

**IN COMMERCIAL CONFIDENCE**

**APPLICATION FOR STAY OF ASPECTS OF THE DETERMINATION  
NOTICE DATED NOVEMBER 22, 2001 ON "PROPOSED MODIFICATIONS  
TO THE EXISTING INTERCONNECTION REGIME" ("DETERMINATION  
NOTICE) AS MORE PARTICULARLY DESCRIBED HEREIN:**

**AND**

**APPLICATION FOR RE-CONSIDERATION OF THE DETERMINATION  
NOTICE**

**SUBMITTED BY CABLE & WIRELESS JAMAICA LIMITED**

**DECEMBER 6, 2001**

**Introduction**

Pursuant to subsection 60(4) of the *Telecommunications Act, 2000* (the “Act”), Cable and Wireless Jamaica Limited (hereinafter called “C&WJ” or “Cable & Wireless Jamaica”) hereby applies for reconsideration of aspects of the Determination Notice entitled “Modifications to RIO-3” (“the Determination”) issued by the Office of Utilities Regulation (“Office” or “OUR”) on 22 November 2001 and received by C&WJ on November 23, 2001. In particular, C&WJ seeks a reconsideration of the Office’s determination that access deficit charges (“ADCs”) will not be imposed either as part of the interim plan or when the next permanent changes to the RIO are implemented.

In addition, as further described below, C&WJ seeks an order pursuant to paragraph 60(8)(a) from the Office staying the application with respect to those sections of the Determination which relate to changes in the termination rates for incoming international calls to mobiles pending the outcome of this appeal.

It is only after considerable thought that C&WJ has filed this application for a stay and reconsideration. Our application will show that it is appropriate to apply ADCs at this time because:

- ? it is apparent that regulatory decisions as regards the formulation of the price cap plan included certain assumptions and estimates that have been shown to be materially unrealistic such that the price cap plan would not allow C&WJ to earn a reasonable rate of return, hence constraining C&WJ from covering its access deficit; and
- ? the Determination has the effect of constraining C&WJ’s ability to earn a reasonable rate of return.

Notwithstanding the fact that the price cap regime has been referred to the Appeal Tribunal, without prejudice to the merits or demerits of the Determination itself, C&WJ considers that it is inappropriate and inequitable to implement the Determination when its effect would be to exacerbate the wrong imposed by the misspecification of the price cap.

We are aware that there are different means of addressing the underlying concerns which C&WJ has with the Determination, and that the Office may favour such alternative approaches. However, Cable & Wireless Jamaica considers that the best approach remains the imposition of access deficit charges, as described below, and pending further developments in this regard wishes to retain its ability to pursue all avenues of appeal.

Hence, C&WJ seeks an order pursuant to paragraph 60(8)(a) from the Office staying the application of those sections of the Determination which relate to changes to the termination rates for incoming international calls to mobiles pending the outcome of this appeal. In addition, C&WJ also requests reconsideration by the Office of its Determination that access deficit charges (“ADCs”) will not be imposed either as part of the interim plan or when the next permanent changes to the RIO are implemented.

**I. APPLICATION TO STAY THE DETERMINATION PURSUANT TO SECTION 60(8)(a) OF THE TELECOMMUNICATIONS ACT, 2000**

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In addition to its application for reconsideration of the Determination presented below, C&WJ also requests, pursuant to paragraph 60(8)(a) of the Act, that the Office stay the implementation of Determination 2.0(vi), which provides as follows:

*“with regard to the termination of incoming international calls on mobile networks C&WJ’s fixed is to pay mobile carriers ... the following:*

- ? Peak \$5.332
- ? Off-peak \$6.281
- ? Weekend \$6.900

C&WJ submits that its application for a stay should be granted because as illustrated below, its application for re-consideration has merit. In addition, C&WJ will suffer grave financial harm if the Determination is implemented without amendment.

**[CONFIDENTIAL INFORMATION DELETED]**

Given that C&WJ’s case for re-consideration presented hereunder has merit, and that C&WJ will suffer grave financial losses in the event that the Determination is not stayed, we submit that it would be appropriate to stay those parts of the Determination set out above. C&WJ is prepared to place amounts equal to the additional revenue that would have been sent to the mobile operators if the Determinations were implemented in an interest-bearing account pending the OUR’s decision on the reconsideration. These amounts would be disbursed if required once the appeals process has been concluded.

**II. APPLICATION FOR RE-CONSIDERATION OF THE OFFICE’S DETERMINATION PURSUANT TO SECTIONS 60(4) AND 60(5) OF THE ACT**

***Legislative Basis for Reconsideration***

Subsection 60(5) states that where an applicant seeks reconsideration of a decision of the Office, the application shall be heard only if the applicant:

1. relies upon new facts or changed circumstances that could not, with ordinary diligence have become known to the applicant while the matter was being considered by the Office; or
2. alleges that the decision was based upon material errors of fact or law.

As will be further detailed in the following sections, C&WJ relies on (2) above, and will argue that the Determination is based on errors of fact and law which justify revisiting and modifying it.

***Background***

*The interconnection regime*

The interconnection regime for incoming international calls to mobile networks requires C&WJ's fixed network to pay competing mobile carriers a termination rate for overseas calls terminating on their networks.

Based on the regime prior to the Determination, mobile carriers received the C&WJ retail rate for fixed-to-mobile calls minus the fixed network retention. The Office proposed in its Consultative Document that for each incoming international call to a mobile network, the rate payable by C&WJ's fixed network to mobile networks would be equal to the US settlement rate less the C&WJ fixed-termination rate as specified in RIO-3.

C&WJ responded to the Consultative Document (dated 7 November 2001) and argued that:

- a) The fixed termination rate has a specific meaning as per RIO-3, that is, the rate applicable for terminating calls on the domestic fixed network but excludes use of fixed network international facilities.
- b) If the OUR intends that C&WJ only be allowed to recover its fixed termination rate, this will lead to significant under-recovery of C&WJ's network costs. For every minute of international traffic destined to mobile networks, costs associated with the use of international transmission and international switching will not be recovered.
- c) The interim proposals will lead to a significant reduction in payment to C&WJ's fixed network. Combined with the fact that the interim proposals do not allow for charging for the use of international facilities, this will result in a significant market distortion brought about by regulatory determination.
- d) Using services described in the RIO (whether fixed termination or fixed retention) to develop a set of regulated charges for international incoming calls to mobile networks leads to interconnection charges that are substantially below the cost of provision.
- e) In addition, whether adopting the OUR's interim modifications or the principles applied by C&WJ for this service under RIO-4, these proposed changes in the way C&WJ's fixed network charges for incoming international calls to mobiles will remove an important source of subsidy required to fund the access deficit.
- f) C&WJ therefore recommended that, pending the approval of RIO-4, the OUR should allow the C&WJ fixed network to pay out the US international incoming settlement rate less the cost of conveyance on the international and domestic network to the POI, using cost estimates derived for international conveyance (switching and transmission) consistent with RIO-3.

As part of the Consultative Document, the Office had further consulted on the appropriateness of Access Deficit Charges (ADCs) during Phase II of competition in Jamaica. The OUR stated that profits from settlements represent a significant share of C&WJ's total profitability and that expected profits from international settlements would ensure that the price cap-plan allows C&WJ the opportunity to cover its costs, including its cost of capital. The Office concluded that ADCs would not be appropriate at this time, and

that their efficacy should, however, be seriously considered when international competition is permitted in Phase III.

C&WJ made a number of arguments in its response of 7 November 2001 to support the use of ADCs during Phase II including the fact that the methodological approach to the treatment of incoming international calls to mobile networks proposed by the OUR and C&WJ as part of RIO-4 effectively eliminates profits from international settlements associated with incoming international calls. In effect, C&WJ will only retain a cost-oriented charge for conveyance of the call over the fixed network.

On 14 November 2001, C&WJ provided further evidence to the OUR about the inappropriateness of using US settlements rates less fixed retention as the mechanism for setting interconnection charges for incoming international calls to mobiles. This included proposals for how such interconnection charges should be set but noted that:

*“It should also be noted that C&WJ’s proposal to use Scenario 2 eliminates the profits from international settlement payments... Finally, irrespective of approach, the OUR’s position that the access deficit can be adequately funded by profits from international settlements seems inappropriate. If the OUR chose to maintain this position, presumably it would then support C&WJ levying an access deficit surcharge for incoming international calls to mobiles. What is clear from this discussion is that both positions of the OUR can not hold and a competitively-neutral solution is required.”*

Determination 2.0 (vi) ruled in favour of changing the basis for interconnection charges for incoming international calls to mobiles along the lines suggested by C&WJ. The interconnection regime for the interim period (until early next year) sets the rates that C&WJ fixed shall pay to mobile networks for incoming international calls to their networks. However, the Determination also stated that Office does not approve any ADCs as part of the interim modifications or the next permanent changes to the RIO early next year.

#### *The Price Cap Regime*

In formulating the price cap plan, the OUR sought to provide C&WJ with the opportunity to recover its total costs. C&WJ has and does contend that the price cap plan as specified fails to provide C&WJ with such opportunity. This matter will be heard by the Appeal Tribunal.

It should be noted that the views expressed by C&WJ with respect to the price cap plan are without prejudice to its position presented to the Appeal Tribunal.

Notwithstanding the broad range of arguments that C&WJ has made in support of its contention, recent events and meetings with the OUR (during the week of 3<sup>rd</sup> December 2001) have confirmed that specific assumptions which were made by the OUR in the specification of the price cap do indeed have the effect of denying C&WJ the opportunity of recovering its total costs.

**[CONFIDENTIAL SECTION DELETED]**. From discussions with the OUR and its advisors we understand that the plan underpinning the price cap regime assumed that a much smaller proportion of incoming international calls would be terminated on mobile

networks. Consequently, the plan and the price cap regime assumed that C&WJ would retain a significantly larger proportion of the profits from international incoming calls, which could be applied to fund the losses on services which C&WJ currently provides below the cost of provision, than will in fact be possible.

Following the aforementioned discussions with the OUR and its advisors C&WJ further understands that in setting the price cap the OUR assumed that international outgoing calls make a substantial contribution to profit. In reality, while the combined outgoing and incoming international calls service is highly profitable and able to contribute to the losses on other services, international outgoing calls, taken in isolation, are only marginally profitable.

It is also clear that the approach proposed by the OUR in its Consultative Document would have yielded a different set of expected profits compared with the regime in the Determination which eliminates any supernormal profits associated with incoming international calls to mobile networks. This reflected a shift in thinking by the Office based on arguments presented by C&WJ. The loss of these profits to fund the access deficit would of necessity render incorrect the previous forecast of expected profits used as the basis for the price cap plan. In these circumstances, it would be incorrect to assume, that the new interconnection regime would continue to allow C&WJ to cover its costs (including its cost of capital).

In addition, since the consideration of the appropriate price cap regime, C&WJ has filed its MEA study. This evidence was not before the Office when it made its determinations on the price cap plan, and in C&WJ's view, casts doubt on the continuing correctness of the OUR's position that the price cap will permit C&WJ to recover its total costs.

#### ERRORS OF LAW

##### **A. The Determination is contrary to sections 33(1)(d) and (f) of the Act**

Section 33(1)(f) of the Act requires the OUR to be guided by the following principle:

*(f) Where appropriate, interconnection costs shall include provision for a supplementary charge, being a contribution toward the access deficit of the interconnection provider.*

Subsection 33(3) goes on to state that:

*(3) In subsection (1)(f) "access deficit" means the amount by which a carrier's revenue from connection and line rental charges falls short of the cost of providing access lines due to regulatory constraints on those charges.*

It is a fundamental principle of regulatory law that the regulatory framework imposed on a regulated company must permit that company to earn a reasonable rate of return. This principle is embodied in subsection 33(1)(d) of the Act which requires the Office, in determining the prices at which interconnection is to be provided, to be guided by the following principle:

*costs shall include attributable operating expenditure and depreciation and an amount estimated to achieve a reasonable rate of return;*

#### The Access Deficit

In its response to the Consultative Document C&WJ noted that a cost-oriented retention for incoming international calls would erode funding for the access deficit. In its 14 November 2001 letter, C&WJ requested that the OUR not order both cost-oriented retention on incoming international calls as well as exclusion of any ADCs. Notwithstanding these submissions, the OUR concluded that ADCs were not appropriate, and that the rate for incoming international calls terminated to mobiles should be cost-based. These views of the OUR are based on its approach to modelling the price cap plan which included recovery of the access deficit and reduction in required funding as a result of losing incoming international calls to mobiles. These are described above in the Background. As indicated above, from discussions with the OUR and its advisors we understand that the plan underpinning the price cap regime assumed that a much smaller proportion of incoming international calls would be terminated on mobile networks. Consequently, the plan and the price cap regime assumed that C&WJ would retain a significantly larger proportion of the profits from international incoming calls, which could be applied to fund the losses on services which C&WJ currently provides below the cost of provision, than will in fact be possible. C&WJ respectfully submits that the Office erred in law in reaching these conclusions as the effect of the decision is to:

- (a) prevent Cable & Wireless Jamaica from earning a fair return contrary to paragraph 33(1)(d) of the Act; and
- (b) ignore the provisions of sections 33(1)(f).

As in most jurisdictions, the current rates for international and domestic services in Jamaica are the product of rate-setting based on social policy goals. Historically, domestic services were priced below cost to promote higher penetration, while more “discretionary” services like international calling were intentionally priced above costs to provide a subsidy to make up the gap between the costs and rates for domestic service. This pricing framework is not inappropriate in a monopoly environment. However, it is generally accepted that this approach is not sustainable in a competitive environment – competition will lower the artificially high rates, reducing the subsidy available for below cost services.

As the OUR is aware, the access network in Jamaica does not recover its costs. Until the Determination, international incoming calls to mobiles provided a significant source of subsidy to the access network. If the Determination is implemented as is, C&WJ will only retain its costs of conveyance for these calls. The additional subsidy that previously flowed from these calls to the access network will no longer be available for this purpose as all revenues beyond those required to cover C&WJ’s costs of conveyance will be passed on to the mobile operators.

Absent a mechanism to recover the difference between rates and costs for the access network, C&WJ will make a loss on these services and will not be in a position to earn a reasonable rate of return. By failing to permit the recovery of ADCs while also restricting

C&WJ's recovery on incoming international calls to its conveyance costs, the OUR has denied C&WJ the opportunity to earn a fair return on its assets, and has acted contrary to the Act. This constitutes an error in law.

As noted above, rates for the access network do not currently recover the costs of that network – in terms of subsection 33(3), C&WJ's revenue from connection and line rental charges falls short of the cost of providing the access lines. Further, C&WJ is subject to price caps which as explained above, constrain its ability to raise rates to cover costs.

? C&WJ's inability to implement effective re-balancing

While it is theoretically possible for Cable & Wireless Jamaica to raise inter and intra-parish rates to recover this amount, it is not possible in practice to do so as these rates are subject to both the overall Price Cap Index, and to specific baskets. C&WJ cannot, as the OUR contends, reduce outgoing international rates to create more "room" to raise inter and intra-parish rates as the rates are currently at margins which would counterbalance full rebalancing of, for example, inter-parish calls in the short-term as well as supporting increases in line rental over the period of the price cap. Over the price cap period, therefore, C&WJ would not be in a position to continuously reduce prices for outgoing international calls and comply with the price cap constraints.

? Erosion of revenue from international incoming calls

Additionally, mobile operators have the ability to compete for international inbound calls in advance of Phase III by developing pricing propositions which encourage mobile subscribers to receive international calls on their mobile phones. The implication of this is significant since it means that the profits from international incoming calls which are required by C&WJ to contribute to the losses is made on domestic services (where rebalancing is constrained by regulation) can be cream-skimmed by mobile operators. In the absence of an ADC regime C&WJ would have no protection from such arbitrage activities. C&WJ therefore submits that the decision not to introduce ADCs prior to Phase III of the liberalisation process should be reconsidered.

In these circumstances, it cannot be disputed that C&WJ has an "access deficit" as that term is defined in section 33(3). C&WJ's revenues from connection and line rental charges fall short of the cost of providing access lines due to regulatory constraints on those charges. C&WJ submits that in these circumstances, 33(1)(f) requires the Office to "include provision for a supplementary charge" to contribute towards the access deficit. The failure by the Office to provide for such a charge while at the same time reducing the amount of subsidy available from incoming international calls is contrary to paragraphs 33(1)(d) and (f) of the Act, and consequently, constitutes an error in law.

? Constraints due to incorrect regulatory decisions with respect to the price cap regime

In its appeal of the price cap plan filed with the Appeal Tribunal, C&WJ argues that the plan, as currently structured, does not permit C&WJ to earn a reasonable return. Even allowing for the possibility raised by the OUR that the price cap may be modified at the

end of the price cap year, no remedy would be available for the period up to that date and, in effect, ensuring that C&WJ would not cover its costs (including cost of capital). C&WJ submits that to implement the changes in the Determination would only serve to exacerbate this problem, and could put Cable & Wireless Jamaica in significant financial jeopardy (see pages 5-6 above). C&WJ submits that to do so would constitute an error of law.

? Summary

The access deficit can be made up in a number of ways, for example, full rebalancing would eliminate the access deficit entirely. Alternatively, the parameters of the price cap regime could be altered. However, full rebalancing is not a viable option as it would result in unacceptable increases to domestic rates over too short a period of time. As described above, the price cap regime does not permit C&WJ to address this situation in a satisfactory manner either. Even apart from the fact that the Act specifies supplemental charges in this circumstance, C&WJ submits that ADCs are the appropriate mechanism to ensure that these costs are appropriately recovered. The failure of the office to approve an ADC during Phase II constitutes an error of law as the charge is appropriate and as such is mandated by section 33(1)(f) of the Telecommunications Act, 2000. Additionally, failure to approve an ADC does not allow C&WJ to receive a reasonable rate of return as mandated by the Act.

**B. The Determination is based on an irrelevant consideration**

In response to C&WJ's arguments concerning access externalities, the OUR in paragraph 3.4 of the Determination, stated as follows:

*(d) Mobile subscribers benefit (through the access externality) from being able to communicate with fixed subscribers but (absent ADCs) do not contribute to the costs of fixed access lines. This point is certainly correct, but it cuts both ways. Fixed subscribers also benefit from being able to communicate with mobile subscribers, but (absent ADCs flowing the opposite direction) do not contribute to the cost of mobile service. In terms of economic efficiency, one can make a stronger case for having fixed subscribers contribute to mobile service than vice versa, because demand for mobile service is much more elastic than demand for fixed service. Hence, ADC revenues going to the mobile sector would be likely to generate far more benefit (i.e., stimulation in number of subscribers) through access externalities than an ADC revenues coming from the mobile sector.*

C&WJ had argued that because mobile subscribers benefit from being able to communicate with fixed line customers, the mobile network should contribute to the subsidy required to fund the fixed access network. This is an argument based on equity. The access deficit can be recovered over any number of services. C&WJ argued that based on their usage of the access network, services to mobiles should attract an ADC. The OUR's suggestion that there is a greater argument for fixed subscribers contributing to mobile service on the basis that ADC revenues going to the mobile sector would be likely to produce more benefit is not relevant to the question of whether ADCs are appropriate for incoming calls to mobiles. Competitive mobile networks are not subject to the same historical pricing distortions as the fixed network and are free to recover their costs through their rates. Accordingly, they will not have an access deficit. It is therefore inappropriate to disallow ADCs on incoming terminations to mobiles on the basis that there would notionally be a

greater benefit from “ADC revenues going to the mobile sector”. It is C&WJ’s respectful submission that the Office erred in taking account of this irrelevant consideration.

**C. The Determination fails to consider all relevant evidence**

**[CONFIDENTIAL SECTION DELETED]**. This information is of obvious relevance to the question of whether an ADC should be applied to incoming international calls terminated to mobiles since it illustrates that the amount of traffic traditionally used to subsidize the access network is being eroded. The importance of the information is underlined by the Office’s request for further information in respect of these figures on 20 November 2001, two days before it would make its Determination.

However, despite the importance of the information, and the OUR’s request for additional information in respect of it, the OUR made its Determination in advance of receiving the additional information on 30 November 2001, the date on which it was required to be submitted. In C&WJ’s view, in so doing the Office erred in law on the basis that it had the opportunity, in the interests of making a Determination based on the best available evidence, to either request the information before it made the Determination on 22 November 2001 or to delay its Determination until after it had received the information pursuant to its own information requests.

**D. The Determination was made contrary to principles of natural justice, procedural fairness and reasonableness**

Cable & Wireless Jamaica respectfully submits that Determination was procedurally unfair and unreasonable in that Office reached a determination in advance of considering the arguments put forward by C&WJ and without waiting for relevant evidence from C&WJ which evidence was requested by the Office (see page 11). Such a course of conduct would not accord with the OUR’s obligation at common law and under section 4(2) of the Act, to observe the rules of natural justice and to act fairly and reasonably. Natural justice requires that all of the evidence adduced by the parties be considered by the decision-maker *before* it makes its determination.

C&WJ is also concerned that in all cases it has not had the opportunity to comment on material information which appears to have formed the basis of the OUR’s decisions. As noted above, it has become evident that the percentage of calls assumed to terminate on mobiles for the purposes of the price cap regime is incorrect. If C&W had been given access to those assumptions prior to the decision being taken, it would have provided its view of the appropriate percentage. This could have lead to a more accurate projection. Similarly, it now appears that the Office assumed a level of profitability for international outgoing calls which C&WJ contends is not present. Again, had the issue been raised and the OUR’s assumptions put forward, C&WJ could have tested those assumptions. Section 4(2)(b) of the Act<sup>1</sup>, as well as the *audi alteram partem* rule, require that parties having an interest in the outcome of a decision have an opportunity to present their case to the

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<sup>1</sup> Paragraph 4(2)(b) states that in making a decision, the Office shall observe reasonable standards of procedural fairness, observe the rules of natural justice, and “give to such persons an opportunity to make submissions to and to be heard by the Office;”.

decision-maker. C&WJ would urge the OUR to provide for as much transparency as possible in its decision-making process on a going-forward basis in order that parties who will be affected by its decisions know the case to be met. The failure to do so in this case constitutes an error of law.

Also, when the Office developed C&WJ's price cap plan, it is C&WJ's understanding that the Office would have looked to ensure that overall revenues from price cap services were sufficient to cover costs (including cost of capital). This would no doubt include projected revenues and profits from incoming international calls to both fixed and mobile networks, partially accounted for by the Z factor (although the Office chose to exclude international incoming calls to mobiles for estimation of the Z factor in the price cap). At that time, the profits from incoming international calls to mobile networks would have been estimated with reference to the interconnection regime as determined by RIO-3. Since that regime would have been superseded by the regime proposed by the OUR in its Consultative Document, if these changes were already reflected in the price cap plan, then this would represent a material error of law as the OUR had already reflected a revised regime its price cap plan for C&WJ but put the issue forward for consultation at a later date.

#### ERROR OF FACT

The Office had noted as part of its Consultative Document that

*“incoming international settlements represent a hefty share of C&WJ's profitability. Settlement rates are determined through international negotiations and are not subject to price cap constraints. Nevertheless, the Office considers the (expected) profits from international settlements in ensuring that the price cap plan allows C&WJ to cover its costs – including its cost of capital.”*

In its Determination, the Office again states that its evaluation was based on

*“information that the Office evaluated before C&WJ's price-cap plan was implemented. In any event, the Office believes that the use of an ADC is not the proper way to redress any alleged shortfall in C&WJ's earnings.”*

C&WJ believes that the OUR's Determination is based on the following error of fact:

The OUR's Determination relied on evaluation of information presented before implementation of C&WJ's price cap plan. As a result, the estimated costs (including the cost of capital) are unlikely to be correct. Similarly, the OUR is still reviewing the MEA values for C&WJ's assets (a proceeding which will run into early next year). C&WJ submits that the Office erred in fact in failing to consider this revised information in its Determination as a factor that would influence estimated profits required to cover costs (including cost of capital).

#### **Actions by the Office sought by C&WJ under section 60(6) of the Act**

Under section 60(6) of the Act, the Office has a wide discretion to remedy any errors. C&WJ urges the Office to reconsider the interconnection regime for incoming international

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calls to mobiles. While it might be possible to remedy some of these concerns by revisiting the price cap plan for C&WJ, as detailed above, this is not the most appropriate approach – particularly given the Appeal filed by C&WJ with the Appeals Tribunal relating to the Price Cap Determination by the Office dated 10 August 2001. C&WJ would urge the Office to include an ADC surcharge on incoming international calls to mobiles