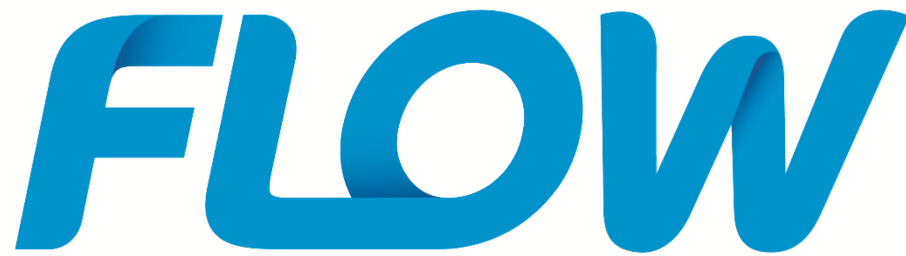

FLOW's Comments on Comments to

OFFICE OF UTILITIES REGULATION

Notice of Proposed Rule-Making

on

Infrastructure Sharing

2017 June 12

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1. Introduction

1.1 This response is submitted on behalf of Cable & Wireless Jamaica and Columbus Communications Jamaica Limited (jointly hereinafter referred to as 'Flow".) Flow appreciates the opportunity to respond to the comments of Industry stakeholders on the Office of Utilities Regulation **Notice of Proposed Rule-Making on Infrastructure Sharing** document published on 2017 March 30.

1.2 It cannot be overstated that the market must be allowed to operate in order for the ICT sector to thrive and continue to attract significant investments in infrastructure. This means that infrastructure sharing must be guided by commercial agreement, in the context of the Law, not regulator fiat. The comments of some operators, demonstrate the need for this area to be given more attention. For example, Verge strongly objects to the principle which suggests that where facilities can be replicated by reasonable means, sharing is not required. Verge contends this condition has the potential to gut the proposed infrastructure sharing Rules and work against its very intent.

1.3 Verge's position reflects a lack of appreciation for the Act, which affirmatively constrains infrastructure sharing obligations to circumstances where there are demonstrable "economic inefficiencies" or "physical or technical impracticability" (see, Section 29A(1)).

1.4 Clearly, the OUR should not mandate the sharing of facilities that can be reasonably replicated. The intent of the Law is clear: sharing must only be mandated where commercial agreement breaks down and bottleneck elements are involved. To do otherwise, is harmful to the market and constitutes regulatory overreach. Verge's "confusion" may well be due to the fact that the Draft Rules are too expansive and need to be completely reframed, consistent with the economic criteria outlined in the Act.

1.5 Investors require an environment that fosters regulatory certainty that is grounded in enacted legislation. Furthermore, we maintain that sustainable infrastructure sharing arrangements are more likely achieved by mutually agreed commercial terms between parties and not by enforcing mandatory Rules. After all, the role of regulatory policy is not simply to facilitate entry, but to facilitate efficient entry. This means that regulation is a second-best to commercial arrangements and in no case is it appropriate when the network facility at issue is not a bottleneck or can be reasonably replicated.

1.6 Our comments on the issues that have a bearing on this consultation are not exhaustive. As such, we reserve the right to make further comments on the matter going forward. Please refer all questions or comments to Charles Douglas at charles.douglas@cwc.com.

2. The Market should be allowed to work

2.1 Flow supports sustainable competition. This means that competition must be premised on a level playing field, and not enabled by regulator-sanctioned expropriation of one competitor's investments by another. Facilities-based competition is preferred to and more sustainable than resale-based and other types of competition. Public Policy should promote and incentivize investment in infrastructure. A basic incentive for a firm to invest in infrastructure is the expectation/assurance that the future benefits derived from such an investment will not be compromised, forfeited or otherwise expropriated by government regulations/policy. Failure to protect the reasonable expectation of infrastructure investors and/or needlessly encroaching on their ability to leverage such investment to grow their business, will lead to a "chill" in such investments. This is especially true in the ICT sector which requires large capital investments and where there is rapid technological change. This is even more so the case in Jamaica, given its weak economic growth and outlook, as it competes with other countries for investment dollars.

2.2 Verge argues that the extent to which obligatory sharing of infrastructure will dilute an operator's incentive is insignificant as there is an overpowering incentive for operators to keep up with new technology and so any decision to invest in these new technologies is unlikely to be influenced by sharing of facilities, but rather the driving force of remaining competitive within the market. Essentially Verge posits that there is little if any correlation between sharing requirements and a firm's investment choices. This is both simplistic and incorrect.

2.3 Mandated infrastructure sharing reduces incentives to make sunk investments. Furthermore, this negative incentive is amplified, not muted, by the dynamic nature of telecoms technology, and these negative effects impact both FLOW's and other competitors' incentives to invest. Put simply, an entrant has to decide whether to invest now, later, or never in sunk equipment. In the telecommunications field, which is marked by rapid innovation and competing technologies, investment is risky, as it may commit the entrant to a

particular technology that later reveals itself to be inferior to other technologies or, even if not technically inferior, less favored by customers. Leasing network elements at regulated rates from FLOW is a crutch that can allow entrants to delay their own investments and efforts at innovation and to wait to see which technologies pan out. The problem with this scenario is that unless competitors make those risky investments, there will be only lethargic technological growth. There will be less incentive for the kinds of aggressive investment that lead to improved technologies and new products. The process of economic growth is fueled by risk-taking, which entails success for some and failure for others. It is wrong-headed and destructive public policy to provide artificial protection from risk. The purpose of infrastructure sharing in the Law is to permit sharing if replicating the network or network element is economically infeasible; it is *not* to limit an entrants' risk, particularly in a market where risk is the seed of innovation and where innovation lies at the heart of the benefits that should arise from competition.

2.4 Infrastructure sharing regulations likewise negatively impact FLOW's incentive to invest. That is, the rewards of successful innovation are diminished, as entrants will demand shared access to successful innovations at rates that do not reflect the innovation risks, while FLOW alone bears the risk of failure. It is a fundamental tenet of public policy that protection of an innovator's exclusive rights to the fruits of its labor is in the public interest. Failure to protect those rights would so severely undermine the incentives to innovate that the social harm would outweigh the static costs of the monopoly. This is the well-known premise behind patents and other intellectual property rights. By the same logic, requiring network sharing at cost-based rates will dampen FLOW's incentive to innovate, at significant social cost. Moreover, if the particular form of network sharing results in a significant loss of control over the use of the asset, the investors are deprived of the fundamental right to determine the level of risk they choose to incur, and of the right to determine how its assets are used.

2.5 The reality is that firms invest in infrastructure to offer services to customers with the objective to make profit. Needlessly compromise the firm's ability to monetize its infrastructure investment and you threaten its viability at its core. It is for this reason that the OUR should allow market forces to work and not seek to impose itself on infrastructure sharing arrangements (i.e. outside of the limited scope provided for in the Act). We are encouraged that this viewpoint is supported by 5G Americas.

2.6 Like 5G Americas, Flow is convinced that the best approach to infrastructure sharing is based on

> "… *arrangements that are negotiated freely between telecommunications providers to complement their networks within a framework of open market negotiations and technical feasibility…".*

Given the rapid technological changes within the sector we agree with 5G Americas that it is best that the Regulator be neither prescriptive nor dictatorial in its effort to facilitate sustainable development in the sector. Flow endorses 5G America's suggestion that

> "…*an approach that leaves the identification of forms of passive sharing ultimately to the telecommunications providers so these agents can negotiate effective arrangements to support infrastructure deployments and reciprocal efficiencies….".*

As well as its view that

> "*As any other type of arrangements, MVNO-operator negotiations should occur in a free market environment that provides reciprocal benefits for the interested parties where it is technically feasible."*

2.7 The OUR's expressed objective for seeking to mandate infrastructure sharing is to promote competition. However as acknowledged by 5G Americas,

> *"Infrastructure sharing is not a solitary condition in the encouraging of service based competition. Competition is a complex issue with many variables."*

Certainly, the OUR should be careful to avoid creating perverse incentives for inefficient or undercapitalized market entrants by mandating infrastructure sharing. The idea that sharing is best based on mutually agreed commercial contracts is the central issue. Any other approach is likely to setback the sector and the country.

2.8 Verge argues that voluntary sharing is unrealistic for Jamaica. It premises its argument on its belief that established operators are multi-national firms with large revenue streams which they use to fund their own infrastructure builds. And that these providers do not need the modest revenues they would receive from infrastructure sharing to build out their networks unless there is a personal benefit to be gained from sharing. It cites the "predominance" of reciprocal sharing as evidence of its viewpoint.

2.9 Verge could not be more wrong. Each Licensee (multi-national or not) in the Jamaican market must justify its infrastructure investment based on the business case for the market. Research will show that these capital investments made to date are funded by loans and/or bonds and not by revenues generated within

market as Verge asserts. In the face of clear undeniable market evidence that commercial sharing of infrastructure does take place (confirmed by Digicel and the CACU), Verge still concludes that voluntary sharing is unrealistic. In doing so it relies on the spurious argument that because a reciprocal business model exists in one instance, it is detrimental to a new entrant who does not have equal facilities to swap. It is an argument that should be rejected, given its clear bias. This bias is evidenced by Verge's position that it does not believe that there are circumstances in which it (Verge) should make its infrastructure available or accessible to other entities by way of a reference offer. On the contrary, Flow does not agree with any Regulations requiring infrastructure owners to be mandated to share their infrastructure as a matter of course, since the Act does not require or support such an approach.

3. Digicel has misrepresented the facts

3.1 Flow maintains that the dynamic changes underway in the ICT sector, both with respect to capital investment and technological changes, require that the OUR be careful not to seek to mandate infrastructure sharing in Jamaica since this would materially and adversely shape the business model of service providers. Instead, subject to the strict provisions of the Act, firms should be allowed to pursue commercial infrastructure sharing arrangements as determined by market forces.

3.2 Flow does not agree with Digicel's suggestion to "waive" the payment of taxes or regulatory fees by operators to incentivize network sharing in the sector. We do not consider a special tax rate to be the way to go as suggested by the CACU. Such notions simplistically ignore the economic realities, and are born of a misunderstanding of what is needed. As outlined in our initial comments and environment that fosters Public Private Partnerships and Joint Ventures are more realistic/practical. Facilitating firms to negotiate their own commercial arrangements is to be preferred to subsidizing their market entry/access.

3.3 Essentially, what infrastructure sharing requires is a commercial case to be made, one that is in the interest of sharing parties, namely the infrastructure seeker and the infrastructure provider. The concept that the investor in infrastructure is to provide subsidized access to an inefficient and/or undercapitalized new entrant or third party, for the sake of stimulating short-term competition in services, is bad Public Policy.

3.4 Digicel recognizes that being mandated to share its mobile infrastructure would cause a material dilution of its considerable investment in its network. Accordingly, it argues that:

a) there is no need to mandate passive mobile infrastructure sharing;
b) it is not necessary to mandate active sharing of mobile infrastructure; and
c) the real constraint to the deployment of mobile broadband networks is the lack of access to investment capital

3.5 Flow agrees in principle with Digicel that mandated sharing rules are not warranted for mobile and we continue to pursue commercial agreements for sharing mobile infrastructure. However, we find it curious that Digicel considered it necessary to misrepresent the market in its effort to secure mandated access to fixed infrastructure owned by Flow. We understand its desire to attain some commercial advantage through regulatory fiat but such a biased and inaccurate representation to trump commercial negotiations is egregious. Notwithstanding that the Act does not support Digicel's desire to have unfettered mandated access to fixed infrastructure, we will show that commercial arrangements are far more suited and viable. Flow is in negotiations with Digicel to finalize several offers.

3.6 Digicel incorrectly argues that:

a) there is the need to mandate access to local duct, pole access to buildings, dark fibre, and inter-urban connectivity;
b) Flow self-supplies its connectivity services to its downstream retail arm by way of both aerial and subsea fibre optic cables but will only supply 3rd party operators' connectivity carried over aerial cables; and
c) the pricing of such wholesale services is above competitive level and thereby causes discrimination within the market.

3.7 Flow considers it very important to respond to these spurious allegations, intended to unduly influence the OUR's policy making on this matter. We have always had ongoing negotiations with Digicel regarding fixed infrastructure sharing. Similar to mobile we also participate in fixed infrastructure sharing contracts with Digicel.

For example Cable and Wireless offered Digicel;

a) **CONFIDENTIAL**
b) **CONFIDENTIAL**
c) **CONFIDENTIAL**
d) **CONFIDENTIAL**
e) **CONFIDENTIAL**

3.8 Digicel has conveniently failed to mention these agreements (commercially arrived at) as it seeks to game the regulatory framework to secure a commercial advantage or "free ride". It already has access to Flow's fixed infrastructure and may secure further access when it wishes. The real issue, in our view, is that Digicel is seeking to gain access at non-commercially negotiated rates, which it anticipates will be lower. This is evident from its objection to the OUR's proposed costing methodology.

3.9 Flow is convinced that the arguments that Digicel made to exempt mobile infrastructure from mandatory sharing rules, equally apply to fixed infrastructure, namely:

i)there is no need to mandate passive fixed infrastructure sharing, as commercially agreed contracts are already in place;

ii) it is not necessary to mandate active sharing of fixed infrastructure, since it diminishes the flexibility for competitive differentiation and innovation; and

iii) the real constraint to the deployment of Digicel's fixed broadband/cable TV networks is the lack of access to investment capital. And not an infrastructure sharing impediment.

4. Conclusion

4.1 Notwithstanding our review of these Industry comments, FLOW remains firm to our initial position that the Draft Infrastructure Sharing Rules as proposed by the OUR are not faithful to the mandate granted to it under Section 29A of the Telecommunications (Amendments 2012) Act.. These Rules would do significant harm to investment and competition.

4.2 Flow anticipates that the OUR will diligently review and weigh the feedback provided and thereafter re-engage the Industry on the subject. In our view, an additional consultation document should be issued to consult on how the criteria for infrastructure sharing rules as outlined in the Act--namely, matters relating to economic inefficiencies and physical or technical impracticability--are to be interpreted or understood.

4.3 Flow is committed to giving its continued and full support to this consultation process.

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