April 27, 2017

BY EMAIL

Office of Utilities Regulation
P.O. Box 593
36 Trafalgar Road
Kingston 10
Jamaica

Attention: Infrastructure Sharing Consultation

Dear Sir or Madam:

Re: Verge Communications Ltd. Response to the Notice of Proposed Rule-Making on Infrastructure Sharing.

Verge Communication Ltd. ("Verge") is pleased to provide this response to the Office of Utilities Regulation (the "OUR" or "Office") Notice of Proposed Rule-Making on Infrastructure Sharing (the "NPRM" or "Notice"). As a relatively new company providing telecommunications services in Jamaica, infrastructure sharing is an important potential tool to be used by Verge and other new entrants to provide new services to customers who are not currently adequately served by the larger, more established providers. Strong rules promoting non-discriminatory access to infrastructure at reasonable rates are necessary if the full benefits of competition are to be realized.

We start our submission with a high level look at the issues raised in the NPRM, followed by comments on more specific sections of the Notice. We have not commented on all issues in the NPRM, and our failure to comment on or address any particular issue should not be construed as either acceptance or rejection of that issue.

Executive Summary

In these comments, Verge takes the position that:

1. Infrastructure sharing is very important if entry by new providers into the market is to be encouraged and facilitated. Infrastructure sharing is an established feature of mature regulatory regimes and does not blunt incentives to invest as established providers often argue.
2. The incentives to share infrastructure in Jamaica as not as compelling as in other jurisdictions, and as a result, mandated infrastructure sharing with clearly prescribed rules is the only viable option.
3. Sharing on a small scale is at least as important, and perhaps more so, than large infrastructure sharing arrangements, and the Rules must accommodate this type of sharing.
4. If the full potential of infrastructure sharing is to be realized, rules for sharing must be sufficiently prescriptive to ensure that sharing is done efficiently and effectively.

The Need for Infrastructure Sharing.

To date, competition in the Caribbean has been characterized by large operators leveraging their scale across multiple jurisdictions. These providers have done a good job of providing standard offerings to the majority of the population. However, because of their size, they are not interested in serving many customers whose needs are different from those of the majority – for example, customers who require different services, or are situated outside major population centres. The threshold of profitability required before a large operator will invest in a market is often higher than for new entrants who may be willing to accept a lower return.

For those customers and situations, the OUR needs a different type of competitor that is not attempting to serve everyone all at once. That type of competitor fills an important niche in the system, but does not have access to the same capital and revenue streams to build out extensive networks of its own – at least not at first. In the absence of a meaningful opportunity to share infrastructure, there is a real risk that these customers will remain unserved or underserved. The OUR's infrastructure sharing policy should acknowledge and encourage entry by smaller providers who will bring new and innovative services to market. That is done by ensuring these competitors can remain nimble, select and roll out services quickly, not be overcharged and not be required to expend excessive efforts in securing the facilities they need to provide services. Clear rules on infrastructure sharing are key to realizing that goal.

However, infrastructure sharing will not happen without regulatory intervention. The NPRM notes in Section 6.3 on page 71 that "some of the incentives that have lead operators in other countries to voluntarily engage in infrastructure sharing also obtain in Jamaica. However, there has been a reluctance on the part of all major operators when it comes to the sharing of infrastructure." This is very much the case. While there are theoretical incentives for established operators to share their networks, and some of those incentives might be present

in Jamaica, the experience to date suggests that established operators are interested in sharing their networks in only the most limited of circumstances.

The NPRM notes that infrastructure sharing can help operators reduce capital and operating expense.[1] However, experience around the world and in the Caribbean shows that it is often difficult to convince an incumbent to share its infrastructure with a potential competitor. The established operators in Jamaica are multi-national firms with very large revenue streams which they use to fund their own infrastructure builds. These providers do not need the modest revenues they would receive from infrastructure sharing to build out their networks. For them, it is a question of whether the benefit of sharing is worth the possible loss of market share associated with helping a competitor to roll out its service – as they do not need the revenues, the answer is almost always certain to be "no".

The predominance of reciprocal sharing demonstrates the true motivations behind sharing or the lack of sharing in Jamaica. The NPRM notes in Section 6.2 at p. 68 that most sharing of masts and towers to date in Jamaica has been done as reciprocal "swaps". In those cases, each provider had a need to find additional sites to build out its mobile network, but was not willing to share until it was assured that it was not giving a commercial advantage to its competition. By structuring the sharing as a swap, each provider could justify the advantage being given to its competitor because it was receiving an equal advantage in return. Competitive position was more important in this case than the need to find new sites. Left to negotiation, or without a hard obligation to share, a true new entrant who does not have equal facilities to "swap" will not be able to convince an established operator to share its facilities because the established operator will feel it is giving up competitive position for little or no benefit. In the absence of a regulatory requirement, providers will share infrastructure where it benefits them, but not if it advances the interests of the other provider over their own. This is completely understandable, but puts the interests of the provider ahead of those of the telecommunications environment and the country generally. As noted in the NPRM, reciprocal sharing represents a serious barrier to entry for new entrants and any requirement to provide reciprocal facilities should be rejected.

The lack of real incentives to share infrastructure in Jamaica points up the need for strong, easily applied rules which require sharing in a timely and affordable way – without those, there is no natural incentive for the established operators to move quickly on sharing, or to offer terms which are likely to be acceptable to a competitor. As the Notice acknowledges: "Even in situations where the law provides for infrastructure sharing, there is still the risk that some infrastructure owners will delay or frustrate the process. Vigilance from regulatory authorities will be required to ensure that the process is not abused by operators."[2]

The "dilution of investment incentives" argument should be rejected.

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[1] See for example, Section 4.2 on p. 44 where the Notice states that "for incumbents it provides new revenue streams as well as lower costs" and section 4.2.1 on page 45 which states that "[i]t is well known that telecommunications operators choose infrastructure sharing largely for the purposes of reducing the costs of the network construction and maintenance".

[2] NPRM, section 4.3.7, page 56.

In most cases where an obligation to share infrastructure is being considered, established operators argue against it on the basis that having to share that infrastructure will dilute the operator's incentive to invest in further facilities. It is important to see this argument in context, however. There is an overpowering incentive for operators to keep up with technology, and the decision to invest in new technologies is likely to be made on the basis of factors other than any requirement for sharing of those facilities. Incumbent telephone company lawyers around the world tell anyone who will listen that mandated sharing of fibre optic facilities destroys the business case for building fibre; this while their colleagues in the field frantically plow as much fibre into the ground as they can to ensure that they remain competitive with their rivals. Neither Digicel nor C&W can afford not to invest in new technologies if they wish to remain competitive with the other – their decision to invest in those technologies is far more likely to be based on that competitive concern than a concern that a new entrant may get access to newly constructed facilities. Provided the OUR sets rates for sharing which permit providers to recover their costs, these providers are not prejudiced by a requirement to share, and infrastructure sharing will not blunt their incentive to invest in new facilities and technologies.

Regulatory Intervention is Required.

Infrastructure sharing must be mandated.

Section 5.2.1 of the Notice raises "optional" sharing as a possible approach, although other sections of the Notice suggest the OUR intends to impose sharing obligations. Verge believes that infrastructure sharing must be mandatory. It is unrealistic to believe that any degree of effective sharing will occur without being mandated by the OUR. As noted by the Office itself in Section 7.3.2 on p. 79: "the OUR has little confidence that there will be an increase in infrastructure sharing if it is left up to the operators". There is simply not enough competition, and the market conditions are not such in Jamaica that the existing providers will be naturally incentivized to offer appropriate terms and conditions for the use of their infrastructure.

While, in theory, there is an incentive to sell space on underutilized facilities, this has to be viewed in the context of the countervailing desire not to assist a competitor; a desire which typically wins out. If there were numerous facilities based providers who had built out to all of Jamaica, and the market was already well served, an entrenched network provider would need to consider the potential revenue to be gained from infrastructure sharing in order to continue growing its business. However, that is not the situation in Jamaica today, and a mandated requirement to share infrastructure will be required to ensure that infrastructure sharing happens.

Further, the OUR cannot assume that commercial negotiations will result in widespread sharing on appropriate terms. Paragraph 12 in Section 7.2 on page 76 of the Notice states that Licensees shall, in the first instance, attempt to reach an agreement on infrastructure sharing by negotiation. Verge accepts that negotiation is the first step in the process and if successful represents the best process for agreeing on the terms and conditions of infrastructure sharing. However, the requirement to negotiate can easily lead to unnecessary delays and gaming. Negotiation is fine as long as there is roughly equivalent market power.

If Digicel and C&W sit down to negotiate an island-wide sharing of facilities, it might be expected that they would arrive at an agreement that is fair for both sides as both sides have much to both gain and lose in such an arrangement. However, that is not the case for a new entrant seeking specific facilities with little to trade in return. The rules have to provide for that situation as well as the larger one. Any requirement to negotiate has to recognize that negotiations will not be successful in many cases, and in those cases the focus must swiftly turn to regulatory action to determine appropriate terms.

Small-scale as well as large-scale sharing must be encouraged.

In places the NPRM seems to assume a wide-scale sharing of infrastructure like that experienced in mature markets in Europe. For example, reference is made to sharing agreements being unsuccessful in Europe because the operators were unable to agree on the degree of sharing.[3] Section 5.2.1 on p. 60 notes that "[g]lobally, both passive and active infrastructure sharing are being facilitated through voluntary mutual agreements reached between service providers. Since 2009, a large number of network sharing deals, ranging from cash-generating tower sharing to highly complex RAN-sharing agreements, has been signed."

These types of arrangements contemplate network-wide sharing by large, well-established operators with extensive networks where each provider can offer something substantial to the other operator. It is unlikely that equivalent arrangements will be reached in Jamaica. Operators like Verge may not need, or be able to afford, network-wide access. They will need access to individual sites or backbone facilities. Similarly, Verge does not yet have a wide-scale network to share with the established providers. If rules are established which assume wide-scale sharing, that will exclude the smaller-scale, but still important, type of sharing which is needed by new entrants.

Rules for sharing must be sufficiently prescriptive to reduce the potential for gaming and delay.

As mentioned throughout this submission, Verge believes that it is important to prescribe infrastructure sharing Rules which allow for rapid agreement of sharing arrangements and ensure the least amount of regulatory gaming and delay as possible.

To this end, Verge believes that standard reference offers should be required from dominant operators and made available to any operator who wishes to share facilities. These offers, which should be approved by the OUR, will help to reduce the amount of time required to conclude negotiations. These agreements should be published to help ensure non-discriminatory treatment – parties should be given the opportunity to claim confidentiality over competitively sensitive sections, but having main terms and conditions available on the public record will make it easier for a party without market power to negotiate.[4]

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[3] See section 4.3.2 at p. 52.

[4] See sections 66 and 69 of the Cayman Islands Information and Communications Technology Authority Law (2011 Revision) which together require that approved infrastructure access agreements be kept by the Authority in a public registry accessible by the public.

In Section 7.2.2 of the Notice, the Office discusses physical or technical impracticability for sharing as an exception to the requirement to share. Verge acknowledges that some infrastructure will not be suitable for sharing without modification, and that there may be limited circumstances in which facilities should not have to be shared for this reason. However, we believe these situations will generally be rare. Given the possibility to frustrate sharing with spurious or unsupported allegations of technical infeasibility, the Rules should start from the position that all infrastructure is suitable for sharing and require concrete evidence that it is not before sharing is not required. It is very easy for an operator to assert that existing infrastructure is unsuitable to sharing, they do not have adequate capacity, or that extensive modifications would be required for that purpose. These claims are usually difficult for a competitor to audit given that they do not have access to the infrastructure provider's facilities, and as a result the competitor has to rely on the regulatory process to ensure that sharing is not inappropriately denied. Accordingly, Verge submits that if an operator proposes to refuse sharing on the basis of physical or technical impracticability, the burden of proving that impracticability should be explicitly put on that operator, with a requirement that their position be supported with documentation unequivocally showing that to be the case before they are permitted to refuse sharing.

In Section 4.2.2 on p. 47 the Office notes that infrastructure sharing encourages increased and faster network roll-out by allowing the new entrant to avoid various activities like site acquisition which tend to lead to delay and high costs. The more options a new entrant has in terms of either building new or sharing existing infrastructure, the better its position in negotiations. Similarly, having access to sharing at a level unbundled to the sharing party's needs also facilitates entry; if a new entrant only needs to install an antenna, having to find a suitable site, negotiate with the landlord, provide for power and possibly a road, build a mast and arrange for maintenance and repair of all those facilities means that the antenna is very unlikely to be installed. The business case for installing that single antenna cannot bear the expense of the building an entire site. If, however, the new entrant can obtain those additional facilities at a reasonable cost, it may.

The importance of time limits and dispute resolution should not be understated. Section 5.2.2 on p. 64 notes that "[r]egulators should also consider imposing time limits for the provision of the relevant information and for negotiating agreements." Verge believes that time limits are essential to the proper implementation of infrastructure sharing. It is too easy for an established operator that does not wish to share infrastructure to frustrate sharing by delaying its responses, failing to provide the necessary information or drip-feeding that information over an unnecessarily long period, and taking unnecessarily one-sided positions in negotiations so that those negotiations take longer than required. The way to avoid these undesirable results is to impose a hard and fast timeframe after which either party can refer the matter to the OUR for resolution. The mere possibility of the matter going before the OUR will impose some level of discipline. Having standardized agreements which have previously been approved by the OUR will also reduce the opportunity to introduce unnecessarily one-sided positions.

Similarly, in Section 5.2.3.1 on p. 64 the Office notes that "an efficient mechanism for the resolution of disputes in connection with infrastructure sharing should be put in place . . . The

regulator should be able to impose interim measures in urgent cases, for example when new entrants depend on site sharing for rolling out their networks and entering the market." Verge agrees with these statements. There is no point imposing a sharing obligation if that obligation cannot be enforced in an efficient manner. Verge is not opposed to a process whereby the parties negotiate the terms for infrastructure sharing – to the extent possible, the parties should be permitted to interact on a commercial level. However, that approach must be accompanied by a fast and effective dispute resolution process if the parties are unable to agree on commercial terms.

Finally, with respect to the role of local authorities, Verge believes it would be appropriate for the OUR to work with other authorities that have a part to play in infrastructure sharing to ensure as seamless a process as possible. While a one-stop-shop for approvals would be optimal, the logistics of achieving that in the near-term may be too much, and the OUR should not delay its consideration of rules pending such a process. Similarly, while it would be ideal to have a central repository of infrastructure information as suggested in Section 5.2.3.3, Verge would caution against making this a precondition to any sharing, or pinning any processes on the completion of such a repository given how long it could take to put such a database in place.

Comments on specific sections of the Notice:

Verge is generally in agreement with the principles for infrastructure sharing set out in Section 7.2 of the NPRM. We have the following comments on specific principles:

- Paragraph 1, p. 74. The Office states that the proposed Rules will apply to "all Licensees who own or control telecommunications infrastructure" but then notes that specific parts of the Rules will only apply to certain Licensees. This should be clarified. It is quite usual for the obligation to share infrastructure not to be imposed on new entrants. In Section 7.3.2, p. 79 of the NPRM, the OUR notes that it "thinks it reasonable that dominant operators be required to provide access to their infrastructure where technically feasible". Verge supports this approach which should be reflected in the language of the Rules. Further, it is also somewhat unusual to require that all Licensees, as opposed to just dominant ones, must prepare a reference access offer. We believe that imposing this requirement on new entrants would be burdensome and ultimately unnecessary. Rule 9.1 in the Proposed Infrastructure Sharing Rules in Appendix A should be amended to specify that "Every ***Dominant*** Licensee" shall develop a Reference Access Offer.

- Paragraph 2, p. 74. This paragraph states that the OUR "shall not require a Licensee to make telecommunications infrastructure available where such Licensee does not also make such infrastructure available to itself or a connected company or otherwise use such telecommunications infrastructure in offering its own service". This should be stated as a positive obligation – that is, "a Licensee that makes telecommunications infrastructure available to itself or a connected company or otherwise uses such telecommunications infrastructure in offering its own service, shall make such telecommunications infrastructure available to other Licensees on rates, terms and conditions that are reasonable and non-discriminatory."

- Paragraph 5, p. 75. This paragraph states that an Infrastructure Provider cannot refuse to provide infrastructure sharing except in the enumerated cases. Verge agrees with this principle but believes it should be supplemented with language stating that any Infrastructure Provider proposing to refuse sharing has the burden of proving, with demonstrable evidence, that the proposed sharing is not appropriate for one of the reasons given before it can refuse sharing. This approach will help to reduce the circumstances in which a provider that does not want to share infrastructure refuses for inappropriate reasons.

- Paragraph 9, p. 75. This principle would require Infrastructure Providers to "endeavor" to conclude an infrastructure sharing arrangement in thirty days. Verge believes that this obligation should be raised to use of "best endeavours" and there should be a right to bring the matter to the OUR immediately if no arrangement has been concluded in thirty days. Paragraph 12, p. 76, states that "any disputes relating to infrastructure sharing shall follow the dispute escalation procedure outlined in the infrastructure sharing agreement and may ultimately be referred to the OUR". This is appropriate where the parties have agreed on the infrastructure sharing arrangement, including the dispute resolution process, and have signed off on an agreement. However, it should be clarified that this process does not apply to disputes about the content of the agreement itself. Until the parties have agreed, provided the thirty day period referenced in paragraph 9 has expired, either party should be able, as of right, to refer the matter to the OUR for resolution, without any further internal escalation.

- Paragraph 10, p. 75. Verge requests clarification on the statement that all agreements shall be "registered" with the OUR. Is this a requirement for approval and will they be made public?

- In Section 7.3.1, p. 78, the NPRM states that "Where an operator has been refused a permit to construct telecommunications infrastructure by any of the responsible authorities, the OUR may mandate the sharing of existing infrastructure that will provide the rejected operator with the same/similar facilities as the infrastructure for which permission was not granted". Verge does not disagree with this approach, but is uncertain as to why it is singled out as a separate situation; as previously discussed in the NPRM, Licensees will be required to share infrastructure that they use or provide to their own operations. This obligation is independent of whether another operator is able to construct that infrastructure on its own. Mandated sharing gives additional options which support the various policy goals behind infrastructure sharing; requiring that an operator be unable to construct equivalent facilities before sharing is required would seriously undermine those goals.

- In Section 7.3.3 on p. 80, the Notice seems to suggest that where facilities can be replicated by reasonable means, sharing may not be required. If this is enshrined as a principle in the Rules, we can anticipate that established operators will argue at every opportunity that it is not overly burdensome for a new entrant to construct facilities as opposed to requiring sharing. This has the potential to gut the infrastructure sharing Rules as, apart from the limited circumstances outlined in this section, it will be

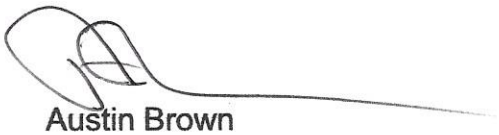
possible to argue in each case that construction is viable, even if it is more costly. The established provider is compensated for the use of its infrastructure, and is already in a position of having infrastructure in most locations where it is needed. The new entrant, by contrast, needs facilities in order to expand its competitive offering. Given a choice and unlimited funds, every provider would choose to construct its own facilities and not rely on the facilities of a competitor to provide its services. However, in reality new entrants are constrained in terms of the capital they can employ and the scale they can achieve by building. Imposing a requirement that construction not be "reasonable" or "practicable" before sharing is required will serve only to limit the effectiveness of sharing, or to create additional disputes. As the established operator is compensated for the sharing, the only impact on them is a competitive one, and this should be precisely what the Office wishes to stimulate. Verge is very concerned that the approach outlined in this Section would work against that intent.

- Section 7.3.4 on page 81 states that prior to issuing a directive under Section 29A(1), the Office will provide an opportunity for representations by interested parties. Verge agrees that such an opportunity must be given from a natural justice standpoint, and in accordance with the language of the Act. However, this does not mean that extensive consultation must be used even after the OUR has determined, following suitable consultation, that certain licensees should be subject to a general obligation to share infrastructure, or that certain infrastructure types must be shared. Once those determinations are made, additional consultation in relation to specific instances should rarely be required.

- Finally, with respect to Section 7.4.1 on p. 84, Verge agrees with the Office that negotiation of charges for infrastructure sharing by the licensees involved is unlikely to result in appropriate and fair rates in the current market in Jamaica due to the overwhelming dominance of a few players. Verge has no objection to paying its fair share for shared facilities, based on the costs to the operator of providing those facilities. Practically speaking, new entrants will be dependent on the OUR to ensure that the rates they are presented with are cost-based and applied in a non-discriminatory manner. The OUR will also have to be vigilant to ensure that the rate-setting process is not used as a means of further delaying access to shared facilities.

Verge would like to thank the OUR for the opportunity to present its comments on this important topic and looks forward to the remainder of the process.

Yours truly,



Austin Brown
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