June 12, 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: Reply to comments of other interested parties in the Notice of Proposed Rule-Making on Infrastructure Sharing.*

Verge Communication Ltd. ("Verge") is pleased to provide this reply to the comments of other interested parties to the Office of Utilities Regulation (the "OUR" or "Office") Notice of Proposed Rule-Making on Infrastructure Sharing (the "NPRM" or "Notice").

In this submission, we respond to the main issues raised by 5g Americas, Cable & Wireless Jamaica and Columbus Communications Jamaica Limited ("Flow"), the Consumer Advisory Committee on Utilities ("CACU"), and Digicel (Jamaica) Limited ("Digicel"). We have not commented on all issues raised by these parties, 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 reply comments, Verge takes the position that:

1. Flow's arguments that this consultation is somehow premature, or lacking in jurisdiction are incorrect. The NPRM gives all interested parties a sufficient opportunity to comment on the Office's jurisdiction to impose infrastructure sharing and no further consultation is required.

2. To have any prospect of success, infrastructure sharing must be mandated, not left to market forces or commercial negotiations as suggested by several parties. Those approaches have not worked to date, and it is clear that established providers will not voluntarily share their infrastructure in Jamaica.

3. The argument that infrastructure sharing will blunt incentives to invest must be rejected. Little or no evidence was advanced to show that this would actually happen in Jamaica, and it is clear that established operators are investing despite the prospect of such sharing.

4. The rules the Office promulgates for infrastructure sharing will largely determine if it is successful. Measures like the creation of an inventory of infrastructure, as well effective dispute resolution processes must be clear and rigorously applied to ensure that the full benefits of infrastructure sharing are realized.

**The NPRM process is appropriate.**

Even before addressing the substantive issues raised by the NPRM, Flow makes an argument that the Office cannot impose infrastructure sharing without a further consultation. It is hard to see this as anything other than an obvious attempt to stall the rollout of infrastructure sharing as long as possible. As a dominant incumbent provider, delay of policies which encourage competition benefits Flow almost as much as refusal of those policies. The OUR should reject this argument out of hand.

Flow argues that (i) section 29(A) of the Telecommunications Act (the "Act") permits the mandating of infrastructure sharing only in the three circumstances listed in that section, (ii) the OUR has not presented sufficient details in the NPRM document as to how it will assess those three criteria, and (iii) the OUR therefore needs to issue a consultation on the specifics of its jurisdiction under the Act.[1] This is incorrect. The NPRM notes the legal framework around infrastructure sharing, and asks questions which go directly to whether infrastructure sharing should be mandated in the three circumstances set out in section 29(A).[2] Chapter 7 of the NPRM specifically addresses each of the three criteria in section 29(A) and makes proposals in respect of them. Interested parties were encouraged to comment on these proposals, and the Office's jurisdiction to impose them, and to answer the questions in the NPRM. Flow has taken that opportunity in its comments, including by commenting specifically on issues of jurisdiction. There can be no argument in those circumstances that parties were notified of the Office's proposed approach or denied an opportunity to comment on the Office's jurisdiction to impose infrastructure sharing pursuant to section 29(A). In these

[1] See Flow submission on p. 4.
[2] See for example, questions 3.5, 3.6, 4.1, 4.2, 4.3, 5.2, 5.3, 6.1, 7.1, 7.2, and 7.3.

circumstances, a further consultation is both unnecessary and inappropriate, and would serve only to delay the realization of the competitive benefits that infrastructure sharing will bring to Jamaica.

**Infrastructure Sharing must be mandated.**

Digicel, Flow and 5g Americas all take the position that infrastructure sharing should not be mandated, and that market forces and commercial negotiations can be relied upon to ensure appropriate infrastructure sharing comes to pass.[3] This position is not surprising – these parties either are, or represent, incumbent players who, through their dominant positions in the market, own or control effectively all of the infrastructure used to provide telecommunications services in Jamaica.

The OUR need only ask itself one question when deciding whether it is necessary to mandate infrastructure sharing: if commercial negotiations or market forces were sufficient to ensure infrastructure sharing, why has it not happened to any appreciable extent in the sixteen plus years since competition was introduced in Jamaica? In response to the Office's request for existing examples of sharing, both of the large existing operators were able to point to only a handful of examples, the main one of which was a reciprocal swap agreement between them.[4] The answer, of course, is that market forces are not up to the task of ensuring sharing of facilities; as in almost all jurisdictions, regulatory intervention is required.

Flow itself confirms that there is no incentive – market forces or otherwise - to voluntarily share infrastructure. In its response to Chapter 5 question 1, Flow states that ". . . any incentive that would cause [Companies] to voluntarily share their infrastructure with a direct competitor, would need to make commercial sense."[5] As we previously stated in our comments, established operators are interested in sharing their networks only where this serves their own, limited commercial interests, rather than the interests of end-users, competition or Jamaica as a whole. Flow's comment confirms that this is the case, and underlines the importance of strong regulatory action to ensure that infrastructure sharing will happen. 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.

We note, in this regard, Digicel's support for mandated sharing of fixed infrastructure. Digicel points out many of the same barriers to entry that Verge identified in its response, noting the high up-front cost and time delay associated with building fibre networks. Verge agrees with Digicel's position that "mandating cost effective fixed infrastructure access with strong and explicit requirements for speedy implementation would have a material and positive impact

[3] Note that Digicel takes this position only in respect of mobile networks. See paragraph 3 on page 3 of its response to the NPRM.
[4] See Digicel response to NPRM at paragraph 9 on page 6, and Flow response to NPRM at paragraph 9 on page 7.
[5] See Flow response to NPRM at second paragraph, page 10.

on the speed of deployment of fibre based fixed broadband"[6], although we also take the position that a similar mandate in respect of mobile network elements and other services is also required.

Further, the OUR cannot assume that commercial negotiations will result in widespread sharing on appropriate terms. Flow points to the tower sharing arrangement negotiated with Digicel as evidence that commercial negotiations can result in appropriate sharing. Flow states that "notwithstanding the fierce competition between Digicel and Flow, both saw the need and benefits of entering into a mobile tower sharing arrangement, both parties contributing major investment dollars to the agreement. We say, let the market work".[7]

This, of course, is a strange example of a working market. In that case, the two largest owners of infrastructure agreed as between themselves to share sites with each other, but only on a one for one swap basis. Any other provider without a widespread mobile network and sites to swap would not be entitled to the same arrangement. This is not an example of a working market at all – in fact, it is not really infrastructure sharing as that term is usually understood. Rather, it is evidence that commercial negotiations are unlikely to result in fair terms unless the parties have equal bargaining power – something that is equivocally not the case for new entrants in Jamaica.

We accept that commercial negotiations are the appropriate first step in discussions for infrastructure sharing. However, any requirement to negotiate must 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.

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

In our comments we noted that "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."[8] True to form, Flow and 5g Americas both raised this argument without providing any convincing evidence that the disincentive they allege would in fact occur.

Flow argues in response to Chapter 3 question 6 that "attempts to dilute or compromise their infrastructure investments will cause a chill / dis-incentive for future investment".[9] However, Flow does not place this argument in any context or provide any evidence from Jamaica to support it. As noted in our submission, many factors affect the decision to invest in facilities, and a requirement to share those facilities is unlikely to be the primary driver in making that decision. Further, language like "dilution" and "compromise" or "confiscate by decree"[10] misrepresents the outcome of mandated facilities sharing. Such facilities are not provided for free, but rather at cost-based rates which ensure the provider earns a fair return on its

[6] See Digicel response to NPRM at paragraph 1, page 7.
[7] See Flow response to NPRM at response to question 3.6 on page 6.
[8] See Verge response to NPRM, page 4.
[9] See Flow response to NPRM, page 6.
[10] See Flow response to NPRM, page 11.

investment. Provided the OUR sets rates for sharing which permit providers to recover their legitimate costs, providers sharing infrastructure are not prejudiced by a requirement to share, and infrastructure sharing will not blunt their incentive to invest in new facilities and technologies. The Office should, therefore, reject this argument as well.

**Information Requirements.**

Both Digicel and Flow opposed the compilation of a detailed inventory of telecommunications infrastructure on the basis that it would be unduly burdensome on the providers. We find this argument difficult to understand. Operators should already have detailed lists of their facilities which could be filed with the OUR. As we noted in our comments, competitors are at an informational disadvantage in their interactions with established operators; it is difficult for competitors to audit claims that infrastructure is unavailable, or that it is unsuitable for sharing because of their inability to access the facilities. Even before facing those issues, without additional information provided by the infrastructure owner, it will be difficult to determine what facilities would be available for sharing without expenditure of significant time and money. An inventory would go some way to reducing that disadvantage and promoting fair and equitable access to infrastructure.

**Dispute Resolution.**

On page twelve of its comments, Digicel notes that a requirement to use the dispute resolution process in an agreement prior to referring the matter to the OUR effectively prevents OUR supervision of the agreement during the currency of any dispute. Digicel instead advocates a process whereby the parties endeavor to use the dispute resolution process but are not prohibited from referring the matter directly to the OUR. Verge agrees with this approach which is similar to our comments on the same issue.

**Process for reaching infrastructure sharing agreements.**

At page 14 of its submission, Digicel argues that the process for negotiating access in the NPRM is unworkable and that infrastructure sharing agreements should be "frameworks" which specify the processes dealing with a call down of the specific asset to be shared. While we are uncertain exactly what Digicel contemplates by "calling down" assets, Verge agrees that it should not be necessary to negotiate a new agreement every time a new instance of sharing is proposed. A framework agreement containing the terms and conditions which are common to most sharing situations could be agreed, with service specific schedules added from time to time as individual instances of sharing are agreed. This would make the process of agreeing an infrastructure sharing agreement more efficient. We reiterate, in this respect, our proposal that standard reference offers should be required from dominant operators as an additional means to reduce the amount of time required to conclude negotiations – a reference offer structured as a framework agreement would be a useful approach.

Verge would like to thank the OUR for the opportunity to present its reply comments on this important topic.

**END OF DOCUMENT**