant markets are:

- **wholesale market for voice call termination on Mossel's (Digicel's) mobile telephone network**
- **wholesale market for voice call termination on Cable and Wireless' (C&WJ's) mobile telephone network**
- **wholesale market for voice call termination on Oceanic Digital's (ODJ's – formerly Centennial) mobile telephone network**

b) There is no supporting evidence that indicates the existence of a single national market for mobile call termination. Further, each mobile carrier is dominant in relation to the voice call termination service it offers. If this remains unchecked, a profit maximizing monopolist (in this case, the mobile operator) is expected to maintain high prices or increase its price in excess of cost, over time.

1.8 Under the calling party pays (CPP) regime, the effect in the mobile voice call wholesale and retail markets is that, mobile network operators have no incentive to lower the price of calls to their mobile networks from other networks (fixed or mobile). The fact is callers to mobile subscribers must terminate those calls on the particular network that the called party subscribes to. Further, since there is no close substitute to this real time service, the Office has determined that the technical characteristics of call termination services, the common use of SIM card locking and the principle of the CPP regime, result in the absence of effective competition and potential effective competition. This means that each mobile operator's pricing of termination services is unconstrained by effective competition or potential effective competition.

1.9 Consequently, in **Determination 4.0** the Office stated that:

All mobile carriers are dominant with respect to the call termination service offered.

1.10 Additionally, (**Determination 5.0**):
The Office has determined that all mobile carriers shall:

- **supply the Office with current and any new or amended interconnection agreements;**
- **provide interconnecting parties with advanced notification of price changes and copy any such notification to the Office;**
- **Supply the Office with wholesale rates for mobile voice call termination services;**
- **Supply the Office with call volume by type (number of calls, call minutes) and;**
- **Supply the Office with call revenue by type.**

Application for Reconsideration

1.11 As noted in the Statement by the Office, one party filed an application for reconsideration (AfR) by the statutory deadline: Mossel Jamaica Limited (trading as Digicel). Digicel also amended its initial submissions on five separate occasions. Submissions were received from Digicel on September 16, 2004, September 17, 2004, October 11, 2004, October 13, 2004, October 20, 2004 and November 3, 2004.

1.12 Provisions were made for Digicel to make amendments to its initial submission up to November 22, 2004. This deadline was communicated to Digicel in the OUR's letter of November 17, 2004.

1.13 The documents submitted during the period ending November 17, 2004 are listed below:

- Miphone Costs 3 Nov 2004
- Affidavit 20 Oct 2004
- Affidavit cover letter 20 Oct 2004
- Pre-judgment 13 Oct 2004
- CWJ costs 11 Oct 2004
- OUR and FTC interactions 24 Sept 2004
- Stay and Reconsideration Request - 17 Sept 2004
- Jamaica dominance OUR reconsideration summary - 16 Sept 2004
- Annex request for reconsideration - 16 Sept 2004

1.14 Responses to the Request for Reconsideration

The OUR received responses from:

- Cable and Wireless Jamaica
- Georgia Gibson-Henlin

Additionally, comments on responses were received from:

- People's Telecom Comments
- Digicel's Comments: Reconsideration of OUR's Determination of Dominance in Mobile Call Termination - May 25, 2005

CHAPTER 2: COMMENTS ON DIGICEL'S REQUEST FOR RECONSIDERATION OF DETERMINATION NOTICE DOCUMENT NO: TEL 2004/10

PREAMBLE

2.0 Before attempting to respond to the specifics of Digicel's request for a reconsideration of the Determination Notice (Assessment of Dominance in Mobile Call termination Document No: TEL 2004/10), the Office takes this opportunity to clearly state where the markets for mobile termination services fall within the definitions of the various markets in the telecommunications sector.

2.1 There are two different market levels in the telecommunications sector:

- retail markets and
- wholesale markets

Retail markets

2.2 These markets cover the services provided by service providers to end users that pay retail prices. They include mobile voice (calling services) and data services.

Wholesale markets

2.3 Wholesale services are offered by carriers as inputs for telecommunications carriers and service providers. These services may be combined with an operator's own facilities and capabilities to provide services to their customers. That is, some service providers will be purchasing other services from C&WJ, Digicel and Oceanic mobile to use as inputs in the provision of their retail services.

Interconnection markets

2.4 The term "interconnection" is used in this document, as it is in the Act to refer to the physical or logical connection of public voice networks of different carriers. Interconnection services are sold in wholesale markets.

2.5 Call termination is the service of delivering calls to the intended destinations on a voice network (fixed or mobile). Theoretically, other operators could use their buyer power in relation to mobile call termination services to force mobile operators with high termination charges to lower those charges. However, any refusal to pass on calls to networks with higher termination charges would be in violation of the any-to-any principle of connectivity based on Section 29(2) (a) of the Act. From a wholesale perspective, it is not possible for the originating network operator to select the network on which the call will terminate. The mobile network terminating a call depends on the number called by the calling party. However, the calling party does not choose the network on which a call is terminated. This choice is made by the called party.

2.6 Since the calling party pays the total price of a call to a mobile phone (and indirectly for the charge for termination service), there is a "disconnection" between the calling party, and the person who makes the choice of the terminating network (the called party) and who therefore, influences the level of the termination charge. Therefore, since the calling party pays for the call, but does not choose the network on which its call is terminated, the calling party has no alternative to the purchase of call termination service (indirectly through the retail rate) from the network on which the called party subscribes. It is also important to note that since voice call termination provides real time telecommunication[2], non-real time forms of communication are not likely to provide close substitutes. These characteristics result in termination to a particular customer being defined as a bottle-neck[3] in contacting that specific customer, even in cases where a network operator has a small share of the retail markets.

OFFICE COMMENTS

2.7 The Office will respond to each comment based on the segment of the Determination Notice to which it relates. It would appear that Digicel's major areas of concern include the presumption of excessive charges, Incorrect reliance on C&WJ's costs, failure [to] properly ,,, consider actual market behaviour, failure [to] properly ... consider actual and potential competitive influences, procedural failings/illegality, failure to properly analyse markets, and failure to make a proper assessment of dominance.[4]

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[2] Communication wherein perceptible delays between the sender and the receiver are minimal and easily tolerable are considered to take place in real-time. Regular telephone calls are real-time; voice messages are not. See www.it.northwestern.edu/telephone/converge/glossary.html.

[3] The network elements that facilitate call termination across telecommunication networks are called bottleneck facilities or "essential facilities" – that is, facilities that a competitor must have access to in order to compete in a particular market. See www.teleinquiry.govt.nz/report/issues/issues-04.html.

[4] See Digicel's comments at the links "Jamaica dominance OUR reconsideration summary - 16 Sept 2004", "Stay and Reconsideration Request - 17 Sept 2004" and "Annex request for reconsideration - 16 Sept 2004".

These concerns were expressed in Digicel's comments found at the following links: "Jamaica dominance OUR reconsideration summary - 16 Sept 2004", "Stay and Reconsideration Request - 17 Sept 2004" and "Annex request for reconsideration - 16 Sept 2004".

2.8 The Office addresses these and other issues below.

2.9 ***Alleged Presumption of excessive charges***

Digicel: "This is a fundamental error in that, while it clearly underlies much of the OUR's market analysis and its subsequent conclusions as to Digicel's dominance, it is founded and calculated on a totally incorrect and unlawful basis. The OUR's clear and stated aim in undertaking the current exercise in assessing dominance in mobile call termination is to constrain prices, ie. [,] to prevent excessive pricing. The OUR's presumption that excessive prices existed in the past (the OUR provided no evidence to suggest current prices are excessive) is based upon a calculation of mobile call termination charges which relies wholly upon figures produced by C&WJ, based upon that operator's claimed costs. If this approach is wrong (as it can be shown to be), then the whole basis of the OUR's investigation of dominance in mobile call termination founders."[5]

2.9.1 **Office: The Office wishes to note that the existence of excessive (or below cost pricing) is a possible symptom of dominance. However, the true test of dominance in a relevant market is the extent to which entry (and exit) barriers[6] exist. It is therefore incorrect to assume that the "...whole basis of the OUR's investigation of dominance in mobile call termination founders..." if prices are proven to be currently at or below cost.**

2.9.2 **Further, the special characteristics of call termination are recognized in the Act. Section 29(4)-(6) singles out call termination as an interconnection service for which the OUR may make a determination of the terms and conditions for carriers that are non-dominant, as well as for dominant carriers. Since the first object of the Act is to promote the interest of the public firstly by—promoting**

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[5] See page 1 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

[6] In economics and especially in the theory of competition, barriers to entry are obstacles in the path of a firm which wants to enter a given market. (See http://en.wikipedia.org/wiki/Barriers_to_entry). Barriers to entry are beneficial to operators already in the industry, since such barriers protect their revenues from being eroded by new competitors.

fair and open competition in the provision of specified services and telecommunications equipment; it must be that the drafters of the Act considered that call termination is likely to be supplied in non-competitive markets, hence the basis for the Office being allowed under Section 29—(4) of the Act to "...make a determination of the terms and conditions of call termination, including charges." If it was thought that the markets for call termination were competitive, this service would not be singled out by legislators for possible regulation.

2.9.3 **The Office therefore, rejects Digicel's contention that it presumed that there were excessive charges on which its decision was based.**

2.10 ***Alleged Incorrect reliance on C&WJ's costs***

Digicel: "It is wrong both in fact and in law for the OUR to rely upon C&WJ's costs when assessing the cost base of (and the possibility of excessive pricing by) Digicel. .... It is wrong in law for the OUR to rely upon C&WJ's costs because this is plainly not permitted under the Act."[7]

2.10.1 **Office:**

Based on Section 29(4-6) of the Act:

> **(4) The Office may, either on its own initiative in assessing an interconnection agreement, or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges.**
>
> **(5) When making a determination of an operator's call termination charges, the Office shall have regard to the principle of cost orientation, so, however, that if the operator is non-dominant then the Office may also consider reciprocity and other approaches.**
>
> **(6) For the purposes of subsection (5), "reciprocity" means basing the non-dominant carrier's call termination charges on the call termination charges of another carrier.**

2.10.2 **Prior to the Office decision on the Assessment of Dominance in Mobile Call Termination, no mobile operator was declared dominant in any market for mobile call termination, therefore, the OUR is**

[7] See page 2 of Digicel's "Stay and Reconsideration Request - 17 Sept 2004"

correct in basing a non-dominant carrier's call termination charges on the call termination charges of another carrier based on the provisions of Section 29 of the Act.

2.11 **Digicel:**

In Digicel's response to the OUR's second consultative document on the issue of dominance, Digicel stated that:

> "...the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections." In a footnote to this statement, Digicel stated, "Clearly, Digicel's views regarding the relevant market for access purposes need not coincide with its view in respect of market definition for other regulatory purposes such as access deficit charges."

2.12 **Office:**

This clearly demonstrates that Digicel's definition of the relevant market depends on the purpose for which that definition is being sought and not the characteristics of the particular market.

2.12.1 **In this instance, since Digicel alleges that "...the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections," the OUR is justified in using the price and cost of termination on another network to check the validity of this claim.**

2.12.2 **Also, in relation to the use of a benchmark (C&WJ's cost) that was established in a Determination Notice a few years ago, the OUR examined this information and decided that it was not necessary to revise this benchmark since it anticipated a decline in cost due to productivity gains. The office knows that in competitive markets for retail mobile services and telecommunications equipment, no efficient network operator will roll out capacity long before it is required. This is due to the fact that the prices of network equipment usually decrease by 10 to 20 percent per year, and leaps in technological performance occur all the time[8].**

[8] http://www.bcg.com/publications/publication_view.jsp?pubID=675&language=English.

2.13 ***Alleged Failure properly to consider actual market behaviour***

Digicel: "The OUR consistently states in the Decision not only that there is not any evidence of competitive forces at work in area of mobile call termination but also implies strongly that it is impossible for such forces to be present, given the structure of the market. However, such bold assertions are simply not justified by the evidence of actual market behaviour. Digicel has shown (and the OUR itself accepts) that prices for calls to mobiles have fallen both at the retail and at the wholesale (termination) level. Moreover, Digicel has provided the OUR with examples of marketing literature which clearly demonstrate Digicel and C&WJ competing publicly on the basis of the price of incoming calls to their mobile networks. Finally, the OUR's own Director General has stated in public that competitive forces are at work in the area of calls to mobile. Faced with such overwhelming evidence, any reasonable regulator would conclude that there are strong competitive forces at work and that it would be wrong to make any assertions about the structure of the market being inherently incapable of allowing competition to bite."[9]

2.13.1 **Office:**

Based on the evidence of market behaviour of mobile termination service takers and suppliers, the Office is not aware of any operator that has or is terminating calls destined for another network on its own network.

2.13.2 **In relation to statements made by individual members of the Office and members of staff of the OUR, the Office wishes to state that it did not make any decision in relation to dominance in mobile call termination prior to September 2, 2004. Further, for the avoidance of doubt, consultative documents express the opinions of the Office at a given point in time and do not reflect decisions of the Office, as indicated by some operators.**

2.13.3 **In relation to statements allegedly made by the Director General (DG) that were reported in the daily Observer on July 15, 2003, assuming that the DG was correctly quoted, these statements only relate to FTM charges. Based on the period which was being reviewed, off-net MTM retail charges were as high as $19.70 per minute (higher than the cost of an international call to almost anywhere in the world) due to increased mobile termination charges of one operator. In fact, some of the prices per minute for off-net MTM calls are greater than**

[9] See page 2 of Digicel's "Stay and Reconsideration Request - 17 Sept 2004"

the lowest price per minute to make international calls from a mobile phone to most destinations.

Alleged Failure properly to consider actual and potential competitive influences

2.14 **Digicel**: "The OUR has discounted evidence of actual and potential competitive influences on the level of call termination charges without proper consideration of the evidence available to it. On the demand-side, Digicel has highlighted numerous examples of competitive influences which do and could exert downward pressure on call termination charges. These include call-back behaviour and substitution by SMS respectively. On the supply-side, the OUR has discounted the competitive pressure posed by bypass, despite the fact that this practice is one which has been openly acknowledged by the OUR. The OUR's assessment of the actual and potential competitive influences is cursory at best and fails to meet the standard of detailed examination which one would expect from a reasonable regulator."[10]

2.14.1 **Office:**

With respect to call-back, a caller to a mobile subscriber (example, a FTM call) sometimes requests that the called party calls them back, hence reversing most of the call charges and avoiding most of the FTM retail charges. Based on per second billing, the person initiating the call places a call to the called party just to request that they call back. The caller only pays for the short time spent requesting the called party to return the call. It can be demonstrated that the per-minute billing regime is likely to discourage this behaviour. Let us assume that it takes five seconds to complete a call-back message. Under the highest previous per second billing price of $12 per minute in 2003, the consumer initiating the call paid a total of $1.00. However, under the current per minute charging regime, the same five seconds call would cost $7.

2.14.2 **The prices for short messaging service (SMS) ($3 per message on Digicel and $2.50 per message on C&WJ[11] mobile) have consistently remained below fixed to mobile (FTM) and mobile to mobile MTM retail charges. FTM termination charges remained as high as $10.268 per minute (between April 2001 and August 2003). If these**

[10] See page 3 of Digicel's "Stay and Reconsideration Request - 17 Sept 2004"

[11] The first 20 messages per month are free.

services were effective substitutes, the lower prices would constrain FTM and MTM charges by the effect of significant numbers of subscribers switching from mobile calls to these alternatives. The Office has seen no evidence of this level of substitution. Further, the characteristics of SMS are such that it is not likely to be a close substitute for a voice call. Notably, text messaging is limited by the number of characters that can be sent in a given message. Also, SMS would not be a close substitute since this is not a real time service.

2.15 **Particulars of Decision**
In relation to the particulars of the determination Notice, the Office will respond to the Reconsideration Request according to the structure of the request. That is, we will first examine the alleged "***Procedural failings/Illegality"*** and the alleged ***"Market Analysis Failings"*** that are said to be based on material errors of law or material errors of fact.

A) Procedural Failings/Illegality

Failure to Rectify Procedural Failings

2.16 **Digicel**:
"…. Digicel … [alleged that it] … listed 20 pages of material procedural failings (pages 12 -32) under section 4(2) of the Telecommunications Act 2000 (the "Act") that have been committed by the OUR which failings are fatal to the investigation that the OUR has attempted to carry out with respect to mobile call termination." [Digicel further alleges that] "… the OUR has not refuted the majority of these procedural failings in its Decision. Since the OUR has not refuted them, Digicel must assume either that these have been accepted and/or that the OUR failed to give any or any sufficient consideration to the impact of these material failings in its ultimate Decision. The OUR knows or ought to know that in the light of these procedural failings it is unlawful for it to make determinations in respect of mobile call termination. The OUR's Determinations therefore are without foundation or effect."[12]

[12] See page 6 of Digicel's "Stay and Reconsideration Request - 17 Sept 2004"

2.16.1 Office:

The Office sets out hereunder its response to each of Digicel's allegation.

Procedure for Carrying out Investigations in the Telecommunications Market

2.17 **OUR's duty to observe reasonable standards of procedural fairness**

Digicel: According to Digicel, "Procedural fairness includes a number of elements. The OUR needs to have ensured it has observed rules of procedure which are appropriate to investigating whether: particular economic markets exist within the Jamaican telecommunications sector; and whether there is a case for saying that any entity operating within those economic markets has a position of dominance."[13]

2.17.1 Digicel went on to suggest (in its view) an appropriate methodology that, according to Digicel, "…would involve (for the avoidance of doubt, it is Digicel view that none of the steps referred to below [were] followed):

1/ first investigating whether there is a prima facie evidence that of a possible failure in the mobile sector as the basis of a hypothesis (perhaps by using international benchmarks);

2/ consulting on the particular information (collected both from mobile operators and the general public) that would need to be collected as the empirical measuring stick against which to test that hypothesis;

3/ collecting the appropriate information from market players and carrying out the necessary public research;

4/ then using the empirical data collected to carry out the market analysis in a thorough fashion.

5/ If any market failures were discovered in relevant economic markets they should then be investigated for any signs of dominance in the market thus defined taking account of international best practice in approaching this subject."[14]

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[13] See page 13 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

[14] Ibid.

2.17.2 **Office:**

In paragraph 2.42 of the Office's Determination Notice, the Office responded by quoting the Fair Competition Act:

"... 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."

2.17.3 **This means that, in conducting its assessment, the Office is required to:**

(a) Define the relevant market

(b) Conduct an assessment of dominance by determining if an entity in a defined relevant market occupies a position of economic strength that enables it to operate in the relevant market without effective constraints from its (i) competitors or (ii) potential competitors.

2.17.4 **As can be seen from the analysis in chapters 3 and 4 of the Determination Notice, the Office's assessment of dominance followed the letter of the law.**

2.17.5 **Further, according to the FTC "...The standard test of whether a firm is dominant is whether it has the power to behave to an appreciable extent independently of consumers, its competitors and customers, in terms of pricing and other decisions. In assessing the existence of a dominant position, the FTC will consider both market share and entry conditions...." Also, in assessing market power, the FTC notes that market power is more likely to exist if an enterprise has a persistently high market share. However, it is important that market share analysis is supported by an assessment of entry barriers since, "...the lower the entry barriers the more likely it is that potential competition will prevent enterprises within the market from exercising market power." The Office wishes to note that the OUR's analysis is consistent with the standard test applied by the FTC.**

2.17.6 **Below are some of the details of the analyses undertaken by the OUR.**

Preliminary Investigation

2.17.7 **In paragraphs 4.5 to 4.6 of the OUR's first consultative document on Dominance[15] in 2000, the OUR stated its initial position in relation to mobile call termination.**

"Even where there is competition between networks, the economic characteristics of termination can be very different from origination, especially under calling party pays arrangements, because it is the caller that pays the call termination charge (via the retail price), but the call recipient that has the choice of which network to take service from. This is referred to as the call termination externality. For origination, the same individual pays the call origination charge (reflected in the retail price) as has the choice of networks. A network may therefore be able to raise the charge for call termination without adverse effect, because it is the customers of other networks that end up paying for the increase. Raising the price of call origination, in contrast may result in the loss of customers to competitors. For this reason call termination can be defined as a separate market for each local network operator, even if operators compete in the provision of call origination. There is a case, therefore, to define separate markets for call termination on each mobile network, because the call termination externality rules out or severely restricts demand side-and supply-side substitution.

The special characteristics of call termination are recognised in the Act. Section 29(4)-(6) singles out call termination as an interconnection service for which the OUR may make a determination of the terms and conditions for carriers that are non-dominant, as well as for dominant carriers. For the present, the OUR proposes to define mobile termination as a single market, but may consider further in the future whether separate markets would be more appropriate."

2.17.8 **Based on the OUR's analysis of the characteristics of the market for mobile call termination and the fact that there was still only one player in the markets for wholesale and retail services, the OUR proposed to view the market for mobile call termination as a single market (instead of separate markets on each mobile network) with the option of revisiting the issue at a future date.**

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15 See http://www.our.org.jm/PDF-FILES/Consultative_Dominance.pdf.

2.17.9 At the end of a consultation on interconnection[16] in February 2001, the Office established the maximum rates for mobile termination using international benchmarks (the rates allowed by the UK's Monopolies and Mergers Commission, now the Competition Commission), adjusted to reflect scale of operations, cost of capital, and other conditions in Jamaica plus the fixed retention rate. Under this arrangement, C&WJ remits to the terminating mobile carrier the revenues from FTM calls less its retention. The same applies to mobile calls from each mobile network.

2.17.10 Subsequently, and as stated in the Determination Notice on mobile call termination[17], the Office used costing data supplied by C&WJ to estimate call termination charges for other mobile carriers or operators in Jamaica. During the parallel consultation on interconnection pricing[18] which was concluded in May 2002, the Office had requested a similar set of costing information from Digicel but only C&WJ provided the said data.

2.17.11 The Office estimated the cost of call termination based on cost data from C&WJ with an adjustment for the cost of spectrum. The Office requested and received some data from carriers during its consultation on dominance, additionally, the Office can and has used information that is publicly available and in some instances, obtained through other regulatory and consultative processes. The Office has provided its assessment of the industry structure (based on retail access) in the form of market concentration and has also presented and assessed data on consumer behaviour[19].

Consult on information collected from the public and operators

2.17.12 The information collected during each segment of the consultation period was presented in various consultative documents, and responses and comments on response received and published on the OUR's website. These include consultative documents on mobile call termination and dominance in general as well as well as consultations on interconnection charges.

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16 See http://www.our.org.jm/pdf/RIO%20decisionfeb2001.PDF.

17 See http://www.our.org.jm/PDF-FILES/Mobile%20Call%20Termination_Determination%20Notice31-08-04.pdf.

18 See http://www.our.org.jm/PDF-FILES/RIODeterminMay82002.pdf.

19 See http://www.our.org.jm/telecomsurveys.asp.

Use data to conduct market analysis

2.17.13 **Based on the analysis of the information collected, the OUR came to the conclusion that the relevant product markets in this analysis are the markets for wholesale mobile call termination service in Jamaica. The analysis pointed to the fact that there are no effective demand and supply side substitutes for call termination on any given mobile network.**

2.17.14 **Hence, the Office Determined that:**

Mobile voice call termination to each mobile operator's network constitutes a separate market. That is, the current relevant markets are:

- **wholesale market for voice call termination on Mossel's (Digicel's) mobile telephone network**
- **wholesale market for voice call termination on Cable and Wireless' (C&WJ's) mobile telephone network**
- **wholesale market for voice call termination on Oceanic Digital's (ODJ's – formerly Centennial) mobile telephone network**

2.17.15 **In relation to the collection of detailed costing information from each operator, as stated before, during the parallel consultation on interconnection pricing[20] which was concluded in May 2002, the Office had requested this costing information but only C&WJ provided the said data. However, based on the technological constraints and the characteristics of the markets for mobile call termination, an assessment of dominance can be undertaken without detailed information from all operators. In relation to the setting of termination rates, the Office will require details of costing information as well as physical characteristics of the relevant network and other pertinent information.**

2.17.16 **If as claimed by Digicel[21], "...the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connection", then the Office is at a loss in relation to the relevance of highlighting the difference between the costs of providing the service on each network. If mobile operators were able to terminate a call destined for a mobile network subscriber on the fixed network or on another mobile network, this may serve to constraint mobile termination rates.**

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[20] See http://www.our.org.jm/PDF-FILES/RIODeterminMay82002.pdf.

[21] See http://www.our.org.jm/PDF-FILES/Digicel%20Response%20to%20TEI200206.PDF.

Under such competitive conditions, wide differences between fixed and mobile operators' termination charges could not continue for three to four years. However, as explained in more detail below, a call destined to a subscriber who is located on a given network must be terminated on the network that the subscriber is on.

Identify market failures and say if operators are dominant

2.17.17 **Increased competition between mobile service providers is expected to reduce the on-net MTM retail rates. But, competition for subscribers is not likely to reduce the off-net and FTM call termination rates. The fact is termination on one mobile network cannot be substituted for termination on another network. That is, at the wholesale level, there are no technologies that allow an originating operator to choose the network on which a call is terminated. At the retail level, a caller from the PSTN or from mobile network *"A"* who desires to contact a subscriber on mobile network *"B"* cannot use the termination service offered on mobile network *"C"* since the subscriber is not located on that network. Mainly due to the technological barriers to entry, all mobile carriers are dominant with respect to the voice call termination service offered.**

2.17.18 **Based on the Office's analysis, it determined that all mobile carriers are dominant with respect to the call termination service offered.**

2.17.19 **Further, in accordance with the requirements of the FCA, the Office demonstrated that in the *defined relevant market* each mobile operator *occupies such a position of economic strength*, that is, it has sufficient market power that enables it to *operate without effective constraints* or to act by itself in setting the price of mobile voice call termination service on its networks without being effectively constrained by its *competitors or potential competitors*.**

2.17.20 **Therefore, the Office's approach is somewhat similar to the approach suggested by Digicel. More importantly, the Office's approach is consistent with that required by the legislative framework.**

The Need for Balance

Digicel

2.18 According to Digicel:

> "A regulator should throughout the process demonstrate balance and an open minded approach and be prepared thoroughly to look for and put forward evidence and arguments that there are either economic markets in the mobile sector should be defined one way or another or if in fact no one market pertaining to the mobile sector exists but in fact should take a wider definition including other sectors of the telecommunications industry. A regulator should try just as hard to prove that an economic market does not exist in such a way as to prove that it does. The regulators should then put the arguments on both sides out to public consultation and base its ultimate decision on the weight of arguments put forward by itself, the public, the industry and the FTC. ..."[22]

2.18.1 **Office:**

Since the contention is related to the definition of the relevant product market, we will examine this aspect of market definition. "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."[23] The standard procedure is to define the smallest possible market and then seek to expand this definition by looking at possible substitutes. As is obvious from the consultative documents, this is precisely what the OUR sought to do. Based mainly on the characteristics of mobile call termination and the facilitating technology, the OUR demonstrated that there are separate markets for call termination on each mobile operator's network as opposed to a single call termination market. Additionally, the OUR also demonstrated that electronic mail, SMS and call-back activities are not likely to be constraining influences on rates charged for mobile call termination. The OUR's position was subject to public consultation and after considering the submissions from the Ministry of Commerce, Science and Technology, the industry and the FTC, the Decision was made.

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[22] See page 14 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

[23] See http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

2.18.2 **Based on the approach described above, the Office is of the opinion that, its analysis did not reflect bias and was open to comments from any member of the public, the industry and the FTC.**

The OUR's Own Guidelines

Digicel

2.19 Digicel stated that:

> "In its own guidelines for assessing dominance in telecommunications markets (see the document entitled "Dominant Public Voice Carriers No.2", dated November 2002) the OUR states that prior to assessing markets and prior to an assessment of dominance the OUR should collect and collate the evidence required for the analysis. The OUR states that this evidence must include market share data (sales value and volume); product functionality; prices and costs; inputs (although it is not clear what this means); principal competitors; and market entry conditions.

2.19.1 The OUR has never asked Digicel for information as part of a legitimate exercise to assess markets or dominance in the mobile termination market or any other market for that matter. Digicel believes that, based on this alone, the OUR has no valid basis for deciding that there are or are not any economic markets relevant to new entrants such as Digicel within the mobile sector nor, therefore for determining whether mobile carriers have dominance in any market."[24]

2.19.2 **Office:**

The Office is not aware of any rule which stipulates that the undertaking of an assessment of dominance requires that all participants in a market must be sent a formal request for information. The fact that a request for information was not sent as part of a particular consultation cannot invalidate the consultative process. It is not necessary to collect information from each player in a market to identify the relevant markets or to demonstrate that such markets exist for a particular service.

2.19.3 **Based on the Interconnection agreements between C&WJ and individual carriers, mobile call termination is sold by each mobile operator. Further more, under section 29—(2) of the Act all carriers**

[24] See page 14 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

(mobile or fixed) are required to provide call termination services to satisfy the principle of any-to-any connectivity. Hence, it is without a doubt that the relevant markets exist.

<u>A Lack of Reasonable Analytical Depth</u>

Digicel

2.20 According to Digicel:

> "The issue of mobile call termination is of enormous significance to new entrant mobile players."[25]

2.20.1 **Office:**

This statement stops short of saying why mobile termination is of enormous significance to new entrant mobile players. However, international experience suggests that mobile operators tend to price mobile termination services above cost and use the excess profit to subsidize mobile hand sets.

Digicel

2.21 Digicel further stated:

> "...Digicel are aware every single National Regulatory Authority in Europe, has employed the services of external independent experts in the area of market definition and dominance assessments in carrying out its market reviews under the new EU regulatory framework. This new framework has been developed around the importation of the ex post concept of dominance in the competition law sense into a framework for dealing with market power in [a]... sector specific ex ante environment. In short, the approach to dominance with respect to telecom's regulation in Europe is similar in virtually every respect to the approach as prescribed in Jamaica.

2.21.1 Consequently, we fail to understand how the OUR has proceeded with considerably less internal resources than most if not all the European regulators with out once seeking external assistance from a reputable independent consultant. It therefore seems amazing that the OUR can have written so little previously about such an important subject and then propose to make a determination based on what proceeded and a final supplementary document that could have huge consequences for the

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[25] Ibid page 15.

Jamaican mobile telecommunications sector. When billions of Jamaican dollars could hinge on a decision such as this both from the perspective of already sunk costs and also for the level of future funds …, it is paramount that no stone is left unturned. We submit that this lack of depth in the process is by itself clear evidence that Office has not afforded sufficient thought to this matter, and that it cannot therefore legitimately reach conclusions with respect to either market definitions or dominance."[26]

2.21.2 **Office: The Office notes that it is irrelevant whether or not it uses internal or external resources. The important thing is the analysis of the Jamaican markets for mobile call termination and the assessment of the existence of substitution (demand and supply) to determine the relevant markets and examine the existence of dominant operators in the relevant markets. The Office is not convinced that a declaration of dominance places existing and future investment in the industry at risk. This declaration will not allow the Office to lower or increase any rate charge for mobile call termination. The main finding is that each operator has the ability to set mobile termination rates for its mobile network without being constrained by competition or potential competition. Now, at any given point in time, if mobile operators charge for mobile termination reflects cost, under the existing legislative framework, the Office cannot direct operators to lower these rates below cost. However, this detailed assessment of the cost of mobile termination is scheduled to be the subject of a separate consultation.**

<u>Breaches of Procedure and Natural Justice</u>

Digicel

2.22 Market Information and Consumer Research

According to Digicel, "It is an absolute necessity for telecommunications regulators that wish to analyse the sector to establish the existence of particular economic markets to collect information from the market players to enable proper analysis to be carried out."[27]

2.22.1 **Office**

The Office is of the view that based on its analysis (see Determination on Mobile Call Termination) the existence of the

[26] Ibid.

[27] Ibid page 16.

relevant market is not in doubt. As noted before, all carriers sell call termination services to other mobile and fixed telecommunications carriers whether through actual physical connection or logical connections.

Digicel

2.23 Additionally, Digicel stated:

> "It is also necessary to carry out proper market research which reliably establishes the views and behaviours of consumers which were relevant to market analysis."[28]

2.23.1 **Office**

The Office contracted the services of an independent and reliable market research company[29] to undertake a survey of the telephone subscribers. Because the results were not what a particular party expected it does not mean that the survey was not executed properly. Yes, there are several other questions that could have been asked. This will always be the case. However, the major queries were answered.

Digicel

2.24 Digicel claim that:

> "...the wording that the Office has used in its 'Dominance' documents strongly suggests that it had made up its mind about what economic markets existed within the mobile sector prior to that date. Further evidence of this is provided in a letter dated 21 April 2004 to Digicel from the OUR's Director General in which he states: "*The fact of the matter is that the OUR's definition of the market has remained the same throughout its consultations*".[30]

2.24.1 **Office**

The statement attributed to the Office is true. The Office had not received any information that convinced it that the OUR's market definition was incorrect so it maintained its original definition. If the Office received clear evidence that the relevant market should be redefined, then it would be compelled to change its definition. The OUR cannot, and did not make any decision on market definition during the consultative process. Any statement by a member of the

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[28] Ibid.

[29] Market Research Services Ltd.

[30] See page 16 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

Office or a member of the OUR staff during the consultative process cannot represent the final position of the Office.

Digicel

2.25 Digicel refers to the information used by the OUR as:

"…unsubstantiated anecdotal evidence with respect to mobile call termination."

2.25.1 **Office**

Let us look at a single piece of the information used by the Office is arriving at its decision. Based on Section 29(2) (a) of the Act, any refusal to pass on calls to networks with high termination charges would be in violation of the any-to-any principle of connectivity stated in this section of the Act. Therefore, operators are obligated by law to ensure that calls to a given network must be able to be terminated on that network. Also, operators must purchase call termination services from each carrier or network operator. By no stretch of the imagination could this be described as unsubstantiated anecdotal evidence.

2.26 **Digicel**: In its response to the OUR's second consultative document on "Dominant Public Voice Carriers" in December 2002, Digicel indicated that:

"… the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections." (http://www.our.org.jm/PDF-FILES/Digicel%20Response%20to%20TEI200206.PDF).

2.26.1 **Office**

This suggests that call termination on all mobile networks and all fixed networks are substitutable for each other in this alleged wholesale market. Also, this suggests that the price of call termination on one mobile network should constrain price on other mobile network. As stated before, from a wholesale perspective, it is not possible for the originating network operator to select the network on which the call will terminate. The mobile network terminating a call depends on the number called by the calling party. Further, at the retail level, the calling party does not choose the network on which a call is terminated. This choice is made by the called party.

Digicel

2.27 Digicel also stated that it:

"…strongly contends that the research which has been carried out is not adequate in terms of assessing consumer views and the extent to which consumers can place pressure on mobile call termination rates. The research on consumers fails to ask absolutely key questions such as how aware consumers are about the cost of making a call to the customers of a particular mobile network, and whether consumers are normally able to ensure that they make calls to a particular person using the cheapest available method (such as by making fixed to fixed calls or on-net mobile calls). If the answers had been yes to these questions, which were not asked, it would have provided strong evidence that the economic mobile markets for call termination on each operator's network which the OUR claims to have identified, may not in fact exist. Clearly dominance in an economic market is not in question if … a[n] economic market has not been properly defined in the first place."[31]

2.27.1 **Office**

Since the OUR's assessment of dominance is not based on any particular network, the information requested from consumers was in relation to the consumers' view on the cost of calling a subscriber to a mobile network. In this regard, the responses to the OUR's questions:

> **(29) How important to you is the cost of others calling your mobile phone? (29b) How important to you is cost in determining how you use your fixed line to make calls to mobile phone?**

certainly demonstrate that most consumers are aware of the relative cost of placing a call to a mobile phone. Further, the relevant market is at the wholesale level or more specifically, this is a market for an interconnection service, therefore, it is the operators' awareness that would be critical in demonstrating the existence of a market for mobile call termination service.

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[31] See page 17 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

The OUR's 'Dominance' Documents

2.28 Digicel alleged that the OUR did not consult "…in good faith in accordance with the TA [Telecommunications Act 2000]."

Dominant Public Voice Carriers No.2; Document TEL 2002/06; dated November 2002

2.29 **Digicel**: According to Digicel, "It is very noteworthy [that]… in the first 'Dominance' document published after the liberalisation of the Jamaican mobile sector, the Office immediately expressed a clear view in the abstract that all mobile public voice carriers were dominant in relation to mobile call termination on their respective networks when it stated that *"all mobile public voice carriers are dominant in relation to mobile call termination on their respective networks"*."

2.29.1 **Office**

The Office wishes to state categorically that the views and analysis set out in the Consultative Documents are for discussion purposes and are not fixed. Statements in a consultative document cannot represent decisions since the purpose of the consultation is to invite comments and the supply of evidence in response thereto and which would provide a basis upon which the Office's decisions on a particular matter may be arrived at. Therefore, the aforementioned statement and all other statements made during the consultation did not and could not have represented Decisions of the Office.

2.30 **Digicel**: According to Digicel, "…in the UK mobile operators do not compete on fixed to mobile calls as mobile operators do in Jamaica. In the UK the mobile networks do not have control of fixed to mobile retail prices."[32]

2.30.1 **Office**

In this respect the Office is not aware of any Jamaican operator that is competing on fixed to mobile call termination. Based on the information available to the Office, an operator cannot use its termination service to substitute for the termination service of another operator. As explained in this document, termination on one mobile network cannot be substituted for termination on another

[32] Ibid page 18.

network. That is, at the wholesale level, there are no technologies that allow an originating operator to choose the network on which a call is terminated. At the retail level, a caller from the PSTN or from mobile network "A" who desires to contact a subscriber on mobile network "B" cannot use the termination service offered on mobile network "C" since the subscriber is not located on that network. This is mainly due to the technological barriers to entry. Therefore, it is not true to state that UK mobile operators do not compete on fixed to mobile calls but mobile operators in Jamaica do.

2.31 **Digicel**: In relation to supply substitution, Digicel alleged that:

"...The Office then purports to deal with the issue of supply substitution in the space of two paragraphs (paragraphs 3.37 and 3.38). This is not credible in any thorough assessment of the market. A reasonable analysis would be based on significant market data and consumer research and run to many pages. Moreover the Office then alleges without further investigation in one of those two paragraphs that the only way that callers could select or pre-select the mobile network operator that terminates a call would be if mobile operators shared SIM information (3.38). This is not true. It ignores other possibilities such as the prospect a level of users own more than one phone, or that they can receive most of their calls at home or at work where it might be possible to receive calls on a fixed line instead. Reaching such a conclusion without proper analysis indicates that the Office was not consulting in good faith and had decided on the outcome."[33]

2.31.1 **Office**

Following the first suggestion means imposing a high cost on consumers to purchase and carry extra handsets (only one percent of householders surveyed subscribe to all three mobile operators).

2.31.2 ***In relation to the second suggestion, subscribers do not pay to receive calls so it is unclear why this should have been considered. It is the caller that pays for the call therefore it is the caller that should be seeking an alternative. Considering that 55% of householders surveyed have only a mobile phone, it is not possible to reach these persons by a FTF or MTF call. Further, 62% of householders surveyed cannot choose between a call from a fixed or mobile line since they only have one of the two.***

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[33] Ibid page 18.

2.32 **Digicel**: According to Digicel, "The Office then looked at demand substitution, and concluded that there was none, again based on no research about whether customers will act in a way which leads to demand constraints being imposed on mobile termination prices. No reasonable conclusion could have been reached at this point about demand constraints without using market data and adequate research and properly analysing it."[34]

2.32.1 **Office**

Again, the Office wishes to state that the views and analysis set out in the Consultative Documents are for discussion purposes and are not fixed. The Office did not and could not have drawn any final conclusion during the consultative process. Therefore, the consultation did not and could not have represented Decisions of the Office. Further, the Office's analysis on demand substitution accompanied its Determination on the Assessment of Dominance in Mobile Call Termination Markets.[35]

2.33 **Digicel**: According to Digicel, "…it was clearly in C&WJ's interests at that time, as an operator in both mobile and fixed markets, to try and minimise competition in the mobile sector by using revenues from its fixed line business where it faced less competition, to subsidise its mobile business to fend off competition from new entrant mobile companies. The OUR could not reasonably have raised the issue of prices without devoting a considerable amount of analysis to these issues to see whether there were other reasons … for the differences in fixed to mobile retail prices. It is worth noting in this regard that virtually every mobile operator has unique mobile rates particular to termination on its own network."[36]

2.33.1 **Office**

Again, based on the information available to the Office, an operator cannot use its termination service to substitute for the termination service of another operator. Therefore, even if the price of mobile call termination on network "A" is zero and the person that is being called is located on network B that charges $50 (for example) to

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[34] Ibid page 19.

[35] See pages 27-29 of the Office's Determination Notice: Assessment of Dominance in Mobile Call termination (Document No: TEL 2004/10), September 2, 2004,

[36] See page 19 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

terminate a call, the operator and the caller (through the retail rates) would still have to pay the termination charge of network B.

Digicel

2.34 Digicel stated that:

"…it is incumbent on the Office to prove that there is a particular economic market in the mobile sector and that there is dominance within that market and not base market definition on a 'process of elimination' basis. It is not the case that carriers can be subjected to regulation unless they can prove that regulation is unnecessary: the burden of proof is on the OUR to make its case.[37]

2.34.1 **Office**

It is the Office's view that it has demonstrated in its Determination that mobile voice call termination to each mobile operator's network constitutes a separate market. That is, the current relevant markets are:

- ***wholesale market for voice call termination on Mossel's (Digicel's) mobile telephone network***
- ***wholesale market for voice call termination on Cable and Wireless' (C&WJ's) mobile telephone network***
- ***wholesale market for voice call termination on Oceanic Digital's (ODJ's – formerly Centennial) mobile telephone network***

Digicel

2.35 Digicel concludes its comments on <u>Dominant Public Voice Carriers No. 2 Consultative Document, Nov. 2002</u> by stating that:

"…Considering the purported analysis of call termination as a whole in this consultation it appears that there are individual sections of it that strongly suggests that the Office was not consulting in good faith. This conclusion can also be drawn when the few paragraphs that the Office devoted to this subject are pulled together and considered as a whole. Accordingly, Digicel believes that this document did not form a part of a legitimate consultation on

[37] Ibid page 20.

possible economic mobile markets or a legitimate assessment of dominance in any such possible mobile economic markets."[38]

2.35.1 **Office**

As noted above (see paragraph 2.29.1), the views and analysis set out in the Consultative Documents are for discussion purposes and are not fixed. Statement in a consultative document cannot represent a decision since the purpose of the consultation is to invite comments and the supply of evidence in response thereto and which would provide a basis upon which the Office's decision on a particular matter may be arrived at. Therefore, all statements made during the consultation did not and could not have represented Decisions of the Office. In instances where respondents may have had a valid concern about the amount of information available to the OUR, addition research and analysis were conducted and presented by the OUR. Based on this fact, one could not conclude that the Office was not consulting in good faith.

<u>Dominant Public Voice Carriers No 3; dated April 2003</u>

Digicel

2.36 Digicel: In its abstract to this document the OUR states that *'The* ***continued existence*** *of dominant* ***carriers*** *in the Jamaican telecommunications markets suggests that the existing quality of service is likely to be lower than in effectively competitive markets and/or higher prices than in effective competitive markets'* [emphasis added]. The fact that the OUR refers in the plural to dominant **carriers** when in fact only C&WJ has been openly determined as a dominant player to date indicates, by inference, that the OUR has already decided that there are dominant players in the mobile sector. The OUR's consultation seems therefore to be merely a process smokescreen, an attempt to disguise a decision that has already been taken. This further demonstrates pre-judgement.[39]

2.36.1 **Office**

The aforementioned statement by the OUR was intended to convey the idea that, to the extent that there were dominant carriers in the Jamaican telecommunications markets this would suggest that the

[38] Ibid page 20.
[39] Ibid page 20.

quality of service is likely to be lower than in effectively competitive markets and/or higher prices than in effective competitive markets.

Digicel

2.37 According to Digicel:

> "The OUR set out a far more sensible approach to telecommunications market reviews in this consultation document at paragraph 2.9. Digicel would contend that it would still have been too early in the development of the mobile sector to have carried out a market analysis, but at least in terms of the process outlined and the timeframes suggested there was practicality and due process in this approach. The Office suggested a period of 3 months as a part of a data collection exercise which was to include both market and industry information.
>
> This was then to be followed by a year of subsequent market analysis. The next 6 months was to be allowed for an assessment of the degree of effective competition. Digicel fails to understand how the Office could have failed to adopt this kind of approach from the outset. Moreover, even according to the OUR's own specific timetable using this process, the OUR had intended to reach decisions about whether dominance existed in telecommunications markets by April 2005. This raised a legitimate expectation about the process to be followed as the earlier suggested deadline in the consultation of February 2003 was based on an approach which was not in compliance with the Telecommunications Act 2000.[40]

2.37.1 **Office**

Firstly, the Office must note that the OUR made it clear to Miss Natasha Francis-Cunningham (Digicel's lead person on this matter) that barring any itches, the Office intended to issue its determination on dominance in June 2003. This was also stated in the Consultative Document. Secondly, the Office's proposal was to assure the operator that it would conduct periodic reviews of the telecommunications markets to ensure that its regulatory approach was appropriate. Thus, after making a declaration of dominance, periodic reviews were proposed to ensure regulatory interventions where appropriate. Again, this was a proposal in a consultative process, not a decision. However, although it turned out that the proposed time table was overly optimistic, the Office tried to follow

[40] Ibid.

this process but could not issue a decision in relation to the data requirements until April 2004[41]. However, Digicel requested that the Office should reconsider its Determination Notice on this matter although the OUR is of the opinion that the information requested was basic information that all efficient operators should have on record.

2.37.2 **To conclude, the Office is of the view that this so called "raised legitimate expectation" of Digicel is clearly a fabrication.**

Digicel

2.38 Digicel also stated that:

> "the OUR rejected Digicel's argument that the buying power of corporate customers constrains the pricing of mobile termination services. The OUR does so on the basis that *"its analysis in this regard demonstrates that there are separate markets for termination services"*. However, no analysis was provided by the OUR. This was clear evidence that the OUR was not prepared to provide those consulted with a fair hearing – if the OUR had evidence why was it not put on the public record?"[42]

2.38.1 **Office**

Regarding buyer power, in paragraph 3.43 of the said Document, the OUR stated that "Theoretically, other operators could use their buyer power to force mobile service providers (MSP) with high termination charges to lower those charges. However, any refusal to pass on calls to networks with high termination charges would be in violation of the any-to-any principle of connectivity (see Section 29(2) (a) of the Act)." From a wholesale perspective, this section of the Act prevents the use of any perceived buyer power. Thus, it is not possible for the originating network operator to use buyer power to force down call termination charges.

2.38.2 **Specifically in relation to the buying power of corporate customers ability to constrain the pricing of mobile termination services, this was addressed in paragraphs 2.16 2.18. Paragraph 2.18 states:**

[41] See Determination Notice "Telecommunications Markets Information Requirements, April 8, 2004", Tel 2004/04. In addition to requesting that the Office reconsider this Decision, **Digicel also applied to the Telecommunications Appeals Tribunal for a stay in addition to submitting an appeal of the decision itself.**

[42] Ibid page 21.

In the case of the corporate user where FTM calls retail at a higher rate than on-net MTM calls, mobile operators can convert FTM call to MTM on-net calls. This can be achieved by programming the private automatic branch exchange (PABX) to automatically route calls dialed from a fixed phone to a mobile phone on to the mobile network as on-net MTM calls; thus, avoiding the high cost of FTM calls. However, the average consumer would not get this benefit.

2.38.3 ***In relation to the definition of separate markets for mobile call termination services, the OUR did provide its initial position in its Consultative Document, Dominant Public Voice Carriers March 2000. Further, according to Martin Cave[43] (an expert that Digicel relied on in the past):***

"It seems unnecessary to rehearse the arguments relating to market definition in detail, since the Issues Paper concludes, in line with European regulators (and Vodafone's views, expressed in the UK), that the supply of wholesale termination on each mobile network in New Zealand is a separate market. (The arguments are summarised in the European Commission's Recommendation on Relevant Markets....[44]) This applies to the generality of customers. In cases where calling and called parties have a common interest in limiting the total cost of calls to mobiles – for example when they are employees of the same firm- special tariffs can be offered, which (implicitly) apply lower termination rates to such customers. As well as rejecting the notion of a multi-operator termination market, the 'single operator' market definition eschews the cluster market approach at one stage adopted by the ACCC, which brigaded mobile termination with outgoing calls. This definition does not seem to have attracted support from regulators elsewhere, in part because, contrary to normal practice, it combines services at different functional levels, retail and wholesale."

"If the market is correctly defined as termination on individual mobile network, the issue of whether it is effectively competitive can be dealt with fairly speedily. Each operator is an authentic monopolist, and its ability to raise price will in practice only be

[43] Martin Cave (July 2004), Regulatory Policy towards Mobile Termination

[44] For similar reviews of the arguments in the context of the UK and Ireland, see Ofcom *Wholesale Mobile Voice Calls Termination Statement*, London, June 2004, and Commission for Communications Regulation, *Response to Consultation and Notification to the European Commission – Wholesale Voice Call Termination on Individual Mobile Networks*, Dublin, June 2004.

constrained by countervailing power." In the concluding remark Cave stated "…that in countries with the calling party pays (CPP) system, there is a growing consensus among regulators in favour of cost-oriented pricing for fixed to mobile termination as the appropriate regulatory instrument…"

Digicel

2.39 Digicel stated that:

"In paragraph 2.16 the OUR made a number of unsubstantiated allegations about the effects of call termination prices. The OUR provided no evidence of the discontinuation of fixed line contracts and no evidence of the extent of customers making a disproportionate (undefined) use of fixed to mobile and across network calls. It was also noticeable that the OUR failed again to follow elementary regulatory good practice here: the OUR did not look at the potential drawbacks associated with regulating mobile termination rates, including the possibility that regulated prices might be sub-optimal and therefore harm the Jamaican economy and Jamaican consumers. This indicated clear bias in the OUR's approach."[45]

2.39.1 **Office**

This seems to be an attempt to distort the OUR's position by ignoring the facts. The referenced paragraph was titled, "Likely Impact of Excessive Mobile Termination Charges". By no stretch of the imagination could this suggest that the OUR alleged that this is a description of the situation in Jamaica. The OUR only noted that these are some possible effects.

<u>Dominant Public Voice Carriers; Document No Tel 2003/03; June 2003</u>

2.40 **Digicel:** In the opening section … entitled *"Comments on Responses"* the OUR states that *"any response to this document will form a vital part of the public debate on the issue of dominance"*. We note that the OUR had consistently maintained previously that there was a clear dividing line between market

[45] See page 21 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

analysis and dominance which formed part of two separate exercises. The above wording however suggests that no attempt was being made to consult on market definition at this juncture but apparently only on the matter of whether there were dominant operators in the market.[46]

2.40.1 **Office**

It would appear to be obvious that dominance cannot be assessed without defining the relevant market. However, for the avoidance of doubt, when the OUR assigns the title: "Assessment of Dominance in Mobile Call Termination" to a consultative document, it is not suggesting that it is consulting only on dominance.

Digicel

2.41 Digicel stated:

"For the avoidance of doubt Digicel believes that its termination rates are reflective of cost and in the case of FTM termination, rates are so low we are concerned these may in fact be below cost."

2.41.1 **Office**

The Office wishes to note that even if some mobile call termination rates currently reflect cost, this does not mean that mobile carriers are not dominant in the relevant markets for mobile call termination. As stated in Section 19 of the Fair Competition Act, "...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." Thus, although a dominant firm may be selling at prices which are at cost, it still maintains the ability to raise or lower prices relative to cost.

Digicel

2.42 Digicel stated, "As to the Office's assertion that its estimates are in some way consistent with international benchmarks this is categorically not true as the Office could have confirmed by the simplest of exercises. Indeed in its latest consultation document it provides evidence that its estimate of costs is clearly out of kilter with international benchmarks."[47]

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[46] Ibid page 22.
[47] Ibid page 23.

2.42.1 **Office**

Again, the Office wishes to note that this is an attempt to distort the true position. In the OUR's last Consultative Document <u>Assessment of Dominance in Mobile Call Termination - March 30, 2004</u> , it provided the proposed cost based rate for mobile termination in the UK (US$0.075 per minute) which is significantly lower than the OUR's estimate of (J$6.929 per minute). Even at the most recent monthly average exchange rate, this would be equivalent to US$0.1025[48]). As noted before, the fact that some rates may now below this level does not imply that operators are not dominant. It is the ability to operate in a market without effective constraints from its competitors or potential competitors that is important. Also, it is likely that the threat of regulation resulted in a decline in some rates. According to Martin Cave[49] (<u>an expert that Digicel relied on in the past to comment on mobile termination issues</u>), "...operators in many European countries seem to have been subject to unofficial regulatory pressure which has forced them to bring down their rates to some degree or face explicit cost-based regulation. The result has been some abatement of monopoly prices, normally accepted by all major mobile operators –but not necessarily the smaller ones – in any country where the pressure is applied."

2.43 **Digicel**:

"Digicel has obtained data from Ovum, an independent firm of consultants ... which demonstrates that Jamaican fixed to mobile termination rates are exceptionally low by international standards. The fact that the OUR's statement is so incontestably incorrect provides strong evidence in Digicel's view that ...supports a finding that the OUR is biased."[50]

2.43.1 **Office**

The Office now quotes from a letter from AT&T to the New Zealand Commerce Commission which quotes Ovum in relation to its position on this issue.

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48 This was computed using the BOJ's February 2007 average rate of J$67.59. See http://www.boj.org.jm.

49 Martin Cave (July 2004), Regulatory Policy towards Mobile Termination

50 See page 23 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

"The harm to consumers' long-term interests is highlighted by a recent Ovum study finding that "[t]here are no effective market mechanisms to curb the price of the mobile termination service" and that "[t]here is considerable evidence that mobile termination rates (MTRs) are well above costs in most countries." (David Rogerson, Mobile Termination Rates, Ovum, Jan. 2004, at 1.) Ovum further states that they "estimate that profit margins of over 100% are commonplace for most mobile network operators (MNOs)." (Id.) Consistent with ComCom's preliminary findings, Ovum states, "[i]n markets where the calling party pays for making calls to a mobile phone, mobile termination rates take on the characteristics of a 'bottleneck' service." (Id. at 4.) "By this we mean a service for which the normal disciplines of the competitive market are narrowed to such an extent that they no longer constrain the behaviour of the service provider." (Id.) The result is unreasonably high mobile termination rates, which in turn requires mobile rates to be "regulated and brought towards cost levels in order to correct these competitive distortions and network inefficiencies." (Id. at 1.)

As with Ovum's findings, other national regulators have reached conclusions about the harm to end users similar to the ComCom's preliminary view. For example, the ACCC's Final Decision in its Mobile Terminating Access Service review found a strong basis for regulation of mobile termination rates, and in turn, appropriately cites the regulatory actions undertaken by Ofcom (formerly OFTEL), in finding that each mobile network operator exercises market power over call termination on their networks and should therefore be subject to termination rate regulation.[51]"

2.43.2 **Specifically related to the issue of benchmarking, the exercise conducted by Digicel can be extremely misleading since mobile call termination rates in most countries are not cost-based, or are in a few cases in the process of moving to cost-based rates or in some cases reflect the effects of the threat of regulation. Therefore, these data cannot be used to argue that the OUR's approach is incorrect or reflects bias. As noted before, although a dominant firm may be selling at prices which are at cost, it still maintains the ability to raise or lower prices relative to cost.**

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[51] ACCC, *Mobile Services Review, Mobile Terminating Access Service, Final Decision* at 37 (June 2004).

Digicel

2.44 According to Digicel:

In paragraph 2.4 (2) the OUR states *"Where required, the OUR will present empirical evidence to justify its definition of the relevant market".* It is difficult to understand how one could ever arrive at a reasonable economic market definition without empirical evidence. If the OUR tried to do so, this would represent a fundamental breach of due process. The burden of proof is on the OUR to establish a proper definition of economic markets not on market players to prove that certain economic markets do not exist.[52]

2.44.1 **Office**

From the carriers' perspective, operators are obligated by law to ensure that calls to a given network must be able to be terminated on that network. To do this, operators must purchase call termination services from each carrier or network operator. Since an operator cannot terminate a call destined for network '*A*' on network *B*, this implies that each operator has 100% of the relevant market for call termination on its network. Therefore, it is not possible for the originating network operator to use buyer power to force down call termination charges.

2.44.2 **From the consumer perspective, consistent with Digicel's suggestion, the OUR commissioned a subscriber survey to collect information on possible demand substitutes. Data from this survey was included in a Supplementary Consultative Document <u>Assessment of Dominance in Mobile Call Termination - March 30, 2004</u>. Outside of carriers and consumers the Office does not consider that there are other groups on which data should be collected.**

Digicel

2.45 Digicel stated that:

"In the paragraph 2.10 … the OUR then attempts to make a distinction between the concept of dominance as it is applied by Oftel and the concept as it applies to the FCA. The OUR seems to be suggesting that in assessing dominance it does not need to take account of entities that can

[52] See page 23 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

act independently of its customers or consumers, only of its competitors. This is a complete fallacy that we are confident could not be supported by the FTC. Following this logic it is suggesting that even if an operator could somehow act independently of its competitors it must be dominant, even in a circumstance[s] where customers stopped buying their product or bid their price down to zero. This defeats the whole purpose of establishing a concept of dominance in the first place.

Further in this paragraph, the OUR has stated 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".* The OUR has chosen to interpret this to mean that it does not need to carry out a thorough investigation of the technical possibilities for termination via other networks. We do not see how the OUR can reasonably have drawn this conclusion. It is precisely the suppliers mentioned which might look to provide those alternative technical possibilities. We believe that the OUR has reached this conclusion because it does not want to investigate alternatives properly rather than because it is not required as a part of due process."[53]

2.45.1 **Office**

The Office continues to be guided by the legislation. As per Section 19 of the Fair Competition Act, "...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." **Therefore, based on the legislation, the OUR is obligated to assess dominance based on an operator's** position of economic strength which is defined by the extent of the constraints from its competitors or potential competitors. **However, for the avoidance of doubt, the OUR did consider consumer actions in defining the market.[54] In relation to the** technical possibilities for termination via other networks**, using existing technologies, a call to a mobile subscriber can only be terminated on the network that the called subscriber is on. The Office is not aware of the alleged "...technical possibilities for termination via other networks."**

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[53] Ibid.

[54] See pages 27 and 28 of the OUR's Determination Notice at http://www.our.org.jm/PDF-FILES/Mobile%20Call%20Termination_Determination%20Notice31-08-04.pdf.

Dominant Public Voice Carriers; Document No TEL 2003/07; August 14, 2003

Digicel

2.46 Digicel notes that in paragraph 1.2 the OUR makes a reference to an earlier survey conducted between February and March 2003. Digicel perceives that this was an attempt to suggest that the February 2003 research contained a reasonable chunk of research into the mobile sector. In fact only one tiny section of that survey mentioned the mobile sector as a part of a large report which looked at a large number of areas which were not relevant to mobile market analysis including consumer *"awareness of regulatory organisations"*. Digicel notes that the only figures gleaned from the survey which were relevant to the mobile sector were possible numbers of Jamaican households and possible numbers of cellular telephones in those households which would provide little or ...[no] input in terms of making an informed decision on mobile termination in any respect. Therefore, that consultation did not form a part of a proper attempt at mobile sector analysis.[55]

2.46.1 **Office**

The fact is, the OUR did use that survey to acquire some information on the mobile markets. Obviously only the aspect of the survey that was relevant to the analysis was used. The claim that this fact means that the consultation did not form a part of a proper attempt at mobile sector analysis has no foundation.

Assessment of Dominance in Mobile Call Termination; March 30 2004

Digicel

2.47 Digicel claimed that:

The OUR also states in the abstract that *"During the consultation on Dominant Public Voice Carriers, the Office expressly stated that it intended to make a declaration on dominance in mobile voice call termination".* No account can have been taken even of the OUR's own market research conducted in January 2004 at this stage. The OUR did not even consider the issue that the consumer survey may have raised issues that required further investigation. In fact as Digicel will highlight, the consumer survey exposes the weakness in the OUR's position. This is a further indication that the OUR intended to find a position of dominance in mobile call termination prior to this consultation.[56]

[55] Ibid page 24.
[56] Ibid page 25.

2.47.1 **Office**

It is not correct to conclude that the OUR's statement of its intention to make a declaration on dominance in a market means that it "...intended to find a position of dominance in mobile call termination prior to ...consultation." When an assessment of dominance is conducted, the result could be that there is a dominant operator or that no dominant operator exists in the relevant market.

2.47.2 **In relation to the consumer survey, as noted before, the results of the survey are in the public domain and were used in the consultative process and the Determination Notice.**

Ministerial Order

2.48 ***Digicel***

Digicel stated that: "In the abstract the OUR indicates that it believes that Ministerial Order 1/2004 gives it the right to intervene generally in mobile call termination. Digicel disagrees. The Ministerial Order was issued specifically in the context of international settlements and is further delimited by constituting a power *"as will stimulate sustainable, effective competition among carriers and service providers".* If termination rates are not relevant to achieving this in the context of international incoming traffic then the OUR has no right to intervene with respect to mobile termination rates whatsoever.

Digicel believes that it is highly unfortunate that a Ministerial Order made in good faith and clearly issued to deal with a perceived crisis in another area of the market, is now being used by the OUR to unnecessarily intervene in another area of the mobile market.

2.48.1 International incoming mobile termination rates are not relevant to ensuring efficient competition in the international settlements market. International mobile termination rates merely form base at which all market participants including mobile operators use as a starting point for selling termination on the international market. If competitors can sell that termination more cost effectively and/or are sufficiently informed in the highly competitive international arena, then they will survive in the market. Digicel notes that the OUR has recently indicated that a difference of 0.8 US cents between the base termination cost and the resold rate on the international market is all the margin that it may be reasonable to expect to compete on. If margins are significantly greater than this, and certainly if they are much more than 1.5 US cents, then it is highly likely that there would be a distortion of the market which would be deleterious to competition.

Moreover, the OUR's right to make stipulations with respect to mobile termination rates for international incoming traffic under this Order is subject to legal challenge. If the OUR's previous determination in this respect is struck out, that will confirm that the OUR has no right to intervene in respect of mobile termination rates in any way."[57]

2.48.2 **Office**

In a letter dated August 13, 2004, from Digicel to the Minister of Commerce, Science and Technology, Digicel suggested that the Ministerial Directives 01/2004 and 02/2004 do not revoke the Ministerial Directive of April 9, 2002. The Minister responded on August 20, 2004 stating that," ...Directive 01/2004 specifically revoked the Ministerial Order of April 9, 2002 and give the OUR an expressed policy directive to "Undertake and implement such acts of regulatory intervention in the mobile (cellular) market (howsoever defined) as will stimulate sustainable, effective competition among carriers and service providers."

2.48.3 **Thus, the Minister made it perfectly clear that Directive 01/2004 is not limited to international settlements.**

2.48.4 **In relation to the legal challenge related to the Ministerial Directive of April 9, 2002, since this was specifically revoked, this Directive in no way constrains the OUR.**

2.49 Digicel

According to Digicel: "In the abstract the OUR also states that *"This Consultation Document sets out the Office's views regarding its assessment of dominance in the markets for Mobile call termination."* This is a further declaration that this document is not making a market analysis and that the market has already been determined. As indicated previously, there has been no collection of information from operators, no substantive or recent prior market analysis, and no prior market analysis which takes into account the research carried out by the OUR in January 2004.[58]

2.49.1 **Office**

The Office wish to note that, throughout this consultation process it has consulted on the definition of the relevant markets. In fact, in relation to this consultative Document (<u>Assessment of Dominance in</u>

[57] See page 25 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

[58] Ibid page 26.

Mobile Call Termination - March 30, 2004), the definition of the relevant markets was clearly stated in the standard manner. The OUR considered both product and geographic markets. Further, if the OUR was not consulting on market definition, why did it accept and respond to comments submitted by Digicel in this regard based on the aforementioned Consultative Document?

Digicel

2.50 In its response, Digicel indicated that "there is strong evidence to suggest that the OUR has blurred the concepts of market definition or dominance and the manner in which an assessment of both should be conducted."[59]

2.50.1 **Office**

In paragraph 2.34 of the Office Determination Notice (http://www.our.org.jm/PDF-FILES/Mobile%20Call%20Termination Determination%20Notice31-08-04.pdf), the Office responded by noting the following:

1. The discussion on pages 18-19 of Digicel's response attempts to undermine the notion of separate call termination markets for each network and the OUR's view that there is limited demand side substitution. Digicel said that the OUR ignored "...other possibilities such as the prospect [of] a level of users own[ing] more than one phone, or that they can receive most of their calls at home or at work where it might be possible to receive calls on a fixed line instead." The Office is not convinced by this argument and the survey commissioned by the Office indicates that Digicel's position is counter factual. For example, the Office notes that only an estimated 11% of mobile subscribers subscribe to two or more networks. Moreover, the very need for multiple handset ownership could be cited as evidence of market distortion. In relation to FTF call being a substitute for MTM calls, only 38% of household respondents to the survey (December 2003-January 2004) indicated that they subscribe to both fixed and mobile service. Therefore, this substitution would not be possible for residents in 62% of households.

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[59] Ibid page 33.

2. The discussion on page 28 relates to relative international termination charges. Digicel is correct to note that charges under pure caller pays systems are not directly comparable with caller charges where the receiver also pays (e.g. US). However, the Office recognizes this, and notes that, as discussed on pages 11-13 of consultative document No: TEL 2004/03, it is important to be cognizant of the economic characteristics of the calling party pays regime which obtains in Jamaica.

3. Digicel suggests that given the pending entry of AT&T Wireless into the mobile industry, "It is unreasonable for a regulator to attempt to define markets given such volatile market conditions." This seems to suggest that no definition of the market can be achieved. The Office is of the view that this has no merit and notes that, defining the market may pose some degree of complexity but it is not ruled out by new entry.

4. On page 39 Digicel argues that buyer power does not enter into the definition of the market. The Office notes that buyer power should be taken into consideration when the existence of dominance is considered. However, in the particular instance that was referenced, the Office only referred to buyer power in this section because of Digicel's suggestion that the relevant market was incorrectly defined and "...fails to take account of relative competitive power of market participants and the ongoing evolution of competition in the market. ..."

5. On page 40, in reference to a paragraph in consultative Document No: TEL 2004/03, Digicel stated that "It is simply incorrect to state that where a market is found there is implied dominance." The Office simply notes that, the statements in the aforementioned paragraph were obviously a summary of the Oftel's position.

6. On page 59 of Digicel's response, it quoted the Office as saying *"The smallest possible definition of the product market is wholesale mobile voice call termination for calls from a fixed or mobile telephone. Notably, this narrow definition of the market is attributed to the fact that, a call intended for a specific mobile subscriber cannot be sufficiently substituted by calls to other individuals."* Digicel then went on to suggest that the Office is arguing that there is a separate market for

mobile termination for every customer. The reasoning is flawed as it is obvious that the Office's statement merely seeks to explain the basis for the seemingly narrow definition of the relevant market.

Digicel

2.51 According to Digicel:

"Digicel has had no visibility of the details of any other discussions between the OUR and the FTC, the foremost institution on issues of market definition and market analysis in Jamaica. In the absence of public disclosure of the details of discussions with the FTC, Digicel, and any objective bystander, must be forced to assume that none took place – if it did, Digicel contend that this information should be on the public record. This is a failure of due process. Moreover it is not reasonable for so little input to have been sought from the FTC in respect of a matter which could have such significant consequences for the Jamaican telecommunications market and the mobile market in particular. It may be that insufficient time was provided by the OUR to the FTC in which case this also constitutes a failure of due process. Clearly, the time the OUR has allotted to FTC comment on its most recent document is alarmingly short.[60]

2.51.1 **Office**

In relation to the disclosure of details of discussions with the FTC, Digicel requested and received the notes (including verbatim notes of the consultative meeting with the FTC to review the Draft Determination Notice on the Assessment of Dominance in Mobile Call Termination) of the OUR consultation with the FTC.

2.51.2 **The OUR is aware of the importance of the FTC to the process of assessing dominance in the telecommunications markets. In the event that the FTC is of the view that the time allocated for its response is too short, the FTC can and has asked for the time to be extended.**

Digicel

2.52 In reference to the OUR's mention of comments by the USTR, according to Digicel:

"The OUR is not permitted to include irrelevant matters as the basis for arriving at decisions."[61]

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[60] Ibid page 27.

[61] Ibid.

2.52.1 **Office**

The Office wishes to note that it stated the reasons for its Decisions and these did not rely on any statement form the USTR. Also, except for the submission of AT&T, the Office did not assess any information from any other US carrier before making its decisions.

Digicel

2.53 Digicel stated that: "In paragraph 2.17 reference is made to the research that was carried out between December 2003 and January 2004. It seems a great pity that the OUR was not open minded about the commissioning of the research and the questions to be asked. The industry could undoubtedly have added much value to the exercise and perhaps enabled more meaningful results to be obtained from it. Advice could have been sought from the industry or from one of the numerous foreign research companies which have carried out work in respect of mobile termination. Key questions, some of which have been mentioned previously, have simply not been asked. Even absent these questions, what evidence that can be gleaned seems very much opposed to the views of the OUR that appear to have 'cherry picked' specific results to try and support its case".[62]

2.53.1 **Office**

Since Digicel is of the opinion that the OUR 'cherry picked' from the results of the survey, Digicel had ample opportunity to demonstrate that this is so. The Office remains of the opinion that the results of the survey support its decision.

Digicel

2.54 Digicel claimed that, based on OUR's Paragraph 2.23: - Digicel thinks it is highly inappropriate for the OUR to suggest, based on no evidence, that the introduction of cross network SMS would not have a significant impact in terms of the pressure that might be exerted in terms of mobile to mobile call termination charges. The OUR has to be open minded to the possibility that cross network SMS might have a significant impact. This appears to reflect the OUR's tendency to pre-judge matters in an attempt to justify its arguments. In fact Digicel wishes to point out that it is now in fact at an advanced stage of negotiations in agreeing terms for cross network SMS.[63]

[62] Ibid page 28.

[63] See page 29 of Digicel's May 12, 2004 Response to OUR's Supplementary Consultative Document "Assessment of Dominance in Mobile Call Termination".

2.54.1 **Office**

The Office notes that, cross network SMS was introduced in mid 2005. More importantly, as noted in the Determination Notice, unlike voice calls, SMSs do not occur in real time. It is thus not likely that SMS would be a close substitute for voice calls.

Digicel

2.55 Digicel alleges that: Paragraph A2.13 demonstrates clear bias on behalf of the OUR. "The OUR states that *"In relation to the household survey, only 9.1% of the respondents said that they consider the cost of others calling them when deciding to purchase a mobile phone. This provides further evidence that user groups are not likely to constrain the price setting behaviour of domestic mobile operators."* .We notice that the OUR has been very selective about the information it has extracted from the survey. In answer to question number 29, 65% of respondents thought that the cost charged to others for calling the customer was very important. The answer to question 29 is completely at odds with the OUR's findings that there is a market for mobile call termination. Despite this the OUR has highlighted only the figure that appears to point most towards6 the outcome that the OUR wishes. This behaviour is procedurally and administratively not reasonable and as already indicated demonstrates clear bias."[64]

2.55.1 **Office**

As noted in the Determination Notice, the Office considers that questions 14 and 15 are more reflective of consumers' behaviour. In fact, when asked what are the most important things that are taken into consideration when deciding on a service provider (question 15) only 1.9% said they consider the cost of others calling them.

<u>Clear Factual Errors</u>

2.56 ***Digicel***

Digicel stated that: In paragraph 3.10 which is headed *"Mobile Termination Rates for MTM Domestic Calls"* the OUR states that *"ODJ's off-net MTM* (termination) *rate increased from $15.00 to $19.70 per minute on November 29, 2002.* Digicel notes that these are clear factual errors. The figures quoted refer to retail rates and not mobile termination rates. If the OUR has approached its analysis believing that some MTM termination rates are $19.70 this must have severely coloured its views. If the FTC is

[64] Ibid.

presented with such factually incorrect errors it may not be surprising that it might concur with the OUR in the limited time it is allowed to deal with the issue.[65]

2.56.1 **Office**

In the Office's Determination Notice in paragraph 2.37 the Office explained that: The first sentence inadvertently referred to off-net MTM termination rates but the actual rates stated were off-net retail MTM rates. However, although termination rates were not stated, based on information available in the public domain, this increase in MTM rate (other mobile to ODJ mobile) from a low of $15.00 per minute (for some callers) to a high of $19.70 per minute (for other callers) on November 29, 2002 was due to an increase in ODJ's termination rate. The overall increase attributable to a rise in termination rate was $2.00 per minute. This amounts to increases of 13.33% and 11.3% above the previous peak MTM retail rates of $15.00 and $17.70 per minute.

Digicel

2.57 Digicel stated that: In paragraph 3.11 the OUR states *"even before this judgment, Digicel indicated on November 5, 2003 that it intended to increase its international mobile termination charge to US$0.1661 compared to the OUR's estimated cost of US$0.1108."* This is another clear factual error. The rate that Digicel notified was J$8.30 or US$0.138 US cents, some 20% lower than the OUR is alleging.[66]

2.57.1 **Office**

Also, in the Office's Determination Notice in paragraphs 2.39 and 2.40 the Office stated "... that the termination rate in paragraph 3.11 of its consultative document (TEL 2004/03) is incorrect. Digicel's notification actually indicated that it was increasing its rate to J$8.30 or US$0.138 US cents approximately 25% above the OUR's estimated cost of US$0.1108. This correction does not change the fact that a unilateral increase in price, the ability to sustain this price increase and the likely consequence of eliminating competition and potential competition are clear indicators of market power and dominance.

2.57.2 **The Office notes that while these errors were correctly identified as errors of fact, they could not be considered to be material; hence,**

[65] Ibid page 29.
[66] Ibid.

they would not affect the conclusions on market definition or dominance. Further, the correct facts were incorporated in the Determination Notice.

Further Examples of Pre-judgement

2.58 **Digicel**

According to Digicel: "The Office announced in document 2004/02 "Observation of Appeal Tribunal's Order on Settlement Rate Decision" and document 2004/05 "Notice of Proposed Decision on Settlement Rate and Termination Charges" a timetable for establishing cost based mobile termination rates irrespective of the outcome of the appeal on dominance.

There was no reasonable use for this information, which is extremely complex and expensive to establish, other than to set cost based mobile termination rates. Cost based mobile termination rates can only be considered as a regulatory requirement once a mobile operator has been found dominant in mobile call termination. Consequently, any exercise aimed at establishing cost based mobile termination rates must be based on an intention to find mobile operators dominant in mobile termination. This constitutes pre-judgement. The OUR only reviewed its position after Digicel wrote to it in this respect on 23 April. It is clear however that the mindset of the OUR was previously to proceed regardless of whether the work was necessary.

2.58.1 In Document Number Tel 2004/06 Digicel notes that the OUR is suggesting that it will publish a consultation document in mid June 2004. It suggests that this is conditional. Presumably the OUR means that it is conditional on whether there is a finding of dominance by the OUR in respect of mobile call termination markets on 31 May. Digicel is forced to point out that it is simply not credible for the OUR to suggest that it can write a consultation document on one of the most complex areas of regulation between 31 May 2004 and mid June 2004.

2.58.2 At a generous estimate it would take several months for the OUR to write such a consultation. The fact that the OUR has the intent to publish this document in mid June indicates either: a/ that it has already been substantially written, in which case the entire dominance procedure has been a sham and the OUR has not in truth been consulting at all on market analysis and dominance because the OUR could only carry out an assessment of cost based termination rates based on a finding of dominance[7]; or, b/ the OUR intends to write such an fragile document that it will constitute a breach of its duties to regulate the telecommunications sector in a reasonable fashion."[67]

2.58.3 **Office**

The Office wishes to note that it was clear in its decision (Document Number Tel 2004/06). The Office stated that: "Dominance as it relates to mobile networks is currently the subject of consultation. Should the consultation result in a declaration of dominance in mobile, the Office will conduct an assessment of cost-based termination charges for this sector."

<u>OUR's duty to give persons the opportunity to make submissions and to be heard by the Office</u>

2.59 **Digicel**

According to Digicel: "Digicel wrote two letters to the OUR on March 31 2004 and April 8 2004. Digicel's first letter sought a reasonable period of time to respond to the consultation. In its response on 5 April the OUR extended the deadline but insufficiently in Digicel's view. The OUR also indicated in that letter that only the results of the subscriber survey were not a part of the aforementioned consultation and that this was specifically why only 3 weeks had been allowed for responses initially – this despite indisputable evidence to the contrary. It therefore seemed to be without reasonable doubt that the only thing that could affect the OUR'[s] previous views with respect to market analysis and dominance was the subscriber survey. If the OUR had been genuinely consulting on the whole of the issues of market analysis and the assessment of dominance it would have provided sufficient time (at least 3 months) to respond. However, the OUR then said in its letter to Digicel of 21 April 2004 that it was consulting on the whole of the issues of market analysis and the assessment of dominance. A consultation on matters of these complexities would in Digicel's view normally allow several months for responses. This indicates that the OUR has chosen to give the industry insufficient time to respond to the consultation despite the necessity of more time for responses being highlighted to it. We therefore believe that the current document on Dominance cannot be held to be a valid consultation on this basis."[68]

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[67] Ibid page 30.
[68] Ibid page 31.

2.59.1 **Office**

The Office notes that while the OUR indicated that only the results of the subscriber survey were not a part of the consultation on "Dominant Public Voice Carrier", at no time did the OUR say that it had completed consulting on the other aspects of the matter. In fact the survey was carried out as a result of queries in relation to market definition. Therefore, it is disingenuous to suggest that the OUR was not consulting in good faith.

2.59.2 **In relation to the claim that the industry was given insufficient time to respond to the consultation, the Office notes that interested parties can request an extension to the deadlines set by the Office. In fact, interested parties, namely Digicel and C&WJ have requested and received extensions on more than one occasion during this consultation process.**

2.59.3 **Further, irrespective of the fact that some respondents have chosen to count the words written on the subject of mobile call termination, the Office contends that what is important is the substance of what is said. In this regard, the Office issued its initial position in its first consultation[69] on the matter. The OUR stated that its views and the basis for those views. Additionally, parties to the consultation had several other opportunities to make submissions during the consultation process between March 2000 and May 2004.**

No Opportunity to Make Comments on Comments

2.60 **Digicel**

"Digicel also notes that the OUR has not included in its timetable any provision for comments to be made on responses submitted to the OUR's latest document on Dominance which was dated 30 March. This is surprising. Previous experience leads Digicel to believe that it has a legitimate expectation that the OUR would provide this opportunity."[70]

2.60.1 **Office**

This oversight was corrected and the OUR received and included Digicel's comments on responses to the aforementioned consultative document in the consultative process. Digicel's response was also posted on the OUR's website[71].

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[69] See Dominant Public Voice Carriers, 2000.
[70] Ibid page 32.
[71] See Comments on AT&T Corp.'s response to OUR's Document on the "Assessment of Dominance in Mobile Call Termination".

2.61 In the Request for reconsideration (Stay and Reconsideration Request - 17 Sept 2004), Digicel also made additional claims on page six (6) of its submission.

Failure to take account of substantial evidence of competition due to falling prices

2.62 **Digicel**

Digicel contends that: "The OUR has argued that falling prices in both real and nominal terms is not 'conclusive' evidence that a market is competitive. In Digicel's response to the consultation it provided a comprehensive pricing history of its mobile termination services that the OUR did not appear to have prior to the consultation. Digicel's pricing history for mobile termination services included data on the following:

- A full history of MTM (mobile to mobile) termination in real terms Jamaican dollars
- A full history of FTM (fixed to mobile) in real terms Jamaican dollars
- A full history of MTM termination in US dollar nominal terms
- A full history of FTM termination in US dollar nominal terms
- A full history combined impact of falling dollar and rising inflation on MTM rates
- A full history combined impact of falling dollar and rising inflation on FTM rates

2.63 In every single case steady and often significant falls in prices were recorded. While Digicel concedes that falling prices may not necessarily be conclusive evidence of a competitive market it is certainly very strong evidence absent significant evidence to the contrary – but the OUR provided no evidence to the contrary. The OUR relied on the alleged costs of C&WJ's mobile termination service in February 2002 to substantiate its claims that somehow these costs showed that the market was not competitive even though current Digicel prices are below and in some cases well below those 2002 estimated costs."[72]

[72] See page 6 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

2.63.1 **Office:**
Let us look at this claim logically.
Claim: The relevant market(s) is (are) competitive.

Evidence: Prices are falling in real terms and in one case (FTM), prices have also fallen in nominal terms.

2.63.2 **Firstly, as conceded by Digicel, falling prices is not a sufficient condition for the existence of competitive markets.**

2.63.3 **Secondly, the three primary characteristics of competitive markets are the presence of *many firms*, *extremely low or no barrier to entry*, and *homogeneous products.***

2.63.4 **There are two extremes in terms of the definition of the relevant markets. On one hand, the OUR decided that, "Mobile voice call termination to each mobile operator's network constitutes a separate market. That is, the relevant markets are:**

- **wholesale market for voice call termination on Mossel's (Digicel's) mobile telephone network**
- **wholesale market for voice call termination on Cable and Wireless' (C&WJ's) mobile telephone network**
- **wholesale market for voice call termination on Oceanic Digital's (ODJ's – formerly Centennial) mobile telephone network**

2.63.5 **From the carriers' perspective, operators are obligated by law to ensure that calls to a given network must be able to be terminated on that network. To do this, operators must purchase call termination services from each carrier or network operator. Since an operator cannot terminate a call destined for network *'A'* on network *B*, this implies that each operator has 100% of the relevant market for call termination on its network.**

2.63.6 **The OUR examined possible supply and demand substitutes and found that there are no effective demand and supply side substitutes for call termination on any given mobile network.**

2.63.7 **In this context, the:**

- **Number of firms in the relevant market is one.**
- **The existing technology creates an absolute barrier to entry.**

- **Mobile call termination is not homogeneous, that is, termination on network *A* is not the same as terminating on network *B*.**

2.63.8 Also, from a consumer perspective, based on the existing technology, it is not possible to select the network on which a call should terminate; this selection is made by the called party. Even if the technology existed for callers to mobile subscribers or originating operators to select a terminating mobile operator based on price, the practice of SIM card locking would limit any alternative.

2.63.9 On the other hand, in Digicel's response to the OUR's second consultative document on the issue of dominance, Digicel stated that, "...the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections."

2.63.10 This definition suggests that voice calls on the fixed and mobile networks are substitutes. In paragraphs 3.17 and 3.18 of the Determination Notice, the OUR stated:
Substitution between Voice Calls: Since some telephone subscribers have both mobile and fixed lines (38% of household respondents) it is possible for some callers to make FTF calls instead of FTM or MTM calls. This suggests that the suppliers of fixed call termination service could offer this as a substitute for mobile call termination. However, since 55% of the respondents in the household survey have only a mobile phone, callers have no choice but to use this service. Additionally, as much as 43% of the calls to household respondents are received on the road. Hence, the Office does not consider fixed termination to be a close substitute for mobile termination.

2.63.11 If the substitution between voice calls (for example, a fixed to fixed (FTF) call for a FTM call) was strong then the FTM termination charge would be constrained by the retail price of FTF calls. Further, if these calls were substitutes for each other, it would suggest that fixed telephony is a substitute for mobile telephony. However, this is not so, partly due to the convenience of making or receiving a mobile call at any given location in the coverage area while in transit and the fact that only 11% and 8.2% of the household and corporate respondents respectively, indicated that they would replace their fixed line with a mobile line."

2.63.12 **In relation to the substitution of on-net MTM calls for off-net MTM calls, as note before, the Office is not convinced by this argument and the survey commissioned by the Office indicates that Digicel's position is counter factual. For example, the Office notes that only an estimated 11% of mobile subscribers (householders) subscribe to two or more networks, and only 1% subscribe to all three networks.**

2.63.13 **Moreover, the very need for multiple handset ownership could be cited as evidence of market distortion. This would be similar to requiring motorist to own four cars to access gasoline from ESSO, Texaco, Shell and Total. Prices for the lowest priced mobile phones range from about $2,000 - $3,000. Therefore, two handsets cost about $4,000 - $6,000. This represents 35% - 53% of the poorest household quintile annual expenditure on telephone services[73]. This kind of expenditure would be tantamount to a misallocation of consumers' resources.**

Alleged Failure to conduct proper analysis on profitability/excessive prices and heavy reliance on this flawed analysis in reaching conclusion and Basis for Assessment of Call Charges

2.64 **Office: As noted before, the Office did not have a "heavy reliance" on any analysis of "profitability/excessive prices" in making its determination.**

2.64.1 **The Office wishes to comment on a point raised by Digicel in this section to demonstrate that it is Digicel's analysis that is flawed.**

Digicel

2.64.2 Digicel stated that it "...would inevitably have had a considerably higher cost of capital than C&WJ since Digicel was a new entrant with no reputation, was financed by venture capital and was only operating in the mobile sector."[74] In footnote one of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004, Digicel stated: A company's

[73] See Jamaica Survey of Living Condition 2002.

[74] See page 8 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

cost of capital is the level of profit required by the company in order to remain in business. For instance an investor will not provide funds unless it can earn a return on that investment. A bank also must earn a return on loans it provides. The combination of these t[w]o requirements for returns gives a company's cost of capital. In economics the cost of capital can be equated to the notion of 'normal' profit which is what a firm/company will earn in a competitive market.

2.64.3 **Office**

The implication from Digicel analysis is that Digicel requires a greater return on its investment than C&WJ. If the relevant market(s) is (are) competitive, above normal profits cannot be made. Yet, Digicel claim to have required, and seemingly earned above what would be considered normal profit in the allegedly competitive market for mobile call termination (as suggested by Digicel). However, for any operator to price and obtain above normal profits over an extended period of time, this suggests that it is likely to be operating in a non-competitive market. However, the earning of excess profit, as in the case of pricing above cost (inclusive of a normal profit), is not sufficient to conclude that an operator holds a dominant position. Thus, although this supports the Office's position, as stated before, ultimately, the important fact is the existence of barriers to entry.

Use to which Information can be put

Digicel

2.65 According to Digicel:

"The OUR has also stated in paragraph 2.13 that:

> "*the Office can use information collected for one consultation process to carry out analysis in another consultation process*".

This is incorrect. Section 4(4) of the Act states that:

> *"where the Office has grounds for so doing, it may for the purpose of its functions under this Act, the Office may require a licensee to furnish.....information...."*[75]

[75] The correct wording of the Act is *"where the Office has reasonable grounds for so doing, it may for the purpose of its functions under this Act, require a licensee to furnish.....information...."*

This makes it clear that the OUR must have grounds for collecting information. It did not have grounds to collect information on some of Digicel's costs on the occasion when it asked for that information as a part of a different exercise to look at C&WJ's Reference Interconnection Offer (RIO). Nonetheless Digicel was prepared to consider provision of the information subject to knowing what it was to be used for and as long as Digicel could be given a reasonable period of time to assemble it. The OUR never responded to Digicel's queries in this respect."[76]

2.65.1 Office

The OUR wishes to note that in a letter to Digicel dated November 19, 2001, the Office stated:

> **"In our meeting of October 24, 2001 we indicated that we would be interested in obtaining specific costing information that would assist the Office with the determination of appropriate mobile-termination rates."**

2.65.2 **It is obvious from the above referenced letter that the Office required the information for the determination of appropriate mobile-termination rates as required by the Act. Thus, it remains unclear why the Office was being asked to restate the grounds on which this information was requested.**

Digicel

2.65.3 Digicel further stated that:

> Even if the OUR had responded to Digicel and Digicel had volunteered to provide the information the OUR would not, in the light of section 4(4) of the Act, have a legitimate basis for using that information for purposes other than considering C&WJ's RIO.
>
> Moreover, irrespective of the legal arguments we believe that it is in principle inappropriate for the OUR to use information submitted for one investigation to inform another where that information may be sensitive. Regulated companies must be confident that the OUR is behaving in a transparent and fair fashion. If sensitive information collected ostensibly for one purpose is then used elsewhere without permission, regulated companies will have no trust in the regulatory process.[77]

[76] Ibid page 13.
[77] Ibid.

2.65.4 **The Office wishes to note that there is nothing illegal or inappropriate about using information required for one consultation in another consultation. Is it that a different set of information would be submitted based on the particular matter being addressed?**

2.65.5 **Regarding disclosure of information, this is a separate matter and is addressed in the Act.**

Alleged Failure to Reveal the Views of the Fair Trading Commission

2.66 **Office**

As noted before, in relation to the disclosure of details of discussions with the FTC, Digicel requested and received the notes (including verbatim notes of the consultative meeting with the FTC to review the Draft Determination Notice on the Assessment of Dominance in Mobile Call Termination) of the OUR consultation with the FTC.

Failure to comply with Statutory Direction

Digicel

2.67 Digicel stated that:

> "The OUR has failed to comply with its statutory obligation under s. 5 of the Act to refer the question of the determination of dominance in the mobile voice call termination market to the Fair Trading Corporation, and the said failure constitutes a material error of law which invalidates the determinations of the OUR in this regard."[78]

2.67.1 **Office**

The Office notes that the relevant section of the Act in relation to the assessment of dominance is Section 28(1). This section empowers the Office "...to determine which public voice carriers are to be classified as dominant public voice carriers...." Further, the FTC was consulted on this matter, as required under the Act. The Office rejects the allegation that there was such failure to consult and that such alleged failure constituted a "material" error of law.

[78] Ibid page 15.

Failure to Address Substantive Points Made by Digicel

Digicel

2.68 According to Digicel:

"…The Act requires the OUR to provide reasons for its decision. Digicel believes that such 'reasoning' must also require an explanation as to why clearly pertinent information has been ignored. The OUR must address this issue of international benchmarks if it is truly cognisant of its requirement to balance its responsibility to both consumers and operators as it has suggested in paragraph 2.5. In the interest of objectivity the OUR must address this point. In this light the OUR must reconsider its Determinations."[79]

2.68.1 **Office**

As noted before, the existence of excessive or below cost pricing are symptoms of dominance. Whether current prices are above, equal to or below international benchmarks is not conclusive evidence of dominance or non-dominance. The true test of dominance in a relevant market is the extent to which market entry barriers exist. It is therefore incorrect to assume that if current prices are low relative to international benchmarks then mobile operators are not dominant.

2.69 **Digicel**

Digicel stated that "The OUR is required to regulate on an impartial basis. Consequently it is difficult to understand why it has chosen to highlight just one part of the total cost of mobile termination rates (for the UK) in Table 1 of its Decision. The OUR has not provided the UK Office of Communications' (OFCOM's) actual figures for mobile termination and has only included the long run incremental cost (LRIC) element of the charge. The OUR has omitted the externality charge within the UK mobile termination rate. In effect the OUR is therefore highlighting figures which if adopted in the UK as the mobile termination rate would be detrimental to consumer welfare in the UK. It is also the case that the table reproduced by the OUR in its Decision states the Ofcom LRIC calculations in 2000/01 prices, not today's prices and therefore further distorts the picture. We reproduce the full table below to illustrate the true UK mobile termination rates (in 2000/2001 prices)."[80]

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[79] Ibid.

[80] Ibid. page 16.

Costs of Mobile Termination in the UK

2.69.1 **Office: As the Office noted, information provided on the UK mobile termination costs was only to demonstrate that the cost of providing mobile voice call termination service has declined in real terms elsewhere. The information showed a declining trend with a marginal increase in the last year of five years of data.**

2.69.2 **Reference is also made to the omission of the externality mark-up (of 0.5 pence). The Office notes that this does not change the fact that mobile termination costs are projected to decline in the UK.**

Digicel

2.70 According to Digicel:
"The OUR has erred in fact in treating the UK LRIC figures as representative of mobile termination rates generally. In fact these figures are below the mobile termination rates in the UK and the UK is probably the least appropriate country that the OUR could have chosen to highlight."[81]

2.70.1 **Office**

The Office notes that Digicel is being disingenuous to suggest that the OUR "...erred in fact in treating the UK LRIC figures as representative of mobile termination rates generally." The OUR did not refer to this data set as representing mobile termination rates in the UK or elsewhere. The information presented clearly state that the data represented mobile call termination costs.

Misrepresentation of Digicel's comments

Digicel

2.71 According to Digicel:
" The OUR has in its paragraphs 2.23 and 2.24 effectively misrepresented Digicel's comments about cost reductions on page 86 of Digicel's current response by taking them out of context and interpreting them as implicitly indicating that mobile termination rates should be lower."[82]

2.71.1 **Office**

The Office notes that, this is yet another of the many disingenuous attempts by Digicel to skew the facts. A review of the referenced paragraphs will demonstrate that there is no error of fact.

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[81] Ibid page 16.

[82] See page 18 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

Failure to Provide a Reasonable Length of Time for Responses

Digicel

2.72 According to Digicel:

"...Digicel are seeking reconsideration of the Determinations on the basis that he OUR did not allow interested parties a sufficient period of time to respond to a consultation of such import and complexity."[83]

2.72.1 **Office**

As stated in paragraph 2.49 of the Determination Notice:

> **"In relation to the time allotted for responses, interested parties can request an extension to the deadlines set by the Office. In fact, interested parties, namely Digicel and C&WJ have requested and received extensions on more than one occasion during this process."**

2.72.2 **Furthermore, interested parties have had at least four separate opportunities subsequent to the issuing of the various consultative documents to provide responses. Additionally, during the reconsideration process, the Office accepted submissions from Digicel in relation to its request for reconsideration of the Office's Determination Notice (http://www.our.org.jm/PDF-FILES/Mobile%20Call%20Termination Determination%20Notice31-08-04.pdf) for about three (3) months subsequent to its Determination Notice.**

2.72.3 **The Office maintains that interested parties were afforded sufficient time to respond to its consultation on the matter of the Assessment of Dominance in Mobile Call Termination.**

Irrelevant Considerations - Distortion of Matters to be Investigated

Digicel

2.73 According to Digicel:[84]

"The "important" question mentioned in paragraph 2.1 that the OUR has considered throughout the consultation has been structured in such a way

[83] Ibid page 19.
[84] Ibid pages 19 and 20.

as to inevitably lead to an incorrect outcome. The question it has concerned itself with was:

> *"If carrier A wants to terminate a call destined for a customer on carrier B's mobile network, what are the alternatives to the purchase of mobile voice call termination service from carrier B?"*

2.73.1 The market reality is that carrier A's incentive to seek alternative forms of supply to termination on B's network will be limited in comparison to the incentives of the customers of carrier A (or B) to do so. This is because the cost of the termination is passed on to the customer and so due to the derived nature of demand for mobile termination it is the customers that will seek alternatives to having such costs passed on. …"

2.73.2 "…Digicel requests reconsideration of the Determinations on the grounds that the 'important question' the OUR has concerned itself with is not the correct question and so was always likely to lead to an incorrect outcome.

2.73.3 **Office**
The Office notes that although the relevant market is a wholesale market, it considered demand side substitutes at the retail level in its analysis. Since the Office considered substitution at both the wholesale and retail levels there is no justification to modify its decision.

Irrelevant Considerations – Abstract

Digicel

2.74 Digicel stated that the OUR's comment:
"The existence of dominant carriers in the Jamaican telecommunications markets suggests that the existing quality of service is likely to be lower than in effectively competitive markets and/or higher prices than in effectively competitive markets."

2.74.1 The Company further claimed that the OUR "…prejudiced itself in terms of actions it should take in response to a finding of dominance…" and this constitutes an error in law.[85]

[85] Ibid pages 20 and 21.

2.74.2 Office

Section 28 of the Act states as follows below:

> ***(1) Subject to subsection (2), the Office shall determine which public voice carriers are to be classified as dominant public voice carriers for the purposes of this Act.***
>
> ***(2) Before making a determination under subsection (1), the Office shall -***
>
> > ***(a) invite submissions from members of the public on the matter; and***
> >
> > ***(b) consult with the Fair Trading Commission and take account of any recommendations made by that Commission.***
>
> ***(3) A dominant public voice carried[86] may at any time apply to the Office to be classified as non dominant and the Office shall not make a determination in respect of that application unless it has invited submissions from members of that public on the matter and has taken account of any such submissions.***

It is submitted that Digicel has adduced no evidence to show that the OUR has "...prejudiced itself in terms of actions it should take in response to a finding of dominance...," to quote theirs. The Office has consulted publicly on the matter, inviting submissions, as per Section 28(2)(a) and has consulted with the FTC as per Section 28(2)(b). These requirements as set out in the legislation have been complied with by the Office in its deliberations and are the gravamen of what the Office should be guided by in terms of its actions in this regard. An issue falling outside of the above stated provisions would constitute an error in law and the Office has considered these fully.

Regarding the comment that:
***"The existence of dominant carriers in the Jamaican telecommunications markets suggests that the existing quality of service is likely to be lower than in effectively competitive markets and/or higher prices than in effectively competitive market.",* this is not enough to constitute an error in law for the purposes of the Office's deliberations. The Office was merely making an observation on what was "likely", and would not make a definite statement regarding the subject matter without following the aforementioned**

[86] This is a printing error the word should be "carrier".

steps, as set out in the legislation. Even if the observation were wholly untrue, this would constitute an error of FACT, not of law, as Digicel is postulating. There would only be an error in Law if the Office failed to follow the steps and limbs set out in Section 28 of the Act, which it did not, and therefore, in light of the above, the Office could not have "prejudiced itself" because it did indeed take the appropriate actions in its deliberations and therefore, it is submitted that the Office did not misdirect itself in terms of its application of the legislative steps.

<u>Pre-Judgement – Reaching Conclusions of Dominance without adequate Consultation</u>

2.75 **Office: During the Consultation on this matter, the Office expressed its opinion that mobile carriers are dominant with respect to the call termination service offered. Submissions of arguments from various respondents did not convince the Office that mobile carriers are not dominant in their respective markets for call termination. Certainly this could not amount to pre-judgment. If so, then regulators all over the world are guilty of this action.**

<u>Possible evidence of further pre-judgement – views expressed publicly by Franklin Brown of the OUR</u>

2.76 **Office: As noted before, in relation to statements made by individual members of the Office and members of staff of the OUR, the Office wishes to state that it did not make any decision in relation to dominance in mobile call termination prior to September 2, 2004. For the avoidance of doubt, the views expressed by individuals do not and have never represented a decision of the Office.**

Unreasonable conclusions

2.77 Digicel stated that:[87]

"In paragraph 3.2 the OUR repeats the allegation that

...mobile network operators have no incentive to lower the price of calls to their mobile networks from other networks (fixed or mobile). ..."

"...Digicel is seeking a reconsideration of the Determinations on the basis that the market reality of decreasing prices runs counter to the OURs assertion that operators have no incentive to reduce prices"

2.77.1 **Office**

The Office notes that this statement refers to incentive in the competitive sense. The OUR demonstrated that there is no incentive to reduce prices based on the absence of effective competitive constraints. As noted before, reduction in rates may be due to the likelihood of regulation.

Alleged Failure to Give Consideration to the Issue of Bypass

2.78 **Office: Based on the information available to the Office, it does not appear that bypass is an effective constraint on the pricing of termination services. Firstly, prior to, or during the consultative process, there were no complaints by Digicel to the Office in relation to bypass activity on its network. Secondly, it seems as if bypass is not a significant constraint on Digicel's international termination charges since it increased its charges from the regulated level of $5.351[88] to $8.30 in December 2003. Further, since higher rates are likely to attract more rather than less bypass activity, it does not seem that bypass is a significant constraint. If bypass was an effective constraint, one would expect rates to decline in order to minimize the margin that attracts this activity.**

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[87] See page 22 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

[88] Se Determination Notice: Interconnect Pricing - Reference Interconnect Offer, May 2002.

Alleged Failure to be Impartial

2.79 **Office**

In assessing dominance, competition analysis calls for the definition of the relevant market and an assessment of the level of barriers to market entry. This is exactly what the OUR did. Further, the OUR looked at the proposed alternative definition of the relevant market (according to Digicel, "... the relevant market for access (wholesale) purposes is the aggregate market for call termination, comprising both fixed and mobile connections") and, like most National Regulatory Authorities throughout the world, determined that this is not the correct definition of the market based on the fact that termination on other mobile networks is not a substitute for terminating on a particular mobile network.

Alleged Failures to Consult

2.80 According to Digicel there is:

"...a general pattern of ignoring or barely addressing the substantive points that Digicel made in its original response suggests that the OUR was not interested in consulting on the issue of mobile call termination. The OUR has paid only lip service to the responses that Digicel submitted to it and has not made a serious attempt to respond to Digicel's comments.

Consequently, Digicel are requesting reconsideration of the Determinations on the basis that the OUR has not taken account of the responses to the consultation."[89]

2.80.1 **Office**

The Office wishes to note that almost all of its comments (except for three paragraphs) from page nine of its Determination to page 23 were dedicated to Digicel's comments. Those comments considered inter alia Digicel's substantive comments. The claim that the Office did not take account of the responses to the consultation is simply incorrect. The Office delayed its decision based on comments by respondents and also sought additional information based on those responses.

[89] Ibid page 24.

B/ *Failure to Properly Analyse Markets*

Assessment of Dominance Determination Notice, September 2, 2004

Digicel

2.81 According to Digicel:

"...a satisfactory explanation must be provided as to why the cost of mobile termination has been falling so dramatically and why the Minister intervened to put a halt to declining settlement rates (which depend on termination rates)[90]. In the absence of evidence to the contrary the OUR must put this down to competition, or under a dominance analysis, countervailing buying power. In the former case the OUR has no case for finding that there are markets for mobile call termination on each mobile operator's network. In either case it is not possible to determine that any mobile operator has a dominant position. If the OUR cannot provide in relation to the decreases in price an alternative explanation to the competitive forces argument advanced by Digicel then on the face of it a material fact underpinning their Determination would effectively be removed. The OUR would therefore have fallen into a significant error of fact on an issue critical to its analysis and Determination. Furthermore in considering the interdependencies of looking at 'prices, costs and profitability', in getting costs so obviously incorrect, the OUR's view of prices and profitability must also be blighted."[91]

2.81.1 **Office: It must be stated that the Office has an obligation to protect competition in Jamaican markets and must act to preserve the competitive environment. To this end, the Office seeks to focus here on the critical issues in the markets for international incoming traffic.**

2.81.2 **The Office wishes to note that settlement rates are the per-minute rate paid by licensed foreign carriers to domestic international facilities operators for terminating foreign originated calls. The settlement rate should cover the total cost of delivering the call to the network to which the called party subscribes. The settlement rate includes the cost of transmission to the international switch, the switching cost at the international switch, the transmission cost to the mobile operator's network and termination cost on the mobile operator's network.**

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[90] Ministerial Order 2/2004

[91] See page 25 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

2.81.3 **It should also be noted that, since operators have market power, it is possible for mobile carrier's to increase the termination charge for international incoming traffic to approximate its settlement rate. This means that any operator accepting international traffic destined for that mobile network may do so at a loss. Therefore, there will be no competition for traffic destined to that mobile network.**

2.81.4 **This type of pricing behaviour (where an operator increases its mobile termination charge to approximate the settlement rate), reduces competition for traffic destined to Jamaica. This concern is amplified when one considers that most of the subscriber base is concentrated on one network.**

2.82 ***Paragraph 2.15***
In relation to the concerns expressed about paragraph 2.15, the Office notes that these were already expressed.

Text Messaging, Multiple Phone subscription and Call Back

2.83 Digicel claim that the Office should consider the cumulative effects of such activity as text messaging, borrowing a relative's phone to receive a call and subscribing to multiple providers (an *estimated 11% of mobile subscribers subscribe to two* networks and 1% of subscribe to all three networks) and short calls like calls to request that the called party calls back the calling party as constraints on the pricing behaviour of mobile carriers.[92]

2.83.1 **Office**
The Office notes that to do this would be irresponsible. In relation to text messaging this was not done across networks until June 2005. Further, SMS would not be a close substitute since this is not a real time service.

2.83.2 **In relation to borrowing a phone and ownership of multiple handsets, the Office notes that this alleged constraint is not credible. Only one percent of the respondents subscribe to all three networks, and if this is so, it seems that Digicel is suggesting that subscribers would be going from house to house, or from car to car searching for a phone to borrow, in order to receive a call. Or is it that Digicel is**

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[92] See pages 83 and 84 of Digicel's May 12, 2004 Response to the OUR's Supplementary Consultation on "Assessment of Dominance in the Mobile Call Termination"

suggesting that the caller does the searching and after locating a subscriber that's on the same network that is willing to give up his/her phone so that the calling party can make a call, the subscriber is contacted and asked to return the call? Either way, this proposition could not be seriously considered and is therefore rejected.

2.83.3 **In relation to the domestic version of call back, to the extent that high mobile call termination rates cause this activity to be significant; the effect is to increase the number of call origination from the mobile network with high termination rates. That is, this may lead to subscribers making more mobile to mobile (MTM) on-net calls on the network with high off-net termination rates.**

2.83.4 **The Office fails to see the basis for cumulating these factors, but notes that, these factors are not effective constraints in the markets for mobile call termination.**

Paragraph 2.34, part 2

2.84 **The Office wish to note that the concern expressed under this heading in Digicel application for reconsideration AfR[93] in relation the lack of incentive to lower call termination charges was already addressed in this document. (See the section of this document titled "Unreasonable Conclusions").**

Paragraph 2.34, Part 3

2.85 According to Digicel:[94]

In paragraph 2.34, part 3, the OUR states:

"Digicel suggests that given the pending entry of AT&T Wireless into the mobile industry, "It is unreasonable for a regulator to attempt to define markets given such volatile market conditions." This seems to suggest that no definition of the market can be achieved. The Office is of the view that this has no merit and notes that, defining the market may pose some degree of complexity but it is not ruled out by new entry."

2.85.1 Digicel further stated that:

"... The OUR cedes that new entry does pose a degree of complexity to the market definition process but Digicel notes that it has not seen any

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[93] See http://www.our.org.jm/PDF-FILES/Stay%20and%20Reconsideration%20Request%20-%2017%20Sept%202004.pdf.

[94] Ibid page 29 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

evidence of analysis on this issue. If new entry adds to the complexity one would expect that there would be a discussion around this issue. … Consequently, Digicel seeks a reconsideration of the Determination in the light of due consideration not been afforded to the entry of a significant new competitor in to the immature Jamaican mobile market. "

2.85.2 **Office**

The Office wishes to note that it never made this alleged concession. The Office only noted that market definition is not straight foreword; it does possess a degree of complexity. However, based on the Office's definition of the relevant markets, new entry does not add to the difficulty of defining the relevant markets since wholesale mobile call termination on a new carrier's network is not a substitute for call termination on an existing mobile carrier's network.

Paragraph 2.34, Part 4

2.86 According to Digicel, the OUR states in paragraph 2.34, part 4 that:[95]

"On page 39 Digicel argues that buyer power does not enter into the definition of the market. The Office notes that buyer power should be taken into consideration when the existence of dominance is considered. However, in the particular instance that was referenced, the Office only referred to buyer power in this section because of Digicel's suggestion that the relevant market was incorrectly defined and "…fails to take account of relative competitive power of market participants and the ongoing evolution of competition in the market. …".

2.86.1 "The OUR's paragraph is confusing. The sentence from the earlier Digicel response does not mention buyer power. It only mentions definitions. Digicel therefore hereby restates that the OUR had misunderstood the relevance of buyer power when it wrote its March 30 2004 document on mobile call termination. The OUR needs to reconsider its Determinations in this light."

2.86.2 **Office: Actually, it is the OUR that is confused with the conflicting position taken by Digicel. In Digicel's <u>Response on Dominant Public Voice Carriers No.2 to O.U.R. (Dec. 20, 2002)</u>, Digicel stated:**

Under EU law, under the concept of "essential facilities", the controller of an essential facility may be subject to regulation in as

[95] Ibid 30.

much as it may be required to provide access to the facility on reasonable terms. Under the OUR's approach, if an operator is found to be dominant, it appears that that operator may become subject to economic regulation. Although countervailing buyer power may go some way towards mitigating the power of the so-called dominant operator, that counterweight is reduced if end-to-end interconnection is mandatory, as is the case in Jamaica. Digicel submits that the "essential facilities" approach may be the more appropriate.[96]"

2.86.3 **This clearly suggests that in the Jamaican context, any possible effect of countervailing buyer power is reduced or non-existent since end-to-end interconnection is mandatory.**

2.86.4 **However, in other comments, Digicel suggest that buyer power is important in this consultation. For example, according to Digicel:**

> **"The rapid falls in termination rates are therefore an indication either of competition, or of buying power forcing reductions on mobile termination rates."[97]**
>
> **"Digicel is facing competitive pressure in terms of demand substitutability or ... if the market has been defined correctly then Digicel's price reductions can only be explained through strong countervailing buyer power i.e. it lacks market power."[98]**

2.86.5 **The Office clearly presented its analysis and position on countervailing buyer power in its Determination Notice and does not see the need to reconsider its decision in relation to buyer power. Further, the Consultative Document issued in March 2004 does not represent a decision; hence there are no grounds for reconsideration.**

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[96] See http://www.our.org.jm/PDF-FILES/Digicel%20Response%20to%20TEl200206.PDF.
[97] See Digicel's Request for Stay and Reconsideration.
[98] See Digicel's Response to OUR's Supplementary Consultation on "Assessment of Dominance in Mobile Call Termination"

Paragraph 2.34, Part 5

2.87 According to Digicel[99]: "In paragraph 2.34, part 5 the OUR states:

> *"On page 40, in reference to a paragraph in consultative Document No: TEL 2004/03, Digicel stated that "It is simply incorrect to state that where a market is found there is implied dominance." The Office simply notes that, the statements in the aforementioned paragraph were obviously a summary of the Oftel's position.'*

The OUR should be aware that Digicel has read and analysed the extensive analysis undertaken in all the Oftel documents. At no point has Oftel ever said or suggested that where a market is found there is implied dominance. This comment is entirely of the OUR's own making. Since this is the OUR's own comment, it demonstrates a striking level of either pre-judgement about its approach to mobile termination in Jamaica and/or a complete misinterpretation of the Oftel position. [...]. Consequently, Digicel seeks a reconsideration of the Determinations based on the OUR's fundamental misunderstanding of market analysis and in particular the heavily referenced Oftel position."

2.87.1 **Office: The Office's Determination Notice clearly defined the relevant markets, assess the extent of market barriers and other constraints and came to a conclusion based on this analysis. Nowhere in the Determination Notice in the Office's analysis of the relevant Jamaican markets did the Office suggest that where a market is found there is implied dominance.**

2.87.2 **The OUR's summary of the Oftel's review of mobile wholesale voice call termination markets may have had a gap but this is of no consequence to the Office's Decision. As noted, and as can be seen from the Office's analysis in its Determination Notice, the standard approach taken by competition agencies was followed.**

[99] See pages 30 and 31 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

Digicel
Paragraph 2.39

2.88 "In paragraph 2.39 the OUR repeats a statement that it made in a previous document relating to international termination rates, namely:

> *"Digicel's notification actually indicated that it was increasing its rate to J$8.30 or US$0.138 US cents approximately 25% above the OUR's estimated cost of US$0.1108. This correction does not change the fact that a unilateral increase in price, the ability to sustain this price increase and the likely consequence of eliminating competition and potential competition are clear indicators of market power and dominance."*

2.88.1 Digicel wishes to point out that we explained in our original response why this statement demonstrated a misunderstanding of market dynamics and was therefore not relevant. Our full comments start on page 53 of our original response. We note that the OUR has not tried to counter any of Digicel's arguments despite bringing up the matter again here. The OUR had to respond to these points that Digicel made previously. We must presume that the OUR has not responded because it knows that Digicel's comments are correct and that the price changes have no connection with market power."[100]

2.88.2 On page 53 of Digicel's response to the OUR's March 2004 Consultation Document, Digicel stated:
Prior to the time at which it was able to terminate international incoming traffic itself [,] Digicel had to accept a below cost incoming international termination rate. When Digicel commenced its own international incoming service it became apparent just how excessively low that rate had been.

2.88.3 **Office: The Office reminds Digicel that there is a distinction between the settlement rate and the cost of termination as discussed previously. As stated before, the settlement rate should cover the total cost of delivering the call to the network to which the called party subscribes. That is, the settlement rate should include the cost of transmission to the international switch, the switching cost at the international switch, the transmission cost to the mobile operator's network and termination cost on the mobile operator's network. If the current charge for FTM termination (of between $5 and $6 per minute on all three networks) reflects the true cost off terminating a**

[100] Ibid 31.

call, the current rates for the termination of international traffic would be above cost. This is so since, terminating an international call does not impose any more cost on a mobile carrier's network than terminating a domestic call. Therefore, there is no cost justification for the difference in termination rates.

Digicel

Paragraph 2.40

2.89 Digicel indicated that "The OUR states in paragraph 2.40 that:

> *"The Office notes that while these errors were correctly identified as errors of fact, they could not be considered to be material; hence, they would not affect the conclusions on market definition or dominance."*

Digicel finds this to be a contentious remark from the OUR in light of the fact that it used one of the key errors of fact to determine that ODJ was dominant in the market for mobile termination. Further, the OUR suggested that these errors of fact supported the case that 'market power is, to a significant extent, not dependent on coverage and subscriber base", yet the OUR has not acknowledged that such factors can have a significant impact on a company's costs."[101]

2.89.1 **Office: The Office notes the error that was made in paragraph 4.13 of its Determination Notice but, as stated in the same Determination Notice in paragraph 2.37, the Office explained that: The first sentence inadvertently referred to off-net MTM termination rates but the actual rates stated were off-net retail MTM rates. However, although termination rates were not stated, based on information available in the public domain, this increase in MTM rate (other mobile to ODJ mobile) from a low of $15.00 per minute (for some callers) to a high of $19.70 per minute (for other callers) on November 29, 2002 was due to an increase in ODJ's termination rate. The overall increase attributable to a rise in termination rate was $2.00 per minute. This amounts to increases of 13.33% and 11.3% above the previous peak MTM retail rates of $15.00 and $17.70 per minute.**

[101] Ibid 32 and 33.

2.89.2 **The Office therefore modifies it Determination Notice at paragraph 4.13 by substituting the following therefor:**

> "***(b) Off-Net MTM Call Rates for Domestic Calls***
>
> **Off-net MTM voice call[102] retail rates range from a low of $17.70 per minute (for calls to C&WJ and Digicel) and $19.70 per minute for call to ODJ. ODJ's off-net MTM retail rate increased from $17.70 to $19.70 per minute (for some callers) in November, 2002. The overall increase attributable to a rise in termination rate was $2.00 per minute. This amounts to an increase of 11.3% above the previous peak MTM retail rates of $17.70 per minute. Further, this rate took effect when ODJ's coverage was limited to three of fourteen parishes and its customer base less than 100,000. This suggests that market power is, to a significant extent, not dependent on coverage and subscriber base or shares of the retail markets."**

Digicel
Paragraphs 2.41 to 2.45

2.90 According to Digicel:

> As we are sure the OUR would concur, Digicel would not expect the Fair Trading Act (FTA) to spell out every detail of how it should go about carrying out a competition analysis. The OUR cannot expect a step-by-step instruction manual to be written into the FTA. The fact that the FTA does not contain this level of detail does not relieve the OUR of its professional duty to carry out an adequate assessment in accordance with international best practice. It has not done so. The OUR must reconsider its Determinations in this light. [103]

2.90.1 **Office: The OUR maintains its position that its methodology for this kind of analysis is consistent with the standards used in competition authorities such as the FTC and the requirements of the FCA.**

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[102] A call made from one mobile network to another.
[103] Ibid page 33 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

Digicel
Paragraph 2.57

2.91 According to Digicel:

"...given the strong anecdotal evidence as reflected in declining prices in real and nominal terms for mobile termination in Jamaica and further supported by the fact that Jamaica has one of the lowest mobile termination rates and retail rates in the world, the OUR can be satisfied that the correct approach to conducting the [Hypothetical Monopolist Test] *HMT test is by using the prevailing price of each operator. ...*"[104]

2.91.1 **Office: The Office wishes to note that, as in predatory pricing cases, low (or falling) prices do not constitute conclusive evidence of predation or non-dominance.**

Paragraph 3.2

2.92 **Office: Regarding the comments related to paragraph 3.2, in relation to statements by members of staff or a member of the Office, as stated before, these statements do not constitute decisions of the Office.**

Digicel
Paragraphs 3.3 and 3.4

2.93 According to Digicel, it stated previously that:

"Just because a calling party has to purchase call termination services from the network on which the called party subscribes this does not mean mobile network operators have market power when setting call termination charges. If for example, calling parties are sufficiently aware of the prices they are being charged for calling the mobile number in question and modify their behaviour such that an increase in call termination prices would have no impact in terms of profitability then there can be no market power.

Modifications to behaviour would include, for example, calling to a second mobile handset owned by the same person which uses another service provider; calling the handset of someone else in the household in order to

[104] Ibid 34.

contact somebody in that household (since most households in Jamaica have 3 mobile handsets according to the answers to the OUR's own research - see question 4); calling a number using a mobile phone borrowed from somebody else in the household; calling the household fixed line from another fixed line; and calling the office fixed line from a fixed line. Most mobile calls are made and received at home or in the office according to the OUR's own survey so this pressure can be exerted. Moreover it may be that the total percentage in terms of volumes of calls made to people who are at home or in the office is far higher, and the average length of calls made to people in homes or offices is longer than other calls. This would mean that a high proportion of total calls could be completed via fixed to fixed or on-net mobile calls. We are unable to determine this however as the necessary questions have not been asked and the necessary data has not been collected from service providers. In respect of calls made 'on the road' to other people 'on the road' it may well be that the 9% of customers who own multiple handsets make the majority of these calls by volume and/or value. In other words, most of these calls might be made on-net. Again, this requires investigation."[105]

2.93.1 **Office: For the record, let us state the obvious once more. The Office has demonstrated that most householders do not have fixed line phones, so they cannot make or receive FTF calls. Further, less than one percent of the respondents to the household survey indicated that they subscribe to all three mobile service providers. According to Digicel, it currently has over one million subscribers to its mobile phone service. To suggest that the more than one million subscribers go from house to house or from subscriber to subscriber to find a subscriber to the network to which he/she wants to make or receive a call is not credible.**

Digicel

Paragraph 3.11

2.94 According to Digicel:[106]

In paragraph 3.11 the OUR has duplicated another statement previously made in its previous document (paragraph 2.22) on mobile termination without addressing the counter arguments that Digicel put forward in its original response. Digicel is therefore compelled to simply repeat its response as the OUR is obliged to address the points made:

[105] Ibid pages 35 and 36.
[106] Ibid page 36.

"The OUR should note that "real time" capabilities alone do not singularly define the product market: if consumers regard an email or text message as a substitute then it is in the same market. Market definition process should be neutral with respect to technologies being considered. In addition, while the OUR notes that text messaging is not currently offered across mobile networks, should this service be offered it may become a substitute."

2.94.1 Digicel's view is reinforced by a statement in an article entitled "Market Definition in Competition Investigations" from the FTC's newsletter – Competition Matters Vol VII, Dec 2002. The FTC stated:

"A market is therefore defined as a set of goods and services which are regarded as substitutes by consumers".

Paragraph 3.11

2.94.2 In reference to the OUR's statement that:

"It is important to note that text messaging and e-mail are not currently offered across mobile networks or between mobile and fixed networks."

2.94.3 Digicel stated that:

"It is incorrect to say that email is not offered between mobile and fixed networks. "

2.94.4 **Office:**

In fact, generally speaking, it is correct to say that e-mail can be sent between mobile and fixed networks. However, more importantly, as noted before, unlike voice calls, SMS and electronic mail do not occur in real time. Therefore, these SMS and electronic mail are not considered close substitutes for voice calls.

Digicel

Paragraph 3.12

2.95 According to Digicel:[107]

In paragraph 3.12 the OUR states that:

"Service providers sometimes suggest that if mobile operators charge unreasonable termination rates customers of other operators would not be encouraged to switch to the high termination rate operator...... However, these arguments do not apply, since the fixed to mobile (FTM) retail rate is not charged to the called party on the mobile network. It is the fixed line

[107] Ibid page 37.

subscriber who pays. The same is true for off-net mobile to mobile (MTM) calls."

2.95.1 Digicel went on to state that:

"It is absolutely clear, as can be seen from empirical market evidence that customers are discouraged from moving to high mobile termination rate operators. On page 95 of its original response Digicel produced an advert which demonstrates C&WJ competing for customers based on the relative price of fixed-to-mobile calls depending on the mobile network called. The OUR has simply ignored this. We assume it has done so because it cannot come up with a coherent counter argument. In these sorts of instances it is incumbent on the OUR to accept that it has made a mistake, acknowledge this and adjust its thinking. Consequently, Digicel requests that the OUR reconsider its Determinations on the basis that it has failed to take account of pertinent empirical data from its own household survey. Furthermore, if the OUR has taken account of the views of Digicel on this issue, it has not provided any reasons for dismissing these views in accordance with its duties under the Act. Digicel can now even provide the OUR with further evidence (see Annex II)[108] that shows that at the time of Digicel significant reduction in its FTM retail rate it held a press conference and engaged in newspaper advertising to highlight the fact drawing comparisons to the rates of its competitors. If the market was not competitive what basis could Digicel possibly have had for such an investment? Consequently, the OUR has even more reason to reconsider this issue that was ignored in the Determination."

2.95.2 **Office: Digicel has not presented or identified any empirical data that demonstrate that customers are discouraged from moving to high mobile termination rate operators. In fact, data on subscription demonstrate that customers were being added to Digicel's network at a rapid rate[109] even when the price of fixed-to-mobile calls on that network was $5 per minute greater than the price for calling other mobile networks.**

2.95.3 **In relation to advertising and promotional activities, the Office wishes to note that such activities take place in competitive and non-competitive markets. In fact, even monopoly operators engage in**

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[108] If Digicel had been afforded enough time to respond to the initial consultation it would have been able to provide… this evidence that it has since been able to research.

[109] Digicel added an average of over 1,000 subscribers per day in its first two years of operation (April 2001 to March 2003).

these activities. Therefore, such activities cannot provide conclusive evidence that a market is effectively competitive.

Digicel
Paragraph 3.15

2.96 According to Digicel:
"The OUR's argument with respect to real time communications was made in its paragraph 3.11 and Digicel refers the OUR to its response to that paragraph. As cross network SMS is not yet in place it is not possible for the OUR to dismiss its potential to be a substitute for voice calls. Doing so indicates clear pre-judgement. The OUR has again returned to an issue without addressing any of the counter arguments that Digicel has put forward. The OUR has not addressed the issue of cumulative effects of many services which together act to constrain prices. See for example pages 102 and 103 of Digicel's original response. Consequently, Digicel are seeking a reconsideration on the basis that the OUR has not approached market definition from a 'technology neutral' perspective."[110]

2.96.1 **Office: If the Office did not approach market definition from a technology neutral perspective, services such as SMS would not have been considered in its analysis. The importance of the real-time characteristics of call termination cannot be discounted. The Office maintains that this is a critical factor in judging substitutability.**

Digicel
Paragraph 3.16

2.97 According to Digicel:
"Again, Digicel remarks that the OUR has avoided trying to deal with the counter arguments put to it. In the table on page 100 in Digicel's original response Digicel points out that

> *"Yet 55% [of respondents] say they used text messages to contact others*
>
> *• From Q28 it can be calculated that of this, 39% make half or more of all their calls using texts*
>
> *• In addition 39% of all respondents said they used texting* ***specifically for cost saving purposes***
>
> *• 8.6% use texts for 100 % of their calls*

[110] Ibid page 38 of Digicel's submission "Stay and Reconsideration Request - 17 Sept 2004".

• *Consider cumulative factor"*

Given the OUR's comments about there being insufficient volume to have an effect on mobile termination rates for voice calls, the OUR must indicate what volume would be sufficient. Does it have to be 100% or 50% or 25% for example? The OUR has not provided an indication of what volume would be sufficient – if the OUR has a view as to what level would be insufficient it must by definition have a view as to what level would be sufficient to have an impact. This suggests that it was set on finding mobile operators dominant irrespective of how much competition there is in mobile termination and irrespective of how much pressure there is on mobile termination rates. Digicel believe that this demonstrates pre-judgement. It also demonstrates pre-judgement to state that cross-network SMS would not result in a sufficient volume of text messages to pressurise mobile termination rates. The OUR has no data or analysis to support its case in this regard. Consequently, Digicel are seeking reconsideration of the Determinations on the basis that the OUR has not given consideration to requiring cross network SMS as a remedy to address potential market failures in mobile termination market despite the fact that the results of the survey suggests this could have a significant competitive effect.[111]

2.97.1 **Office: The facts are, SMS is limited to a specified number of characters, it is not used as a replacement for calls by a large number of subscribers and more importantly, it is not a real-time service. The Office restates its position that SMS is not a close substitute for mobile call termination. In fact, the survey data suggests that most mobile subscribers use SMS as a complement rather than using them to replace their calls. Only 13% of those surveyed indicated that they used text messaging as much as twice daily.[112] This compares to an estimated average of at least four calls per day per subscriber in the first quarter of 2006 based on available data. For the same time period, an estimated average of less than 0.3 text messages per subscriber is sent per day. Further, based on initial reports, this gap seems to be widening with time. If subscribers were substituting text messages for calls, one would expect this gap to narrow over time.[113]**

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[111] Ibid pages 38 and 39.
[112] See the OUR's 2003/2004 survey (General Public) at http://www.our.org.jm/new/Utilities/Telecoms/Surveys/telecomsurveys.asp.
[113] These calculations (for the first quarter of 2006) were based on data on 60% of the industry's mobile subscribers.

Paragraph 3.18

2.98 **Office: The Office dealt with the allegation that falling real prices are necessarily the result of competition under the section titled "failure to take account of substantial evidence of competition due to falling prices".**

Digicel

Paragraph 3.19

2.99 According to Digicel "...on page 65 of its original response when responding to this paragraph on the first occasion it stated that:

> *"The OUR states in respect of call back cost reducing strategies employed by customers that "If sufficient subscribers engage in this action, it is argued that FTM call termination rates would be constrained. But, the OUR has no evidence that this is so". Digicel has looked at the OUR's own customer survey which appears to be saying that 82% of customers do engage in call back. That is clearly sufficient in terms of numbers to constrain FTM charges. Why therefore has the OUR chosen to ignore its own research? The OUR goes on to state "However, if this was the case, Digicel could not have maintained its FTM retail rate at 71% above the lowest FTM retail rate for over two years." As has already been explained, if the OUR's market definitions were correct it would be irrelevant to compare FTM termination prices for one network with another. Moreover C&WJ's approach with respect to the pricing of FTM calls at the outset of mobile market liberalization does not seem credible and may even point to below cost pricing by C&WJ."*
>
> *It is no secret that C&WJ has continually pushed for lower mobile termination rates. This is a classic dominant dual operator strategy of implementing below cost mobile termination while at the same time charging inflated fixed origination and termination costs, in order to attempt to undermine competition in the sector in which it faces competition. It can then cross subsidise its mobile arm from the fixed side of the business. The OUR might have been able to substantiate such a case, had it involved external experts in assessing C&WJ cost modeling to carry out an assessment of whether C&WJ's costs had been properly allocated."*

We have since discovered that the OUR may have employed some external experts in some respects to look at C&WJ's model. Digicel have never seen any details of C&WJ's cost model, indeed it would not normally be a priority for Digicel have access to such a model. However the OUR has placed such substantial weight on these costs to supports its case that it is imperative in accordance with the law of natural justice that Digicel is permitted to comment on this model. Unless full details are made public, nobody other than C&WJ and the OUR will ever know whether C&WJ's costs have been reasonably calculated or not. Digicel is confident that if it is given sight of the C&WJ it would be able to better quantify differences in costs that it has referred to."[114]

2.99.1 **Office: In relation to the allegation that, if most mobile customers engage in callback this should constrain the pricing of mobile call termination, the Office states that, only 26.7% of mobile customers engage in callback in response to the cost of calling (see responses to question 30 of the OUR Survey).**

2.99.2 **Let us take another look at callback using current prices. A fixed line subscriber calls a mobile subscriber and request they callback. Given that the MTF charge is greater than the FTM call charge, the Office sees no pricing incentive to return the call. In fact, given the higher charge for making a MTF call, there is a disincentive to return the call.**

2.99.3 **On this basis, the Office does not think that any effective competitive pressure on mobile call termination charges is currently being exerted by or is likely to originate from callback activities.**

2.99.4 **Fixed termination rate on C&WJ is regulated by the OUR and up until 2004, fixed origination was also constrained from increasing immediately to cost. With this in mind the Office fails to comprehend how Digicel could suggest that C&WJ employed *"...a classic dominant dual operator strategy of implementing below cost mobile termination while at the same time charging inflated fixed origination and termination costs, in order to attempt to undermine competition in the sector in which it faces competition."***

[114] Ibid 40 and 41.

Digicel
Paragraph 3.20

2.100 According to Digicel:[115]

In paragraph 3.20 the OUR states

"The mobile licence requires each public mobile voice carrier to provide 90% geography coverage within 5 years of its licence being issued."

Digicel understands that Oceanic's licence has in fact been changed and that its obligation now is for 90% population coverage. If network costs incurred is independent of subscriber base or coverage, as suggested by the OUR, then there should be no basis for making such an amendment – in making such an amendment it appears that the OUR is …[cognizant]… of the cost implications of requiring 90% geographic coverage as opposed to population coverage. Consequently, Digicel is seeking a reconsideration of the Determinations based the OURs recognition in other areas of regulation that operators face different costs and so erred in the manner in which they assumed all operators should face the same costs of mobile termination as part of the basis for its Determinations.

2.100.1 **Office: The Office must first note that it had no powers to make any amendment to any licence. Secondly, this has no implication for the definition of the market since all licensees are licensed to operate in the geographic limits of Jamaica. Thirdly, for the avoidance of doubt, the Office used the price of mobile call termination on one network and suggested that if the relevant market included all mobile operators as described by Digicel, this should constrain the price of termination on other mobile networks.**

Digicel
Paragraph 3.21

2.101 Digicel stated that in paragraph 3.21 the OUR concludes that[116]:

> *"The foregoing analysis suggests that the relevant product markets in this analysis are the markets for wholesale mobile call termination service in Jamaica. The analysis points to the fact that*

[115] Ibid page 41.
[116] Ibid pages 41 and 42.

there are no effective demand and supply side substitutes for call termination on any given mobile network."

"Based on all the flaws (including not considering vital information) that Digicel has highlighted in the OUR's attempt at analysing the mobile sector it seems plain that no reasonable regulator could draw these kinds of conclusions. Either the OUR should carry out a proper consultation exercise and undertake the necessary level of research and analysis, or, as is indicated by international benchmarks, cease to investigate the mobile sector because Jamaica is already a world leader in mobile termination prices, something that is probably significantly correlated to the unique manner in which FTM retail rates are set in Jamaica."

2.101.1 **Office: The Office has responded to each allegation of analytical flaw, error of law and fact, and demonstrated that there are no grounds for changing the relevant Determinations. In relation to international benchmarks, the Office notes that making comparisons with termination charges in countries in which tariffs are not necessarily cost oriented, does not constitute an appropriate market analysis. Finally, low or falling prices does not constitute conclusive evidence that a market is competitive.**

C/ Failure to Make a Proper Assessment of Dominance

Assessment of Dominance Determination Notice, September 2, 2004

Paragraph 2.3

2.102 **Office: The Office has already responded to the comments raised in relation to this paragraph.**

Digicel

Paragraph 2.18

2.103 According to Digicel[117]:

"Paragraph 2.18 is based on the same premise the OUR … [has]… stated in 2.17. The following section of paragraph 2.18:

"However, the average consumer who is not a member of a user group would not get this benefit" is therefore incorrect. As has already been explained the benefits of closed user group pressure are automatically passed to virtually all Digicel's customers."

[117] Ibid page 43

2.103.1 **Office: Based on information in the press and from a Digicel customer service representative, the benefits of the closed user group package was only available to business customers until the launch of its "VIP" package in 2005. Further, only customers who are members of a closed user group get the benefit of this group.**

Paragraphs 2.20 to 2.23

2.104 **Office: The Office has already responded to the claim that falling real prices imply that markets are competitive. Additionally, the Office also addressed the claim that the omission of the externality factor (in relation to the projected declines in mobile termination cost in the UK) was material to it decisions.**

Digicel

2.105 According to Digicel:

"The OUR has not stated the projected decline in mobile termination rates in the UK but merely the projected declines in the LRIC element of the charge".[118]

2.105.1 **Office: Again, the Office notes that, information provided on the UK mobile termination costs was only to demonstrate that the cost of providing mobile voice call termination service has declined in real terms elsewhere. The suggestion that the data presented only represent a portion of the termination charge is disingenuous. It is true that estimates of LRIC tend to omit a number of cost categories under general overheads, general technical support, management costs and R&D. However, the Office provided a link to the reference document (http://www.ofcom.org.uk/consultations/past/wmvct/wmvct.pdf) which shows that the information presented includes an estimate for non-network costs.**

Digicel

2.106 Digicel also stated that:

"...introducing a requirement for cost-orientation on dominant operators is used by regulators where market failure has occurred. In other

[118] Ibid page 44.

jurisdictions it takes between 18 months and 2 years to establish what the cost orientated rates are".[119]

2.106.1 **Office: The Office wishes to make it clear that it has not imposed cost oriented mobile termination rates on any operator. The determination of cost oriented mobile termination rates is a separate issue from an assessment of dominance.**

Digicel

Paragraph 2.26

2.107 Digicel alleged that:[120]

- No account taken of advertising
- The Office did not take account of the unique price setting regime for FTM in Jamaica…

2.107.1 **Office: As noted before, advertising and promotional activities take place in competitive and non-competitive markets. In fact, even monopoly operators engage in these activities. Therefore, such activities cannot provide conclusive evidence that a market is competitive. More importantly, a caller to a mobile subscriber cannot substitute termination on one network for termination on another. Further, as confirmed by the OUR's December 2003 to January 2004 subscriber survey, less than 1% of household respondents subscribe to all three mobile service providers.**

2.107.2 **In relation to the alleged "unique price setting regime for FTM in Jamaica", since the fixed to mobile retention rate is regulated by the OUR, the retail price for FTM calls is effectively set by the mobile operator. Admittedly, making this information available to the market is an attempt to place to pressure mobile operators to adjust prices downward. However, the Office does not consider this to be equivalent to effective competition. Further, this price setting regime only applies to domestic FTM calls, and not to international incoming calls or MTM (off-net) calls.**

Digicel

Paragraphs 2.28 – 2.30

2.108 According to Digicel in relation to advertising by C&WJ:

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[119] Ibid page 45.

[120] Ibid page 47.

"In respect of C&WJ's costs and prices for mobile termination from February 22, 2002, these are irrelevant because the advertising could potentially have a two fold competitive effect on Digicel's price for termination (i) it would discourage fixed line customers from calling Digicel's network due to the higher relative price when compared with calling C&W (ii) it would encourage greater uptake of C&W handsets …".[121]

2.108.1 **Office: The Office wishes to note that since the called party on a FTM call is not paying for the call, advertising of this nature is not likely to encourage a significant number of mobile subscribers to switch service providers. In relation to the calling party, since there is no effective substitute for call termination, advertising has not lead to result in effective competition.**

Digicel

Paragraph 2.30

2.109 Digicel stated[122]:

We are concerned that the OUR has misrepresented Digicel again in paragraph 2.30 as it says:

> *"The Office notes that even if this reflected the true cost of termination, termination charges were still above cost in nominal and real terms, based on confidential pricing data submitted by Digicel".*

Office

2.109.1 **The Office notes that this statement is true for the period of April 2001 to August 2003.**

Digicel

2.110 Digicel further stated that: [123]

"To follow the OUR's thinking through its logical end, all mobile operators of different sizes, experiencing different economies of scale and scope, facing different costs of capital, employing different types of technology and regardless of stage of market entry should all face exactly the same costs of mobile termination. "

[121] Ibid pages 47 and 48.
[122] Ibid page 48.
[123] Ibid pages 48 and 49.

"...Digicel are requesting a reconsideration of the Determinations on the grounds that the OUR has made unreasonable assumptions in assessing Digicel's costs. Digicel are also requesting a reconsideration on the basis that Digicel's current rates for FTM termination are currently below the OUR's "estimated" cost of mobile termination[124]."

2.110.1 **Office:**
Let us look at the market based on Digicel's notion of a competitive market and compare this to an actual competitive market. Digicel's claim is that termination services are sold in a competitive market. The fact is, the price difference between Digicel's termination charge and the alleged close substitutes (such as SMS and e-mail) is greater than 50% in some cases. In the case of an e-mail, there is no charge for sending a mail from a computer to a Digicel mobile phone. Now, if these alternatives were close substitutes this kind of price differential could not be maintained for in excess of two years. In competitive markets, this kind of price differential cannot be sustained for a number of years. In a competitive market, most mobile subscribers would simply switch from making calls to sending text and e-mail. In effectively competitive markets, while competing product prices are not necessarily the same, price are not expected to differ by as much as 50% and be maintained for over two years. Further, if the price of the alleged close substitute is zero (as in the case of e-mail), it is likely that a substantial amount of subscribers would switch to this product.

2.110.2 **In the competitive market for Irish Potatoes in Jamaica, assuming no shortages, if there are many farmers wholesaling Irish Potatoes and the wholesale price is $5 per kilogram, if one farmer decides to enter the market at $7.50 per kilogram, it is not likely that that farmer would continue in business for two years.**

2.110.3 **At no time did the OUR indicate that all mobile operators would have the same cost irrespective of technology and other factors. The fact is, in competitive markets, firms are price takers. However, in relation to mobile call termination, each firm sets its own price.**

[124] Should the OUR or FTC be concerned that Digicel are selling its service below costs then any remedial action taken by either needs to take parallel action actions [against] Digicel's competitors. If Digicel were unilaterally forced to raise the price of its FTM termination rates it would ... face a serious competitive disadvantage in the market.

Digicel

Paragraph 2.37

2.111 According to Digicel[125]:

"…the OUR has conducted no analysis on the costs of ODJs mobile termination rate. It has not sought any reasons from ODJ as to why it increased its rates for mobile termination. For instance it may have been the case that ODJ had anticipated acquiring a higher market share when it first set its MT[M] but due to lower economies of scale it could no longer maintain rates at the previous level. That rates increased by 11-13% is irrelevant. If it increased by these levels yet ODJ were still not profitable in the market for mobile termination it provides no evidence of market power. The SSNIP test examines whether a firm can increase prices and maintain profitability. Was ODJ profitable either before or after the price increases in the OUR's alleged market for mobile termination? – no supporting analysis has been conducted by the OUR to suggest this was or was not the case.

Consequently, Digicel is requesting a reconsideration of the determination on the basis the incomplete analysis was carried out with respect to supporting evidence in relation to ODJ mobile termination rates.

2.111.1 **Office: The Office wishes to note that, if as alleged by Digicel, the relevant market(s) is (are) competitive, ODJ would have initially priced its call termination service at the market determined price. In a competitive market, it is irrelevant whether a targeted market share and economies of scale are achieved. Competitors cannot simply increase price because targets are not met. In a competitive market, each competitor in the relevant market is constrained by the market determined price. That is, each competitor is a price taker.**

2.111.2 **Digicel seems to be suggesting that subscribers will sympathize with suppliers (if they adjust prices above the competitive level) and continue to patronize them.**

2.111.3 **The fact is, the markets for call termination services are not competitive. Operators or callers cannot choose the call termination service based on the lowest price. The choice of call termination**

[125] Ibid page 49.

service is made by the called party when they select a service provider (in the main, by purchasing a mobile phone).

Digicel
Paragraphs 2.47-2.48

2.112 Digicel stated that[126]:

"[It]... may not have the authority to determine what constitutes adequate consultation but as one of the biggest capital investors and employers in the Jamaican economy, Digicel has a legitimate expectation as to what constitutes adequate consultation in accordance with the laws of natural justice. The OUR suggests that in "at least two cases[127] "the FTC has supplied written comments. Firstly, Digicel and all other interested parties, including members of the public, should have access to the comments of the FTC on those two or more occasions. Digicel has seen comments from the FTC on two occasions, one of which disagreed with the OURs opinion, the other just over a page long agreeing with the OURs view with limited analysis, based on OURs seriously deficient analysis (often factually incorrect). This in Digicel's view does not constitute adequate consultation. If the OUR has engaged in substantial consultation with the FTC then the notes, memos, documents etc from those consultations should be made part of the public record.

Consequently, Digicel is hereby requesting a reconsideration of the determination on the basis that the OUR has not engaged in adequate consultation with the FTC on a matter of national importance. In the event that the OUR claims to have engaged substantially with the FTC, Digicel hereby requests a reconsideration of the determination on the basis that it has not been afforded an opportunity to comment on the views of the FTC in accordance with the laws of natural justice.

2.112.1 **Office: The Office refers Digicel to its consultative documents on this matter. On each occasion, the Office has requested comments from the FTC. If the FTC finds it prudent to submit written comments on some occasions while not doing so on other occasions; that decision is entirely up to the FTC, not the Office.**

2.112.2 **As noted in the Determination Notice on this matter, "...the Office cannot make a Determination in relation to dominance without consulting with the Fair Trading Commission (FTC) and take account**

[126] Ibid pages 49 and 50.
[127] Digicel are concerned that the OUR seem to be unsure of whether the FTC has commented on two occasions or more than two occasions.

of any recommendations made by that Commission. Any written responses or comments submitted by the FTC in relation to a consultative document on dominance, or information submitted in relation to the public consultative process on the assessment of dominance, were published along with the other responses and comments from interested parties. Where it was not possible to post a document on the OUR's website, the interested parties and the FTC were informed of the document's availability at the OUR's Information Centre.

2.112.3 **In addition to requesting comments on the Consultative Documents, the Office also requested and received comments from the FTC on the Office's Draft Determination Notice.**

Digicel

Paragraph 2.53

2.113 According to Digicel[128]:

In relation "...to Digicel's translation of information from the Peruvian telecommunications regulator's web site the OUR states:

"The Office's view is that if the FTM call termination markets in Peru were competitive, carriers would not have to voluntarily reduce call termination rates [to J$18 per minute – Digicel's insertion], *since such rates would be set by the market. Hence, if rates are reduced voluntarily, this does not mean that carriers are non-dominant. In fact, it could be argued that what OSIPTEL was doing was to use a credible threat of regulating interconnection to correct a market distortion. What is important in assessing dominance is whether a carrier is effectively constrained by competitors or potential competitors."*

We note first that the OUR has avoided addressing the most important aspect of the translation, namely that the mobile operators should only voluntarily reduce their fixed to mobile rate over a period of 18 months to the benchmark termination rate for Latin American countries of US$0.294 or J$18 per minute. This benchmark rate is hundreds of per cent above Jamaican mobile termination rates. The Peruvian operators' mobile rates are above this, yet in spite of that fact, the Peruvian regulator is able to see how much risk has been undertaken by mobile network providers in investing in and rolling out their networks and has avoided regulating mobile termination rates.

128 Ibid pages 50 and 51.

In its previous document the OUR attempted to use Peru as an illustration that there was a market for mobile termination on each mobile operator's network in Jamaica and that each network operator had dominance in those markets. By revealing what the Peruvian regulator actually thinks it is apparent that the Peruvian regulator's views do not provide any evidence of this kind. All that is revealed is that the Peruvian regulator has not tried to intervene formally in the Peruvian market in spite of the fact that mobile termination rates there are hundreds of per cent higher than in Jamaica.

The Peruvian example does not provide any prima facie case of market failure in Jamaica in respect of mobile termination rates. By mentioning it all that the OUR should have been able to deduce that there was no need to look at mobile termination rates in Jamaica when comparisons where drawn to Latin America. The fact that it has tried to do the opposite runs counter to any attempt at vigorous analysis and demonstrates the OUR's inclination towards a particular outcome.

Consequently, Digicel is requesting a reconsideration of the determination on the basis that OUR has ignored the most pertinent issues with respect to developments in the Peruvian market with respect to mobile termination."

2.113.1 **Office: The Office notes that Digicel fails to understand the meaning of dominance. Even if mobile termination charges in Peru were a thousand percent above those in Jamaica, this does not provide conclusive evidence that the relevant markets in Jamaica are competitive.**

Digicel
Paragraphs 2.54 - 2. 57

2.114 According to Digicel[129]:

"The OUR has argued that falling prices could occur under monopoly conditions if cost of production are shifting down due to technological change. This statement suggests a lack of understanding on the OURs part as to how and when costs are incurred in the telecommunications industry.

There has been no technological change that has facilitated a reduction in costs for Digicel since it launched in 2001. The capital costs[130] that

[129] Ibid page 51.

Digicel incurred has not varied in this regard. Assets had to be purchased and put in place, they depreciate until the[re] asset lives expire but Digicel's network is just 3 and a half years old, shorter than the life of any of its network assets. The MSC switches, the BSC towers, the Ericsson equipment that Digicel purchased cost Digicel a fixed amount – Digicel do not get rebates on this equipment from suppliers going forward purely on the basis that certain elements might be cheaper today than when Digicel built its network. Consequently, the only basis … the OUR has given for not using prevailing prices is founded on unrealistic possibilities while the compelling case for using prevailing prices in a sector specific assessment of dominance (as opposed to an abuse of dominance case) has been completely sidelined as it would significantly undermine the OURs conclusions on dominance.

Consequently, Digicel requests a reconsideration of the determination on the basis that the OUR unjustifiably ignored the use of prevailing prices in assessing the relevant market.

Digicel hereby requests a reconsideration of the Determinations on the basis that the OUR has incorrectly assumed that Digicel could have benefited from cost savings on the basis … of technological change when this simply is not possible 3.5 years after market launch.

Digicel hereby requests a reconsideration of the determination on the basis that the OUR has ignored all the anecdotal evidence that supports the use of prevailing prices in an assessment of the market and provided no evidence as to why it should diverge so drastically from this methodology.

2.114.1 **Office: Digicel's comments give the impression that its network was established by launch in April 2001. However, based on various reports, by June 2004, Digicel had made additional investments totaling over 80 percent of its initial investment. Throughout the last four years, the company has consistently added more cell sites to it network and has been reported as saying that "…it intends to acquire additional equipment, as well as optimize and redeploy current equipment to further improve coverage and service area."[131] In fact, this is exactly what is expected of a prudent and**

[130] In fact Digicel's cost of capital is likely to increase significantly across the Caribbean following the events of hurricane Ivan and it devastating effects on Digicel's networks in Grenada and Cayman. Investors will undoubtedly require a higher return on capital based on these developments if further funds are to [be] made available for investment in the [Caribbean]

[131] See Jamaica Observer June 6, 2004 and Gleaner July 30, 2003.

efficient operator. As stated above (paragraph 2.12.2), the office knows that in competitive markets for retail mobile services and telecommunications equipment, no efficient network operator will roll out capacity long before it is required. This is due to the fact that the prices of network equipment usually decrease by 10 to 20 percent per year, and leaps in technological performance occur all the time[132]. Therefore, Digicel would have benefited from technological changes embedded in the equipment it acquired over the last four years. Further, changes in the configuration of the network and the reallocation of equipment are likely to result in improved efficiency. It is therefore disingenuous of Digicel to suggest that the company could not have benefited from cost savings based on technological change.

2.114.2 **In relation to the use of prevailing prices, the OUR concluded that there are no close substitutes for call termination based on the characteristics of this service. Therefore, the suppliers of wholesale call termination are not constrained by existing competitors. Also, the Office was not able to identify any potential competitor. Based on this assessment, as stated in its Determination Notice on the matter of Dominance in Mobile Call Termination "by considering the degree of product substitution at prevailing prices, one may be effectively considering the position after the firm or firms have already raised price to the maximum extent possible, i.e. after they have exercised that market power." Therefore, it would be unwise to use prevailing prices for this analysis.**

Digicel

Paragraphs 2.59 to 2.64

2.115 According to Digicel[133]:

"With respect to paragraphs 2.59 to 2.64 - although Digicel concedes to having made an error in its calculation of a critical loss test that could be applied to the OUR unfounded estimation of Digicel's marginal costs, the results of the test as recalculated by the OUR still show that a small loss of market share is all that would be required (critical loss) in order for a Digicel price increase to prove unprofitable. Furthe[r]more, the OUR has completely misrepresented what Digicel were demonstrating by stating that "*Digicel has more power in relation to increasing its price than it reported*". Digicel was not "reporting" a degree of market power, Digicel

[132] http://www.bcg.com/publications/publication_view.jsp?pubID=675&language=English.

[133] Ibid pages 52 and 53.

used what it believed to be illogical assumptions employed by the OUR to demonstrate that even if they were true, Digicel still does not possess market power.

Apart from the fact that the OUR has strongly relied on a particular section of an academic paper produced by Katz and Sharpiro to support its case and the fact that the OUR did not reveal the important fact that the particular section of that paper sought to challenge the findings of a Swedish court that upheld similar views as expressed by Digicel in relation to critical loss, Digicel believe the OUR has in fact taken the case raised by Katz and Shapiro completely out of context.

Digicel believe that case using real world information is more than sufficient to support Digicel's case. However, as the OUR seem intent on supporting its case with academic references such as this Digicel believe the following should be considered key to the debate.

The case being assessed by Katz and Shapiro examined critical loss in a multi-participant tea market. However, the OUR has argued that Digicel is a monopolist in the call termination market on its own network and as such it faces no competition. The OUR also argues that a high gross margin implies that the product in question has an inelastic demand and so the producer of this service possess market power. However, if Digicel were a monopolist then in accordance with established economic theory, it would never price a product on the inelastic portion of the demand curve because clearly this cannot be profit maximising – prices could be further increased by 5 to 10% without an equivalent fall off in demand for an inelastic product. Of course what has happened in reality is that Digicel has continued to reduce termination rates in both real and nominal terms in order to remain competitive. It has sought to increase production rather than to constrain it which is counter to the approach of a monopolist.

Consequently, Digicel seeks reconsideration of the Determinations on the basis that the OUR has unreasonably and incorrectly assumed that Digicel was attempting to display its degree of market power through critical loss analysis."

2.115.1 **Office: The Office notes that whether Digicel was attempting to display its degree of market power through critical loss analysis or not is immaterial to a finding of dominance. What is critical to the assessment of dominance is the existence and level of barriers to entry and exist.**

Digicel

2.116 Digicel also stated that[134]:

"Digicel also seeks reconsideration of the Determinations on the basis that in taking account of the OURs illogical assumptions about Digicel's costs, the critical loss analysis suggests Digicel would still not have market power in accordance with court findings in similar circumstances in other jurisdictions."

2.116.1 **Office: In relation to the referenced case (FTC v. Swedish Match North America Inc. 2000), this was not heard in a Swedish court and was decided in favour of the FTC. The Office is at a loss as to why Digicel would request a reconsideration in this instance as it is evident that there are no errors of fact or law, or changed circumstances.**

Digicel

2.117 According to Digicel:

"Digicel also seeks reconsideration of the determination on the basis that the OUR has implied that Digicel faces inelastic demand for call termination based on estimation of 'alleged' past gross margins being earned by Digicel on mobile termination. However, if Digicel were a monopolist, then in accordance with established economic theory it would never have priced its service on the inelastic part of the demand curve."

2.117.1 **Office: The Office notes that at no point in its Determination did it state or suggest that Digicel have priced its wholesale mobile call termination service on the inelastic part of the demand curve. Digicel should seek to determine the meaning of the term inelastic demand.**

Digicel

Paragraph 4.3

2.118 Digicel stated that in paragraph 4.3 OUR stated that[135]:

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[134] Ibid page 53.

[135] Ibid page 54.

"Since there is no effective substitute for call termination on a given network, all mobile operators have 100% of their respective call termination markets. "

"We remind the OUR that it cannot simply keep restating the arguments it has put forward without addressing the counter arguments put to it by Digicel. We refer to our comments on substitutes which should be properly addressed. These comments are contained on pages 37, 58, 59, 61, 63, 64, 65, 73, 94, 102 of our original response."

2.118.1 **Office: The referenced pages contain comments on demand and supply substitutability, the SSNIP test, market definition, real decline in rates, the use of comparative benchmarks, and statements by members of the Office and members of staff. The Office has addressed all these topics and found no substance in Digicel's comments that would require it to change its Determination.**

Digicel
Paragraph 4.4

2.119 In commenting on paragraph 4.4 Digicel stated that[136]:
"We are pleased that the OUR has acknowledged this fact. We are sure that the OUR is not suggesting that the entry of AT&T into the Jamaican mobile market is not of competitive significance. If it were saying this it would be disagreeing fundamentally with the government. AT&T Wireless would also be surprised to learn that the OUR has determined that it will not be a significant competitor. The OUR clearly cannot state that AT&T will not be a significant competitor, because, as a very commercially powerful international mobile network operator, that is precisely what it represents."

2.119.1 **Office: Based on this comment, it is obvious to the Office that Digicel is again trying to suggest that there is one market for all telecommunications services in the mobile industry. However, the OUR has clearly stated its definition of the relevant market and is not convinced that a market consisting of a collection of different mobile call termination services exists. What is also obvious is that there are no errors of fact or law, or changed circumstances.**

Dgicel
Paragraphs 4.8 and 4.9

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[136] Ibid.

2.120 According to Digicel[137]:

"The OUR attempts in paragraphs 4.8 and 4.9 to make a case that customers cannot identify which network they are calling because of confusion about numbers yet the OUR has provided no evidence to supports its position about customer confusion in this regard. Several pertinent questions could have been asked to establish to what extent customers are aware of ... what network they are making calls to. No such questions were asked in the OUR survey. This is a key issue that the OUR should have researched.

In Digicel's experience, again, admittedly anecdotal (but it is not Digicel which is obliged to have carried out the market research) customers generally do know which network they are calling. This is because the Jamaican market is very price sensitive and customers take the effort to discover what the most cost effective way of making calls is. If there is a cheaper alternative, Digicel's experience is that customers will find it. The Jamaican consumer is very sophisticated in this regard.

In the absence of empirical evidence about customers' knowledge of who they are calling the only reasonable position that the OUR can adopt is to assume that there is no problem. It is legally for the OUR to prove its case, not for regulated companies to disprove a hypothesis suggested but unsubstantiated by the OUR. Consequently Digicel are seeking a reconsideration on the basis that the OUR has not carried out sufficient market research to assist it in its market analysis. This is research that could quite easily have been carried out without significant cost.

2.120.1 **Office: The Office wishes to make it abundantly clear that even if a given mobile subscriber knew what number ranges were associate with the three networks they still would not have a choice of calling a customer unless that customer has all three mobile phones, one associated with each network. Based on this fact, the Office does not consider that, the absence of a survey to determine if subscribers are aware of the number ranges associated with the various network operators constitutes an error of fact or law, or changed circumstances.**

Digicel

Paragraph 4.10

2.121 Digicel request[138]:

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[137] Ibid page 55.

"…a reconsideration of the Determinations on the basis that the OUR has not considered the externality factor in its estimation of the mobile termination costs."

2.121.1 **Office: The Office notes that it will consider this factor in the relevant consultation process. The fact that this was not considered here cannot constitute an error of fact or law, or changed circumstances.**

Digicel

Paragraph 4.11

2.122 According to Digicel[139]:

The OUR has in paragraph 4.11 duplicated paragraph 3.8 of its previous document on mobile call termination except for two words. There were previously two references to "excess profits" but the first one has now been removed, although this does not appear to have made a material difference to the paragraph. Digicel therefore simply repeats the paragraph it wrote in response in its original response (page 68) below since the OUR has not answered the points that we made. The OUR should address all the points made by Digicel if it is to fulfil[l] it duties in accordance with laws of natural justice and its duties as prescribed by the Act :

*"The OUR states "C&WJ's charge for FTM calls is $7 per minute. Because C&WJ's fixed network business unit's retention for a FTM call remains at J$1.732 per minute, its mobile termination rate is $5.268 pm. On the other hand, Digicel's peak fixed to mobile retail rate up to August 2003 was J$12 per minute. This means that Digicel's termination charge was J$10.268 when C&WJ's fixed retention charge is deducted. This implies that Digicel earned **excess profits** of $5.00"[140] Digicel is appalled that the OUR can make such a serious and groundless allegation based on such inadequate analysis. The analysis of profitability involves complex modeling and cannot be concluded in such a succinct, simplistic and theoretically flawed manner. There are numerous possible reasons for the price differential between Digicel's FTM retail rates and C&WJ's such as: different costs; cross-subsidisation by C&WJ; and C&WJ economies of scale; none of which suggest that there is any kind of excess profitability. The OUR pursues this illegitimate approach for the same reasons when it*

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138 Ibid page 56.

139 Ibid.

140 The Office wishes to note that the quotation made by Digicel of the OUR's paragraph 4.11 of the Determination Notice is incorrect.

states " When compared with the OUR's estimated maximum mobile termination charge of $6.929 per minute18, this suggests that Digicel earned ***excess profits*** *(supposition) of $3.339 per minute above the cost of terminating traffic from C&WJ's fixed network".*

2.122.1 **Office: It is abundantly clear from this statement that Digicel does not have a clear understanding of how competitive markets operate. Now if there is only one market for mobile call termination and this market is competitive as claimed by Digicel and Digicel charges almost twice the price of its competitor, customers are likely to switch to the service offered by the competitor.**

2.122.2 **As stated by the OUR, if the data available approximates the true cost of termination, this implies that charges above this may represent excess profit. However, excess profit is likely to be maintained overtime in non-competitive markets. Now, if the markets are non-competitive, the prices of providing the service may vary significantly without being constrained by competitors.**

2.122.3 **It should be noted that even if the data available to the OUR did not approximate the true cost of mobile call termination, what is important is the extent to which there are competitive constraints. This is determined by the existence of barriers to market entry.**

2.122.4 **As stated above[141], the implication from Digicel's analysis is that it requires a greater return on its investment than C&WJ. If the relevant market(s) is (are) competitive, above normal profits cannot be made for any extended period of time. For any operator to price and obtain above normal profits over an extended period of time, this suggests that it must be operating in monopoly market(s). Notwithstanding this, the earning of excess profit, as in the case of pricing above cost (inclusive of a normal profit), is not sufficient to conclude that an operator holds a dominant position. Therefore, the Office cannot and did not base its determination on this inference. Hence, this does not provide a basis for reconsideration since the Determination does not assume that this is a fact which leads to a declaration of dominance.**

[141] See the section titled "**Failure to conduct proper analysis on profitability/excessive prices and heavy reliance on this flawed analysis in reaching conclusion and Basis for Assessment of Call Charges**".

Digicel

Paragraph 4.12

2.123 Digicel stated that in paragraph 4.12 the OUR states that[142]:

"ODJ's FTM rate started out at $7 per minute when that service was launched in the last quarter of 2001. This was increased to $9 per minute in October 2002 but was subsequently reduced to $6.95 per minute. ODJ charges the lowest rate for FTM calls and implicitly, the lowest FTM termination rate. But as shown below, ODJ has the highest off-net MTM rate for calls and implicitly, the highest off-net mobile termination rate."

"Digicel does not understand how this implicitly suggests that the ODJ has the highest off-net mobile termination rate. The OUR has conducted no analysis of ODJ's retail costs. Furthermore, the OUR has no evidence to support the case the ODJ's FTM retail rate is above cost. As a non-dominant operator ODJ is permitted to cross subsidise services so it may be the view of ODJ, that in order to remain profitable, it may need to cross subsidise FTM calls. In fact it is striking that that smallest operator has chosen to have a more competitive rate for this service than its larger competitors. If mobile termination was a monopoly then why would ODJ not charge at least as high, if not higher than Digicel or C&W for its FTM retail service. In addition, the OUR has conducted no analysis on the weighted average mobile termination rate of any of the operators, so it is difficult to draw comparisons between rates. Digicel are therefore seeking a reconsideration of the Determinations on the basis that the OUR has not given due regard to these important issues."

2.123.1 **Office: Digicel suggests that ODJ may be cross-subsidising FTM calls in order to remain profitable and this may be skewing the implied termination rates suggested by the retail rates. However, what is the source of this subsidy? Since the retail markets are deemed to be somewhat competitive, this subsidy could only come from the wholesale markets with a major one being off-net MTM call termination. If off-net MTM call termination and FTM call termination are also competitive, then it is not likely that there is any subsidy.**

142 Ibid pages 56 and 57.

Digicel

Paragraph 4.13

2.124 According to Digicel[143]:

"Paragraph 4.13 is a virtual copy of paragraph 3.10 from the OUR's previous document on mobile call termination. Digicel highlighted in response to that document that the rates referred to were in fact retail and not termination rates. However, in the OUR's Decision, the same document that contains paragraph 4.13, the OUR even states that it realises that Digicel was correct, yet has gone on to re-print the errors in paragraph 4.13. This suggests that the OUR has paid little attention to Digicel's consultation document and consequently no or no sufficient regard to our submission in regard to termination rates. We underline the only words in paragraph 4.13 that are new when compared to 3.10:

> *"Off-net MTM voice call termination rates range from a low of $17.70 per minute (for calls to C&WJ and Digicel) and $19.70 per minute for call to ODJ. ODJ's off-net MTM rate increased from <u>$17.70</u> to $19.70 per minute (for some callers) in November, 2002. <u>The overall increase attributable to a rise in termination rate was $2.00 per minute</u>. This increase was more than 11% in excess of the peak rate charged by other mobile carriers. ODJ has maintained this rate for a period in excess of <u>18 months</u>. This demonstrates that ODJ's voice call termination rate for off-net MTM termination rate is not constrained by the rate charged by other mobile carriers. Further, this rate took effect when ODJ's coverage was limited to three of fourteen parishes and its customer base less than 100,000. This suggests that market power is, to a significant extent, not dependent on coverage and subscriber base or shares of the retail markets."*

In the light of the conflicting wording in the OUR's Decision Digicel must assume that the OUR has assumed that the MTM retail rates were in fact the mobile termination rates and used those retail rates when arriving at its Determinations. This is a significant factual error. The OUR has suggested that it provided a draft of the determination to the FTC before it issued the decision. If the FTC were again faced with providing comments on such delinquent information it may not be entirely surprising if they

[143] Ibid 57 and 58.

concurred with the views of the OUR. Consequently, Digicel are requesting a reconsideration of the Determinations either on the basis that it has consulted the FTC on the presentation of factually incorrect information or the OUR itself laboured under a misapprehension as to what actual mobile termination rates are."

2.124.1 **Office: The Office has reconsidered this issue and determined that its decision in this matter did not depend on these figures. As noted before, high termination rates (whether domestic or international incoming) are only possible symptoms of dominance but does not form the basis of a declaration of dominance. The Office cannot and did not base its determination on these rates. Therefore, these rates do not provide the basis for changing the declaration of dominance since it did not depend on them.**

Digicel
Paragraph 4.15

2.125 Digicel stated that in paragraph 4.15 the OUR states[144]:

> *"Theoretically, other operators could use their buyer power to force mobile operators with high termination charges to lower those charges. However, any refusal to pass on calls to networks with higher termination charges would be in violation of the any-to-any principle of connectivity based on Section 29(2) (a) of the Act."*

"Digicel assumes that this paragraph is an attempt to undermine the notion that buyer power can have an impact on termination prices. In fact it answers none of the points that Digicel has made with respect to buyer power for example on pages 66, 77 and 78, 101, and 103."

2.125.1 **Office: The Office reiterates the fact that buyer power is not a factor based on the existing legislation.**

Digicel
Paragraph 4.18

2.126 , Paragraph 4.18 of the OUR's Determination stated that[145]:

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[144] Ibid page 58.
[145] Ibid page 59 and 60.

"The ability of residential subscribers (the larger of the two groups of respondents) to exert countervailing buyer power in light of the prevailing CPP[146] regime is limited. This is due to the fact that there is a disconnect between the calling party who pays for the call and indirectly, for the mobile voice termination service, and the called party who selects the terminating operator. Thus, although it is the caller who pays, they have no influence on the level of the termination charge."

According to Digicel:

Once again the OUR has chosen simply to ignore all the counter arguments that illustrate it is incorrect and that it has not carried out enough research to draw any conclusions. Digicel is therefore forced to repeat comments it made on pages 58 and 101 of its original response:

[page 58 of Digicel's original response] *"The OUR states that "Based on Digicel's suggestion that features like call-back, e-mail and text messaging are substitutes for mobile call termination; the suggested constraint of buyer power on the price setting behaviour of mobile operators, and the claim that there is one call termination market, the Office commissioned an independent customer survey to determine the validity of these claims". The OUR must be aware that a customer survey is insufficient by itself to test these claims. To analyse these issues properly, a full customer survey including key questions omitted in the OUR's last survey, as well as information from operators must be collected. Digicel has already pointed out some of the deficiencies of the consumer research which was carried out by the OUR recently. In this regard it seems a great pity that the OUR was not prepared to consult on how to make the research more fit for purpose. The industry could undoubtedly have added much value to the exercise and enabled more meaningful results to be obtained from it."*

[Page 101 of Digicel's response] *"Of course the OUR should have tried to reconcile the fact that 65% of consumers regard the costs to others as being very important with the fact that 18% of consumers take it into account when switching service provider. Following a simple line of reasoning it is easy to establish the fact that the 65% is the key figure. ......For the 65% the question was 'Level of*

[146] A Calling Party Pays regime is one in which the person who makes the call pays for the entirety of the call.

importance linked to cost of others calling your mobile phone'. On the face of it both figures are very relevant, however, it is highly likely that in response to the latter question customers that have been with the same service provider for years and are satisfied with them have not considered the issue as to what factor they would take into account in the event that they were looking to switch service provider. ***However, the latter question is completely unambiguous in the sense this is something that customers know now and is not dependent on whether something does or does not happen****.[Emphasis added on this occasion] Clearly if these 65% of customers saw a level of phone charges to individuals calling them that they deemed to be too high, they would give greater consideration to switching service provider but while that is not the case there is no need for them to give this serious consideration at this time.*

It is also quite possible that while the 65% deem such costs to be very important, they also believe the people that are calling them are rational enough to choose the method of communication that which minimizes those costs i.e. they call fixed to fixed or make on-net mobile calls, or use call back, or SMS or email. If such substitutes were not available then this 65% of customers may indeed choose to switch. The OUR, however, failed to ask any detailed questions on consumer activity with regards to what consumers do to minimise their cost. Irrespective of the reasons for the apparent anomaly between the two figures the OUR cannot possibly simply ignore that 65% of consumers regard the level of importance linked to cost of others calling their mobiles is crucial. Consumers are constantly observing and accounting for this fact. By comparison they will not buy a new phone everyday or switch service providers for that matter."

The OUR has not tried to address these points which means firstly that it has not taken account of significant market information that undermines their final assessment of the market, secondly that they have failed to undertake the vigorous data gathering through market and industry survey that would have informed the process and. In the result they have drawn conclusions based on insufficient information or inaccurate information and they have failed to adhere to their duties as laid out in the Act. It is all the more surprising, to state in the light of all before it that "*Thus, although it is the caller who pays, they have no influence on the level of the termination charge*".

2.126.1 **Office: The points raised here were already addressed by the Office in this and previous documents. See for example, paragraph 2.55.1 of this document.**

Digicel

Paragraph 4.19

2.127 Digicel states that in paragraph 4.19 the OUR states[147]:

> *"The fact is termination on one mobile network cannot be substituted for termination on another network. That is, at the wholesale level, there are no technologies that allow an originating operator to choose the network on which a call is terminated...... Mainly due to the technological barriers to entry, all mobile carriers are dominant with respect to the voice call termination service offered."*

"Digicel requests reconsideration here on several grounds. Firstly, on the basis that the OUR has not made a reasonable attempt to assess whether there are alternative technologies available that could be utilised. Secondly, even if this were true, on the grounds that the OUR has given technological barriers to entry undue weight: as prices have been falling rapidly and are competitive it is a self-apparent fact that mobile operators are not dominant in mobile call termination and other factors must be more important. Finally and most importantly, technology does exist and is being used, as the OUR is aware, to chose the type of call that is being terminated through bypass. The OUR has not addressed the issue of bypass and so Digicel are requesting a reconsideration of the decision on this basis."

2.127.1 **Office: Again, the points raised here were already addressed by the Office in this and previous documents. See for example, at paragraph 2.78 of this document in relation to bypass. Regarding alternative technologies, the Office is not aware of any legitimate technologies that will allow mobile operators to compete in the markets for mobile call termination. Calls destine to a subscriber on a particular mobile network must be terminated on that network.**

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[147] Ibid Page 60.

Digicel

Paragraph 4.21

2.128 Digicel stated that in paragraph 4.21[148]:

The OUR has again decided not to address the points made by Digicel in response to those comments. Digicel therefore reminds the OUR of the comments in our original submission on page 73 in response to the same unsubstantiated comments made by the OUR previously:

"There is no supporting evidence that indicates the existence of a national market for mobile call termination." We note that the OUR is again trying to reverse the burden of proof here. It is for the OUR to prove that markets do or do not exist. The OUR cannot legitimately come to conclusions based on not having evidence about contrary view points, especially when it has not made a serious attempt to establish whether counter arguments are true. We note the OUR's statement that "a profit maximizing monopolist (in this case, the mobile operator) is expected to maintain high prices or increase its price in excess of cost, over time." ***Since mobile termination prices are in fact declining significantly and steadily this indicates that mobile operators are doing the exact opposite of what the OUR thinks that they should be doing [emphasis added on this occasion].*** *The OUR should consider why this is the case. It points a complete absence of any kind of market power in the mobile sector."*

If the OUR were acting in an impartial manner it would attempt to tackle these points rather than ignoring them and merely repeating its original statement. Consequently, Digicel are seeking a reconsideration on the basis that the OUR has failed to take account of these important points raised by Digicel in its response to its previous document.

2.128.1 **Office:**

As noted before, carriers in some countries seem to have been subject to unofficial regulatory pressure which has forced them to reduce their rates to some degree or face explicit cost-based

[148] Ibid page 61.

regulation. The Office maintains the view that Jamaica is no different. Also, the fact that prices fall in a given market (some times below cost) is not conclusive evidence that a market is competitive.

Digicel

Paragraph 4.22

2.129 According to Digicel[149]:

In paragraph 4.22 the OUR repeats much of paragraphs 3.18 and 3.19 of its previous document. The OUR has removed some wording from the original wording in paragraph 3.19. However one of those omissions is very significant and fundamentally undermines the OUR's own arguments.

To illustrate this, firstly, we reproduce part of paragraph 3.19 from the OUR's previous document followed Digicel's response to this and a relevant statement by the OUR, followed by the part of paragraph 4.22 that paragraph 3.19 represents. We underline the word from paragraph 3.19 that has been omitted from paragraph 4.22 that we wish to mention:

Paragraph 3.19 "....*To avoid the anticompetitive effects of* ***differential*** *and above cost termination rates, it is desirable that termination charges for all mobile operators are regulated to reflect cost based pricing consistent with the requirements of the Act."*

Digicel's response to this (original response page 74) was that:

> *"... there is nothing inherently anti-competitive about differential termination rates. Differential rates could reflect legitimate cost differences or strategies employed by the incumbent."*

Moreover Digicel's view is reinforced by a statement in an article entitled "Market Definition in Competition Investigations" from the FTC's newsletter – Competition Matters Vol VII, Dec 2002. The FTC stated in respect of what constituted demand side substitution and therefore effective competition that:

"The prices of products do not have to be identical."

OUR paragraph 4.22 (OUR Decision) – *"....To avoid the anticompetitive effects of above cost termination rates, where they are found to exist, it is*

[149] Ibid pages 61 and 62.

desirable that voice call termination charges for all mobile operators are regulated to reflect cost based pricing consistent with the requirements of the Act."

It becomes clear on comparison that the word differential has been omitted as a result of Digicel's criticism. We believe that this is proof therefore that the OUR knows that differential termination rates are perfectly possible in a competitive market for mobile termination. This has wide ranging implications for the OUR's Determinations which call for reconsideration of the Determinations. For example, see paragraphs 3.19 and 4.11 where the OUR talks of differential FTM retail rates and therefore mobile termination rates as part of its justification for intervention. In the light of its own admission the OUR must reconsider its Determinations with respect to the regulation of mobile call termination.

2.129.1 **Office:**

The Office reiterates the fact that consultative documents do not reflect decision of the Office. However, in relation to differential prices, the Office is not convinced that such prices provide conclusive evidence that there is or is not competition in a given market. Indeed, price differentials can exist based on different cost structures as in the case of the mobile industry. However, the wider these differentials are in any industry, and the longer they persist, it suggests that competition may not be effective in such markets. See paragraph 2.110.1 to 2.110.3 of this document.

Digicel

Paragraph 4.23

2.130 Digicel stated that[150]:

"Given all the above factors and the lack of response on a host of areas with respect to Digicel's original submission, the OUR has not demonstrated that:

> each mobile operator occupies such a position of economic strength in a market for call termination on its own network (ie sufficient market power), that enables it to operate without effective constraints, or to act by itself in setting the price of mobile voice call termination service on its network without being effectively constrained by its competitors or potential competitors.

[150] Ibid page 62.

Thus the OUR must reconsider its Determinations."

2.130.1 **Office:**

To the contrary, based on the Office's response to the comment raised by Digicel, it is abundantly clear that these do not constitute errors of law, fact or changed circumstances.

Other Grounds for Reconsideration

Digicel

Paragraph 2.50

2.130.2 According to Digicel[151], in paragraph 2.50 the OUR states:

"The Office is aware that excessive regulation can reduce the incentive to invest and to innovate. Therefore, the Office is careful to ensure that it balances its responsibility to both consumers and operators, since a failure to do so could have detrimental welfare effects."

Given the strong indication of pre-judgement in the OUR's response and the inadequate manner in which it set about examining the matter of mobile termination the OUR has not made an adequate case for the regulation of mobile call termination. In order to avoid detrimental welfare effects of which it speaks by inappropriately intervening in the mobile sector, it should either desist completely from investigation into mobile termination, or restart the entire process and carry it out in an impartial, transparent and thoroughly researched manner.

Reliefs Sought

Digicel requests that the OUR reconsider and reverse its Determinations set out in Decision Tel 2004/10 as set out below And further that it put an immediate stay on Determination 5.0 pending the hearing of this Application for Reconsideration.

Determination 3.0

Mobile voice call termination to each mobile operator's network constitutes a separate market. That is, the current relevant markets are:

- wholesale market for voice call termination on Mossel's (Digicel's) mobile telephone network
- wholesale market for voice call termination on Cable and Wireless' (C&WJ's) mobile telephone network
- wholesale market for voice call termination on Oceanic Digital's
- (ODJ's – formerly Centennial) mobile telephone network

[151] Ibid page 63.

Determination 4.0
All mobile carriers are dominant with respect to the call termination service offered.

Determination 5.0
The Office has determined that all mobile carriers shall:

- supply the Office with current and any new or amended interconnection agreements;
- provide interconnecting parties with advanced notification of price changes and copy any such notification to the Office;
- Supply the Office with wholesale rates for mobile voice call termination services;
- Supply the Office with call volume by type (number of calls, call minutes) and;
- Supply the Office with call revenue by type.

Digicel wishes to receive all copies of documentation that the OUR has used in reaching its Determinations in this Decision. This includes copies of all correspondence including internal correspondence and emails in which the OUR has discussed issues of dominance and mobile termination and related matters.

Digicel wishes to receive all copies of documentation that the OUR has in respect of creating a cost model for mobile termination. Digicel wishes to receive copies of all correspondence including internal correspondence and emails in which the OUR has discussed the issue of creating a cost model for mobile termination.

Digicel also requests a stay of:
any further work by the OUR on the creation of a cost model for mobile termination including a consultation on the cost of mobile call termination;
a consultation on the obligations to be imposed on a dominant mobile operator.

2.130.3 **Office:**

For the avoidance of doubt, the Office wishes to note that all the Decisions outlined in the Office's Determination Notice were stayed during this Reconsideration process. However, based on the Office response to the comment raised by Digicel and reported here so far, it is clear that these do not constitute errors of law, fact or changed circumstances.

Additional Basis for Reconsideration

In three letter to the OUR (Miphone Costs 3 Nov 2004, CWJ costs 11 Oct 2004 and Pre-judgement 13 Oct 2004), Digicel also submitted additional basis for reconsideration.

Technology Differences between GSM and CDMA Networks and Benchmarking

Digicel

2.131 In letters to the OUR (Miphone Costs 3 Nov 2004 and CWJ costs 11 Oct 2004) Digicel asserted that:

- Based on technology differences **between GSM and CDMA networks, the operating costs of the networks are likely to be different.**
- **Following on the first point, it alleges that it is "...**inappropriate to use alleged cost figures of one operators network, particularly when it is based on a different technology, to draw inferences about the costs another operator incurs.

Digicel went on to claim that "...the OUR made a material error of fact in assuming that Digicel should incur the same costs as C&WJ as calculated by the OUR in February 2002."

2.131.1 **Office:**

Based on Section 29(5-6) of the Act:

"(5) When making a determination of an operator's call termination charges, the Office shall have regard to the principle of cost orientation, so, however, that if the operator is non-dominant then the Office may also consider reciprocity and other approaches.

(6) For the purposes of subsection (5), "reciprocity" means basing the non-dominant carrier's call termination charges on the call termination charges of another carrier.

2.132 **This approach does not suggest that the operating costs are the same but that one is being used as a proxy for the other. In using the cost of another carrier, the Office was guided by the Act.**

Therefore the Office did not make a material error of fact in using C&WJ's cost to approximate those of other carriers.

2.133 **Further, throughout Digicel's submissions it has provide information to show that network costs are not the same; and also, it has presented information to show that these network operators are not constrained by competition in setting prices to recover cost.**[152]

Pre-judgment

Digicel

2.134 In a letter to the OUR dated October 13, 2004 (Pre-judgement 13 Oct 2004), Digicel indicated that:

"The Ministry of Commerce Science and Technology commissioned a report from a consultancy named PS Associates entitled a "Review of the Legal, Institutional and Regulatory Framework for the Telecommunications Sector and Recommendations for Reform". The report is dated 16 July 2004. However a copy of the report was not sent to Digicel until September 30.

In that report on page 42, when referring to the work of the OUR the consultancy has stated:

> "*It* ***has determined*** [Digicel's emphasis] *that each mobile operator is dominant with respect to the domestic and international voice calls it terminates on its network. The OUR will, therefore, establish cost based mobile termination rates to impose on mobile operators. This will be done in conjunction with the review of RIO 5.* "

No doubt this text was based on the communications that took place between the consultancy and the OUR.

Moreover, the consultant's report:

> a/ pre-dates the meeting that took place between the FTC and the OUR on July 30, 2004 which was described in the notes of that meeting as a "Discussion to Amend the Determination Notice [with respect to mobile call termination] Between FTC and OUR";

[152] See the section above titled *"Failure to conduct proper analysis on profitability/excessive prices and heavy reliance on this flawed analysis in reaching conclusion and Basis for Assessment of Call Charges"*.

b/ pre-dates the provision by the FTC in its letter of August 3, 2004 to the OUR of the FTC's written comments on the "Determination Notice on Dominance in Mobile Call Termination".

This lends further support to Digicel's view that the OUR had pre-judged the outcome of its investigations into the issue of mobile call termination in breach of its duties and in particular section 4(2) of the Telecommunications Act 2000 with respect to procedural fairness and natural justice."

2.134.1 **Office:**

The OUR cannot be held responsible for statements made by the Ministry's consultant. Based on the date of this report, the OUR had not yet issued a Determination on this matter. If any of the OUR's staff expressed an opinion in relation to the Determination of dominance in mobile call termination markets, this is exactly what it was, an opinion and would not represent the Office's Determination.

Digicel Submission of Affidavit from William Bishop

In an Affidavit (Affidavit 20 Oct 2004) from William Bishop, Digicel submitted additional basis for reconsideration. The Office now addresses these additional issues.

Digicel

Regulatory precedence from other countries and the German experience[153]

2.135 According to the report of William Bishop[154], "The OUR's finding of dominance in mobile call termination is in line with some of the decisions taken by regulators in other countries which adopt the CPP system (most notably the UK, following the Competition Commission inquiry into calls to mobiles of 2001). It is not however consistent with the position

[153] See page 4 of "Digicel's Appeal against the Determinations contained in the OUR's Determination Notice TEL 2004/10 on the Assessment of Dominance in Mobile Call Termination".

[154] See Digicel's appeal against the Determinations contained in the OUR's Determination Notice TEL 2004/10 on the Assessment of Dominance in Mobile Call Termination, expert report of William Bishop.

adopted by the Telecommunications Regulator (RegTP) in Germany, the largest European country, which also has CPP. RegTP, the German Telecoms Regulator, does not regulate mobile termination rates. RegTP defined the market for call termination and assessed the dominance of the MNOs in 1999. Two market definitions were considered: i) each mobile network as a relevant termination market, and ii) all mobile networks together. In both cases, RegTP argued that there are competitive forces that prevent an MNO from acting independently of its competitors. End-users indirectly put pressure on termination rates and limit potential market power. According to the RegTP users would react to price increases by shortening their call duration and, in addition, take account of the prices from fixed to mobile networks when considering a possible subscription to a mobile operator. RegTP therefore concluded that under no relevant definition of the market is there a dominant position of any MNO regarding termination services. RegTP reiterated its view that it saw no need to impose price cuts for FTM termination in February 2003, four years after its initial decision.

This decision reflected the broad perception that the German telecommunications market is competitive, with below average prices (by international standards). German[y] also has historically had a high level of handset subsidies, which require termination rates above cost to finance them and encourage market expansion.

Evidence from prices in Germany suggests that the regulator's decision not to regulate termination prices has not resulted in excessive or high prices. To the contrary, termination rates in Germany have fallen considerably since 1998, and they are currently one of the lowest in Europe. ...

The German regulator's decision is an important precedent against the need to impose price controls which the OUR has not taken into account in its decision. It is important to note and acknowledge that not all countries, even those with established mobile telephony markets and CPP, have decided to regulate the prices for termination services, as the German example makes very clear.

It is also important to bear in mind that precedents in favour of a finding of dominance and of the need to regulate from other countries with established mobile telecommunications markets cannot be easily applied to the Jamaican market, which is a relatively young market, and where mobile telephony has only been liberalized since 2001. I will come back to this point below, when I will argue that specific features of the Jamaican market have not been taken into due consideration by the OUR in reaching its decision."

2.135.1 **Office:**
The following was taken from the OECD's Review of Regulatory Reforms in Germany:

Independence of RegTP[155].

2.135.2 ***"The full privatization of DTAG [the incumbent telecommunications operator in Germany], which should take place under transparent and non-discriminatory conditions, should help in dispelling questions of independence. In the context of such concerns, there has been skepticism expressed about the extent to which RegTP has been truly independent of the government and the Ministry of Economics and Labour or the Ministry of Finance (which controls most of the DTAG shares on behalf of the German government). One issue supporting such skepticism is RegTP's continued support for the Ministry's position that there is no need to regulate fixed-to-mobile termination charges, contrary to widening and compelling regulatory and economic conclusions internationally that such regulation is in fact necessary to address anti-competitive effects in the market."***

2.135.3 **Also, in relation to the German telecommunications markets, in a report by Martin Cave et al[156], it was stated that "...the rates charged by E-Plus, the third MNO, were persistently considerably higher than those charged by D1 and D2. DTAG reduced termination rates in 2000 significantly and exerted pressure on the other MNOs to follow. In the case of E-Plus, DTAG even initiated a regulatory proceeding against E-Plus' rates." If the markets are competitive as claimed by Digicel and its expert witness, why would it be necessary to initiate a regulatory proceeding against E-Plus with the intention of lowering its termination rates? If the markets were competitive, the constraints of the market would cause prices to fall without the need to request regulatory intervention.**

[155] http://www.oecd.org/dataoecd/46/19/32408088.pdf
[156] http://www.cerna.ensmp.fr/Documents/OB-GLB-F2M-FinalReport.pdf

2.135.4 **In relation to the pricing information submitted in Annex I of the Affidavit, it is assumed that this information was intended to demonstrate that falling prices suggest competition in the German markets for mobile call termination. However, as stated before, the Office is not convinced that low or falling prices provide conclusive evidence that there is or is not competition in a given market. In fact, as noted above, it is unusual for an operator to initiate regulatory proceeding against its competitor because its rates "...were persistently considerably higher than those charged by..." other operators. The relevant question is, in competitive markets, is this kind of action required? To reiterate this important point, in competitive markets, operators are price takers; therefore, there is no need to report an operator to the regulator because its price is high. Customers would simply switch to the low price operator causing the high price operator to lose revenue and ultimately go out of business if the high price is maintained.**

"Waterbed" Effect[157]

2.136 Mr. Bishop stated that, "According to this effect, mobile network operators compete with each other by offering "bundles" of services, which include subscription, call origination and call termination. These services are not offered separately, but in what economists term "pure bundles". If the market is competitive overall, then the aggregate price for these bundles will also be competitive (i.e. in line with the long-run incremental costs of providing the services). However, the price for any individual service in the bundle may well be above marginal cost, with other services being provided below-cost. Therefore, while the overall level of prices will be in line with costs, the structure of relative prices across services may depart from costs to reflect the degree of price sensitivity in the market and non-cost considerations (e.g. the desire to encourage subscriptions). A regulator should therefore not worry about the prices of individual services in the bundle, but should focus instead on the overall competitiveness of the market. ... (when I consider the specific features of the Jamaican market) there is evidence from Jamaica that call termination rates are part of the bundle of services with which MNOs actively compete with each other.

The "waterbed" argument is particularly relevant to termination services

[157] See page 6 of "Digicel's Appeal against the Determinations contained in the OUR's Determination Notice TEL 2004/10 on the Assessment of Dominance in Mobile Call Termination".

given that it may be optimal for mobile operators to price these above marginal costs, in order to reduce the prices of subscription and origination to encourage overall participation in the network, and still recover overall fixed costs. This is because there is a so-called "network externality" when someone joins a mobile network, which results from the fact that other users will benefit from being able to contact the new subscriber and being contacted by him. This externality (ie. the benefit to others) will not be fully considered by the subscriber when deciding whether to join a network (implying that subscription levels are below the social optimum), but the mobile operator will have incentives to account for it in its pricing in order to increase overall market participation.

Allowing network operators to optimally re-balance the pricing of the bundle of their services, by increasing termination rates and reducing subscription costs, can be efficiency enhancing especially if market participation is partial (i.e. high levels of penetration have not already been reached). This may well be the case in Jamaica, as I stress below. By contrast, forcing mobile operators to lower their termination rates by means of regulatory intervention may result in higher subscription and/or origination prices. This may deter participation in the mobile network, and reduce overall efficiency. A recent academic article by Professor Julian Wright of the University of Auckland proves this point rigorously ("Access pricing under competition: an application to cellular networks", *Journal of Industrial Economics, 2000).*

The existence of a waterbed effect for overall mobile telephony prices implies that the main possible negative impact of above-cost termination rates may be on fixed-line users. The fact that higher termination rates imply lower subscription/origination prices does not benefit fixed-line users, and may also discourage the efficient use of the fixed line network. The incidence of these effects on fixed-line users needs to be assessed empirically, and traded-off against the efficiency benefits of broader mobile network participation. This is not an exercise that the OUR has carried out in its assessment of dominance. However, as I highlight below, my understanding of the telecommunications market in Jamaica suggests that any negative effects on fixed-line users of termination rates that are above marginal costs (even if this were the case, which is not proven) may not outweigh the positive impact of greater mobile phone participation."

2.136.1 **Office:**

In relation to the claim that mobile operators compete, based on bundles of services which include subscription, call origination and call termination, various regulatory and competition authorities throughout the world have found that there is a separate market for call termination services (example the UK's OFCOM and New Zealand). The Office does not consider (based on the OUR's analysis and in particular the current state of technology) that there are unique factors in the Jamaican markets for mobile call termination that would result in a different outcome.

2.136.2 **Contrary to the impression given in the aforementioned Affidavit, mobile call termination is not purchased as part of a pure bundle[158] by other network operators. The fact is, in the context of CPP, mobile call termination service is a wholesale product that is purchased by other network operators for resale. As should be clear by now, the Office's concern is with off-net (not on-net) mobile call termination.**

2.136.3 **Regarding the arguments related to network externality, the Office will consider these arguments in its subsequent consultation on the cost of mobile termination.**

2.136.4 **In relation to Mr. Bishop's claim that based on his understanding of the telecommunications market in Jamaica, any negative effects on fixed-line users of termination rates that are above marginal costs may not outweigh the positive impact of greater mobile phone participation; the Office wishes to remind Digicel that the principle of cost causation is fundamental to the efficient pricing of goods and services. This principle states that the users of a service should only pay for those costs that are caused, or triggered, by the provision of service to them. The Act also makes reference to this principle at Section 33(a) which states that "costs shall be borne by the carrier whose activities cause those costs to be incurred." Within this context, it is difficult to justify a situation in which subscribers on a fixed or mobile network are required to subsidize subscribers on another carrier's network.**

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[158] **Product bundling** is a marketing strategy that involves offering several products for sale as one combined product. **Pure bundling** occurs when a consumer can only purchase the entire bundle or nothing. (See http://en.wikipedia.org/wiki/Product_bundling).

Ramsey Pricing[159]

2.137 Mr. Bishop's Affidavit states that: "According to the theory of Ramsey pricing, mark-ups between prices and short-term marginal costs for multiple services that have a common fixed cost of production to be recovered should be set in inverse proportion to the elasticity of demand for each service. That is, services with a lower elasticity of demand should recover a higher proportion of the fixed cost, in order to minimise distortions, and enhance efficiency.

Arguments in favour of setting termination rates in line with Ramsey-pricing principles have been put forward in other jurisdictions (most notably in the UK) mainly in the context of how to regulate these charges, assuming that some form of price regulation is going to be imposed. They are however relevant also at the market definition and dominance stage of the regulatory process, since they can inform a regulatory assessment of the prevailing levels of termination rates. Simply observing that termination charges are above long-run incremental costs does not imply that these rates are excessive, from a social point of view, and therefore should be regulated. This is especially the case if the elasticity on termination services is deemed to be lower than on other services (for whatever reason, including the properties of CPP), given that this implies that they should bear a greater proportion of fixed network costs according to Ramsey pricing. ..."

"It was further stated that: "Evidence from the UK suggests that applying Ramsey prices to termination rates can lead to optimal fixed-to-mobile call prices that are considerably above the level that would be obtained by applying equi-proportionate mark-ups to mobile services (see the work by Christian Koboldt and Dan Maldoom...)."

2.137.1 **Office:**

The Office considers that a full discussion on the issue of Ramsey pricing is more appropriate for the consultation on the establishment of mobile termination rates. However, based on the Office's understanding of market competition, in a competitive market for

[159] See page 7 "Digicel's Appeal against the Determinations contained in the OUR's Determination Notice TEL 2004/10 on the Assessment of Dominance in Mobile Call Termination".

mobile call termination, mobile carriers would bid for the right to terminate calls. Based on this scenario, carriers would bid prices down toward the long run incremental cost (LRIC). Given this scenario, if a carrier sets its termination charges based on Ramsey pricing, other carriers would have very strong incentives to undercut it. It follows therefore that a competitive market for mobile call termination cannot sustain Ramsey prices. Hence, the suggestion that mobile call termination market is competitive is not credible.

2.138 Further, Oftel (now OFCOM), the Competition Commission and the European Regulators' Group have all rejected the use of Ramsey pricing in setting mobile call termination rates.[160]

Notwithstanding this, the Office will evaluate the evidence (locally and internationally) in its subsequent consultation on mobile call termination cost.

The claim that Ramsey pricing is efficiency enhancing especially when high levels of penetration have not already been reached seems to be irrelevant since mobile penetration in Jamaica was estimated to be about 74% as at December 2005 and approximately 93% based on preliminary data as at December 2006.

Reverse price setting arrangement for FTM calls [161]

2.139 According to Mr. Bishop, "The OUR does not seem to factor in this "reverse" pricing arrangement for FTM calls in its assessment of dominance. Its description of the CPP system in Jamaica is entirely standard, and does not reflect (or even mention) the fact that it is not the calling party's operator that sets the rates for calls originating on its network (e.g. see paragraph 3.1 of the Determination Notice). However, the specific features of the Jamaican CPP system impl[y]... the presence of greater competitive pressures in termination markets and therefore has a bearing on an assessment of dominance in termination markets."

160 See "The Importance of Price Elasticities in the Regulation of Mobile Call Termination", Frontier Economics, September 2004.

161 See page 8 "Digicel's Appeal against the Determinations contained in the OUR's Determination Notice TEL 2004/10 on the Assessment of Dominance in Mobile Call Termination".

2.139.1 **Office:**

Again, the Office points out the conflict in Digicel's arguments. If "reverse pricing" resulted in effective competition in the markets for mobile call termination, Ramsey pricing is not sustainable.

Weakness in empirical evidence in the OUR's Determination: Price and cost comparison; evidence from the survey[162]

2.140 Mr. Bishop stated that, "One of the major elements of the empirical evidence used by the OUR to support its arguments on dominance in termination is the comparison of rates across the three mobile operators in Jamaica. In particular the OUR claims that the presence of differences in the termination rates across operators shows that termination on each network is a separate market, and that Digicel's prices are "excessive". The OUR also relies on price differences between operators to argue that some of the survey results (e.g. on the importance of call-back) cannot be relied upon to support a view that mobile operators are not dominant in call termination (see e.g. Determination Notice, paragraph 3.19).

The simple price comparisons between operators used by the OUR however do not provide evidence to show that Digicel is setting its termination prices above efficient levels. Differences in prices between operators may simply reflect a number of factors in a competitive market, such as differences in cost structures, commercial strategies (e.g. in terms of tariff structures and network expansion), quality of provision and geographical coverage. This is particularly the case in a market in a phase of rapid and significant change, such a newly-liberalised mobile market."

2.140.1 **Office:**

Contrary to Mr. Bishop's claim the Office maintains the position that "...competition for subscribers is not likely to reduce the off-net MTM and FTM call termination rates. The fact is termination on one mobile network cannot be substituted for termination on another network. That is, at the wholesale level, there are no technologies that allow an originating operator to choose the network on which a call is terminated. At the retail level, a caller from the PSTN or from mobile

[162] Ibid page 13.

network '*A*' who desires to contact a subscriber on mobile network *B* cannot use the termination service offered on mobile network *C* since the subscriber is not located on that network. Mainly due to the technological barriers to entry, all mobile carriers are dominant with respect to the voice call termination service offered."

2.140.2 **It seems that Mr. Bishop and Digicel have missed the point or are not aware of the fact that, in an assessment of dominance in a defined relevant market, what is critical is the extent to which there are barriers to market entry. In the absence of market entry barriers or relatively low entry barrier, prices will be forced towards cost (including a normal return on capital). Further, it is not price differentials that demonstrate there are separate markets but the absence of substitutes.**

2.141 Also in relation to pricing, Mr. Bishop stated that, "The price comparisons for FTM calls that the OUR relies upon are also based on the price differential between Digicel and CWJ during the period April 2001-August 2003, and fail to take into account the substantial reduction in Digicel's peak rate of September 2003 (from J$12pm to J$7pm). Digicel argues that this price reduction was largely a reflection of a reduction in unit costs (resulting from superior scale economies), and it was also a competitive response to the prevailing market conditions (where network operators compete also on the basis of the cost to users of reaching their mobile network). This explanation for the reduction in Digicel's rates is consistent with the evolution of a newly liberalised mobile market, the growth of a new entrant into this market, and the specific features of price-setting for FTM calls in Jamaica (which I have reviewed above). It is therefore consistent with a view that the overall market for mobile services in Jamaica is competitive, and that these competitive conditions also affect the level of termination rates."[163]

Additionally, Mr. Bishop claimed that the OUR failed "...to consider the fact that players with market power do not have incentives to fully pass-through changes in marginal cost, and have limited incentives to pass-through reductions in fixed costs (or a decrease in average costs due to higher volumes, such as the one experienced by Digicel). These considerations have not been analysed by the OUR in sufficient detail. A reduction in prices of the magnitude implemented by Digicel may well be inconsistent

[163] Ibid page 13.

with a view that Digicel has significant market power, and is more likely to be a combination of competitive market conditions, reductions in cost and a response to demand price sensitivity to termination rates by Jamaican customers, given the way retail rates are set in Jamaica ...."[164]

2.141.1 **Office:**
As stated before, operators in many European countries seem to have been subject to unofficial regulatory pressure. This forced them to reduce their rates in order to avoid facing explicit cost-based regulation.

2.141.2 **From the consumer perspective, on closer look, this tariff adjustment may only be one of form, rather than substance since it's now a per-minute as opposed to the previous per second rate. As stated before, in relation to call-back messages, assuming that it takes five seconds to complete a call-back message. Under the highest previous per second billing price of $12 per minute, the consumer initiating the call paid a total of $1.00. However, under the current per minute charging regime, the same five seconds call would cost $7. A FTM call lasting for one minute and one second would cost $12.20 using the previous rate but would cost $14 using the current per minute rate. Thus, for all calls that are one minute and nine seconds or less, it actually cost the subscriber more under the new per minute charging regime. It is clear that the effect of this price adjustment is to increase the cost of "call-back" activity and reduce any alleged competitive effect.**

2.142 In relation to C&WJ's cost in the OUR's analysis, Mr. Bishop stated that, "The OUR is also placing excessive emphasis on the 2002 cost data supplied by the incumbent fixed-line operator to determine "termination costs" for the market, and applying these costs to Digicel. The two operators should not be expected to have identical cost structures (especially at this stage of the market), and cost information provided by one operator cannot be directly applied to the other."[165]

2.142.1 **Office:**
The Office has already commented on this issue above[166].

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[164] Ibid page 14.
[165] Ibid.
[166] See paragraphs 2.11.1 – 2.11.3 above.

2.143 According to Mr. Bishop, "...on the issue of price comparisons, termination charges in Jamaica appear low by international standards. For example, in the UK, when the 2001 investigation into termination charges began, peak wholesale charges were in the range 12-15 pence per minute (ppm), with a weighted average of 10.2ppm, and an estimated cost of 6ppm — a mark-up of around 70%. The current retail charge in Jamaica is J$7 per minute, which equates to approximately 6.2ppm. A thorough investigation of cost has not yet been conducted in Jamaica, but it seems unlikely that the mark-up would be near the levels seen in the UK (also in light of the OUR's preliminary calculation of "competitive" termination rates, based on C&WJ's cost estimate, of J$6.93).[167]

2.143.1 **Office:**
As noted before, at the appropriate time, the OUR will conduct a consultation on cost-based mobile termination rates. Even assuming that FTM termination rates currently reflect cost, this does not demonstrate that the mobile operators are not dominant in relation to mobile call termination.

2.143.2 **The Office also notes Mr. Bishop placed excessive emphasis on FTM termination with little or no mention of off-net MTM call termination.**

Letter to the OUR dated September 24, 2004

Office

2.144 In another letter dated September 24, 2004, Digicel submitted what it considered to be further grounds for reconsideration in relation to the meeting between the OUR and FTC on July 30, 2004. In this letter, Digicel simply repeated most of its previous allegations accompanied by disingenuous abbreviated quotes from the Verbatim notes of the aforementioned meeting between the OUR and the FTC. These allegations include:

- The claim that the OUR relied heavily on C&WJ's cost to Declare Digicel dominant.
- The suggestion that the relevant markets are competitive

[167] Ibid.

- Claims that the OUR's data don't constitute a benchmarking
- Price convergence equates to competition
- The OUR's meeting with the FTC and the comments submitted by the FTC do not constitute consultation as required by the Act.

Claims that the OUR has been less than transparent during its consultation with the FTC are baseless. On page three (3) of its letter, Digicel stated that:

> "...the Act suggests that a range of costs should be considered when examining interconnection costs. However, the OUR has (a) not informed the FTC of this fact and (b) not provided the FTC with any range of costs."

Office

2.144.1 Firstly, the OUR was not seeking to establish or "...determine the price at which interconnection is to be provided by a dominant carrier...", therefore, it was not necessary to take into account, the principles outlined in Section 33 of the Act. Secondly, even if it was, there is no requirement to provide the FTC with any such range of costs.

Digicel

2.145 In relation to benchmarking, Digicel stated that, "...an objective regulator would consider 'benchmarking' within the internationally accepted meaning of the word."

2.145.1 **Office**

The OUR is not of the view that a comparison of prices across countries would prove anything except that some prices are higher than others as demonstrated by Digicel. Since most of these countries do not have cost based mobile call termination rates, this would not be very helpful.

Digicel

2.146 Regarding the supply side analysis, Digicel claimed that the OUR "...failed to alert the FTC of this supply side substitutive factor" **[that is, bypass]**.

2.146.1 **Office**

The OUR fails to comprehend why Digicel persists with these frivolous claims? If the FTC was of the view that this was a factor to be considered, it would have included it in its comments since

Digicel's claims in relation to bypass were sent to the FTC and were posted on the OUR's website.[168]

Digicel

2.147 According to Digicel, "It is clear that the OUR provided the FTC with a power point presentation of pricing anaysis they conducted."

2.147.1 **Office**

The document referred to consisted of Digicel's charts of its nominal, real and exchange rate adjusted termination rates.

Digicel's Statements on Cost Standard

2.148 In response to a presentation by Strategic Policy Research in 2000 on the review of C&WJ's Reference Interconnection Offer[169] Digicel indicated that:

> "Mossel broadly agrees with SPR on the following findings:
> … (2) Interconnect rates charged by C&WJ should be cost-oriented. Mossel believes that the cost-oriented price should be calculated based on a LRIC (Long Run Incremental Costs) model.

However, in April 2003 Digicel said:
"Any approach to regulation that has an excessive focus on allocative efficiency and the equation of price to some proxy for marginal cost (whether it be LRIC or otherwise) is likely to result in static investment and a failure to adopt new technology over time. Ultimately, Jamaican consumers and the overall Jamaican economy will suffer."[170]

2.148.1 **Office**

These statements speak for themselves.

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[168] See http://www.our.org.jm/new/PDF-FILES/Digicel's%20Response%20May%2012%202004%20without%20confidential%20info.pdf.

[169] See Mossel's letter to the OUR dated October 15, 2000.
[170] See http://www.our.org.jm/PDF-FILES/DigiRespons29_4_03.pdf.

Gibson-Henlin's[171] Comments in Relation to the Application for Reconsideration

<u>Regulatory Framework and Possible Remedy</u>

2.149 **Gibson-Henlin**: "Making Determination No. 5 which impose remedies (except the request for the RIO and amended RIO) which are prima facie:

i. Not authorised by the Act at this stage; and

ii. Suggestive of an intention to regulate the market for termination."

It was further stated that, "It is submitted that the matter may be rectified by excising the unnecessary references from the Consultative Document and amending Determination No. 5 to remove the seemly offending sections. It is further submitted that if it is felt that there is no error in Determination No. 5 or that the comments are not justified then the Office should issue a clarification having regarding to the issues raised herein."[172]

2.149.1 Office

The following should be viewed as the Office's clarification of *Determination number 5*, which states:

"The Office has determined that all mobile carriers shall:

- **supply the Office with current and any new or amended interconnection agreements;**
- **provide interconnecting parties with advanced notification of price changes and copy any such notification to the Office;**
- **Supply the Office with wholesale rates for mobile voice call termination services;**
- **Supply the Office with call volume by type (number of calls, call minutes) and**
- **Supply the Office with call revenue by type."**

Under Section 3 of the Act, the Office is obligated to:

"(a) ... promote and protect the interest of the public by -

(i) promoting fair and open competition in the provision of specified services and telecommunications equipment;

(ii) promoting access to specified services; ..."

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[171] An Attorney-at-Law and Partner in the firm of Nunes, Scholefield, DeLeon & Co., a firm which represents Digicel.

[172] See page 5 of Georgia Gibson-Henlin's "RESPONSE TO CONSULTATION ON DOMINANCE IN MOBILE CALL TERMINATION – DETERMINATION NOTICE # TEL 2004/10 SEPTEMBER 2, 2004."

Determination 5 seeks to ensure that the Office and the industry have the relevant information that will facilitate a competitive outcome. Basic data on wholesale prices, volume and revenue facilitate the monitoring function of any independent regulatory. Further, given the absence of competition, suppliers of call termination services may change prices independent of market constraints and adversely affect market outcomes. It is clear from the wording of the aforementioned Determination that it seeks to promote fair and open competition in the provision of specified services. Additional information only allows the regulator to observe the behaviour of market players. These are referred to as "Interim Regulatory Remedies" since they will are not ultimate constraints on the possible adverse behaviour of a dominant carrier or service provider.

Based on a declaration of dominance in mobile call termination, the Office indicated that it would conduct future consultations to determine if there is need for any further actions.

The Office stated that it "...will undertake the following consultations:

1) An assessment of the Cost of Mobile Call Termination services

2) The obligations to be imposed on a Dominant Mobile Operator: these include, but not limited to:-

(a) Requirements for Regulatory Accounts;

(b)Provision of a Reference Interconnection Offer; and

(c) Competitive Safeguards

An assessment of the "Cost of Mobile Call Termination Services" will determine if it is necessary to impose any substantive regulatory remedies on any mobile carrier or service provider. Even if the outcomes of this investigation suggest the need for such remedies, the specific nature of such remedies will be subject to consultation.

The Office is of the view that, based on this clarification, there is no need for a reconsideration of _"Determination 5"_ since there was no error of fact, error of law, new facts or changed circumstances.

Basis for Suggesting Reconsideration – Regulatory Framework

2.150 **Gibson-Henlin**: "It is submitted that, Section 29(4) can only be invoked when assessing an interconnection agreement or when resolving a dispute between operators. One such situation is if there is a declaration of dominance and the mandatory RIOs are filed."[173]

2.150.1 Office: **This Section forms part of the *Regulatory Framework* since its inclusion in the legislation suggests that the provision of mobile termination service is not offered in competitive markets. Where markets are competitive it is not necessary for legislators to specify provision(s) for setting the price of a specific service.**

2.151 Gibson-Henlin

"***Because of the suggestion of regulation by reference to the sections that deal with the regulation of termination charges, it is necessary that these issues be addressed in the re-consideration process.*** The respondent Digicel's request for reconsideration is *riddled* with some of these issues in terms of whether what was or was not intended was to regulate or not regulate termination charges. To the extent that the regulatory framework of the consultative document raises sections that specifically relate to termination charges or the regulation of competition it appears that there is or the reference caused ***a considerable degree of uncertainty for the operators in this sector.*** It is felt that this ***supports the need for re-consideration to treat specifically with the issue that was intended in the first instance the determination of dominance.***"[174]

2.151.1 Office: **In paragraph 1.12 the Office stated: "The main consequences that can flow from a declaration of dominance are listed below:**

- **Price Cap as per Section 46**
- **Competitive Safeguard as per Section 35**
  - **(i) Separation of accounts;**
  - **(ii) Keeping of records;**
  - **(iii) Provisions to ensure that information supplied by other carriers for the purpose of facilitating**

[173] Ibid page 6.

[174] Ibid page 14.

interconnection is not used for any uncompetitive purpose;
(iv) Such other provisions as the Office considers reasonable and necessary for the purpose of competitive safeguard rules.

- The application of interconnection principles related to dominant public voice carriers as 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;
- Possible subjection to rules which the Office may make 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.
- The Office may make competitive safeguard rules inclusive of accounting separation rules as provided for at Section 35(1)(a) of the Act.

Additionally, in paragraph 1.13, the Office stated that: "For the avoidance of doubt, the Office will *not* impose any of these conditions without consultation on how and whether they should be implemented.

As is apparent from the wording of the referenced statements by the Office, none of the listed consequences that can flow from a declaration of dominance will automatically flow from this declaration. Even in the case of an obligation to provide a Reference Interconnection Offer and to keep separate accounts, the Office intends to consult on the particular form for compliance with these obligations.

<u>Market Definition</u>

2.152 **Office:** Based on the information presented in this section of the respondent's (Gibson-henlin) comments, there is agreement with the Office's definition of the relevant markets. Issues mentioned in relation to the "Waterbed Effect" and the impact on penetration and

usage does not affect market definition. It is more appropriate to consider these issues when assessing whether or not to regulate termination rates if it is demonstrated that these rates do not cost oriented.

Market Power and Dominance in Mobile Call Termination

2.153 Gibson-Henlin

"It is submitted that Determination No. 4 should be re-considered on the basis that that there was insufficient evidence and/or the markets in Jamaica are immature to make the finding of dominance and market power."[175] This claim is based on the allegation that "It does not appear that any or any sufficient regard was paid to the behavioural aspect in particular to factors such as the level of price competition in the provision of a given service, the price cost margins available to suppliers of that service, price changes overtime, service differentiation and comparisons with similar services provided in overseas jurisdictions."[176]

2.153.1 **Office: The Office agrees that these factors may be included to various degrees when conducting an assessment of dominance in a relevant market. However, these factors are, in some cases, very subjective and may be misleading. The Office has sought to place emphasis on structural and technical factors that give a clearer picture of the market conditions and market power. The fact that prices may have declined over a given period does not mean that the relevant markets do not have a dominant operator. Such declines may be mainly due to the perceived threat of regulation rather than the existence of effective competition.**

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[175] Ibid page 24.
[176] Ibid page 26.

CHAPTER 3: OFFICE DECISION AND ACTION

Decision

3.0 Each Determination in the Office's Determination Notice of September 2, 2004, "Assessment of Dominance in Mobile Call termination - Document No: TEL 2004/10" becomes effective on the date of issue of this Decision.

Action

3.1 All mobile carriers are required to meet all mandatory requirements for dominant carriers by virtue of Sections 30-32 of the Act. These include:

(a) The provision of interconnection in accordance with the following principles, as per the relevant Sections of the Act:

(i) The provision of interconnection on a non-discriminatory basis;

(ii) The incorporation of reasonable and transparent, terms and conditions relating to the relevant technical specifications and the number and location of points of interconnection;

(iii) Move towards the incorporation of charges that are cost oriented and guided by the principles as set out in section 33 of the Act

(b) Abstention from arrangements that facilitate unfair cross subsidies.

(c) The provision, where technically and economically reasonable and feasible, of interconnection services that are diversified in a manner so as to render it unnecessary for an interconnection seeker to pay unreasonably for network components or facilities that it does not require;

3.2 Additionally, dominant public voice carriers are required to:

(a) keep separate accounts in such form and containing such particulars as will enable the Office to assess whether the relevant carrier provides interconnection services in accordance with the principles set out above. The OUR will propose and consult on the particular form of separated accounts.

(b) Lodge with the Office a proposed reference interconnection offer (RIO) setting out the terms and conditions upon which other carriers may interconnect with the relevant public voice network of that dominant carrier.

3.5 Such reference interconnection offers (RIO)s should be submitted to the Office as per the following guidelines as set out under Section 32 of the Act:

RIOs should be submitted:

(a) within ninety days after the date of determination of dominance pursuant to section 28 of the Act, or

(b) at least ninety days before the date of expiry of an existing reference interconnection offer,

(c) The existing telecommunications carrier shall submit its initial reference interconnection offer within thirty days after the appointed day.

3.7 The relevant reference interconnection offer shall contain such particulars as may be prescribed.

3.8 The relevant reference interconnection offer or any part thereof shall take effect upon approval by the Office in the prescribed manner, as per the Act.

3.9 For non-mandatory requirements, the Office will conduct public consultations if it is of the view that any of these are necessary.