VERGE'S SUBMISSIONS

IN RELATION TO THE

APPLICATION FOR RECONSIDERATION BY CABLE & WIRELESS JAMAICA LTD.

OF

OFFICE OF UTILITIES REGULATION'S COST MODEL FOR FIXED TERMINATION RATES- THE DECISION ON RATES

July 13, 2017

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Directors: Mr. Austin Brown B. Eng. (Hons), MSC. MIS. Mr. Thomas R H Theobald LL.B

Office of Utilities Regulation
3rd Floor, PCJ Resource Centre
36 Trafalgar Road
P.O. Box 593
Kingston 10

Attention: Ambassador Peter Black CD, JP- Secretary to the Office
Dear Sir,

VERGE'S SUBMISSIONS

As a duly licenced operator and an interested stakeholder, Verge Communications Limited (Verge) is grateful for the opportunity to present its submissions on Cable & Wireless Jamaica Limited's Application for Reconsideration of the Determination Notice **"Cost Model for Fixed Termination Rates- The Decision on Rates" (hereinafter called "the Determination").**

Proposed Glide Path

1. In section 2.3 of the Determination, the OUR agreed with C&WJ's comments on the draft model that the applicable rate for 2016-2020 was determined with the expectation that the model would be implemented in 2016. The OUR further noted that it would not implement the result of the model retroactively. In considering the OUR's current position in relation to the glide path, it is clear that C&WJ, along with all other stakeholders, were given ample notice of the alteration of the fixed termination rates contrary to what has been stated in paragraph 7 of C&WJ's Response. In fact, C&WJ has enjoyed and benefitted from the operation of the old rates for over a year, which is longer than they ought to have benefitted, because the original implementation date was postponed from 2016 to 2017. In light of this, should C&WJ continue to gain a material financial and commercial advantage to the detriment of other stakeholders? By postponing the revised rate, C&WJ would continue to keep its competitor's costs high, thus giving it a huge commercial advantage, as is clear from the findings of the LIRIC model.

2. The Telecommunications Act clearly provides at section 33 (1):

   33 (1) "Where the Office is required to determine the charges for the provision of interconnection by a dominant carrier, it shall, in making that determination, be guided by the following principles- ...

   (g) in the case of charges for wholesale termination services, charges shall be calculated on the basis of forward looking long run incremental cost, whereby the relevant increment is the wholesale termination service and which includes only avoidable cost."

3. The OUR's LIRIC cost model clearly demonstrates that operators currently interconnected to CW&J are being significantly overcharged; for example, in the case of the Incoming International Call Termination service, where that rate should in fact be reduced by 93%. There is no legal basis on which the OUR can continue to allow the overcharging of interconnected operators as this is hugely detrimental not only to the operators but also to the public. Maintaining these excessive rates in contravention of the Telecommunications Act serves to undermine the business of small operators who would be able to increase traffic volumes if the rates were reduced to LIRIC levels as set out in the law.

4. Verge submits that the OUR's decision to implement a glide path of six months, commencing immediately, is unnecessarily solicitous of C&WJ's revenues to the detriment of other operators as C&WJ will be allowed to charge a rate of 77.37 cents instead of the cost based rate of 10.04 cents provided for under the law. Essentially, the OUR, while recognizing that other operators are being charged excessive termination rates, and having taken a decision to put a stop to this overcharging, which really ought to have ceased in 2016, has nonetheless taken a decision to allow the overcharging to continue at a somewhat lesser level for the remainder of 2017 . Verge views this position as unacceptable.

5. Verge further submits that any further delay in the implementation of this long overdue Determination wrongfully, and we would submit illegally, exacerbates the financial harm suffered by interconnected operators. Should the OUR accept C&WJ's proposal of a glide path of a minimum of two years or a maximum of three years for the implementation of the reductions in Fixed Termination Rates, this would extend the financial and commercial harm other interconnected operators are suffering. If the old rate regime is allowed to continue for

two or three years, Verge will lose an estimated monthly sum of [Confidential]. Further information relating to Verge's estimated losses are detailed below.

The Estimated Financial Losses of Verge if the Old Termination Rates Persist Beyond Six Months

PROJECTED REVENUE LOSSES	
CONFIDENTIAL	

6. Whereas these losses may not be significant for a major operator such as C&WJ, they are very significant for minor operators in the market. It is Verge's view that the OUR should move with alacrity to comply with the law and set the charges for wholesale termination services "*on the basis of forward looking long run incremental cost....*"

7. A prolonged glide path of two to three years will only serve the purpose of maintaining a fixed termination rate which is above cost, thereby enabling C&WJ to continue to collect high revenues at the expense of other licenced operators whose interests the OUR is also required to take into account as a part of its mandate to promote fair and open competition.

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Loss of Legitimate Expectation

8. Section 4 (2) of the Telecommunications Act ("the Act") specifies how the OUR should exercise its powers under the Act.

    s.4 PART II. Administration

    (2) In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice, and without prejudice to the generality of the foregoing, the Office shall—

    a) *consult in good faith with persons who are or are likely to be affected by the decision;*
    b) *give to such persons an opportunity to make submissions to and to be heard by the Office;*
    c) *have regard to the evidence adduced at any such hearings and to the matters contained in any such submissions;*
    d) *give reasons in writing for each decision;*
    e) *give notice of each decision in the prescribed manner.*

9. The doctrine of legitimate expectation rests on the principle that when a public authority has **promised** to follow a certain procedure, it is in the interest of good administration and transparency that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. It is trite law that a legitimate expectation must be reasonably held by the person or entity that seeks to rely on it. This means that the public body, which is the OUR in this case, must have made a representation, either by way of an express promise or implicitly through its past conduct, that it would act in a particular way, therefore giving all interested stakeholders a reasonable and legitimate expectation that it would proceed in accordance with its representation.

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10. It is of particular note that the OUR, in its consultations, never promised to implement a glide path of two years to introduce the new rates. On the contrary, the OUR merely stated at section 7.4 of its Consultation Document, 'Cost Models For Fixed Termination Rates-Principles and Methodology Consultation' dated 19 January 2015 that the **maximum** time period that it would consider for rates to adjust to costs is two years. An excerpt of OUR's reasoning is provided below:

> *7.4. The length of this glide path cannot be determined at this point as it will depend on the size of the difference between the TLRIC and Pure LRIC termination rates. It should also be noted that the mobile termination rate was immediately adjusted to the Pure LRIC level which has created an anomaly, which needs to be corrected, where the fixed termination is higher than the mobile termination rate and is set using a different cost standard.*
>
> ***The OUR is however mindful that the glide path needs to be reasonably short to curtail the negative effects of having a fixed termination rate which is above cost.*** *As such, the OUR will decide on the Cost Model for Fixed Termination Rates – Principles and Methodology 45 Consultation Document; Document No: 2015/TEL001/CON.001 January 19, 2015 Office of Utilities Regulation exact length of the glide path after the model is developed and the fixed termination rate is calculated. However, the maximum time period that will be considered for rates to adjust to cost is two (2) years (emphasis ours).*

11. In light of the foregoing, it is submitted that C&WJ's professed legitimate expectation has no real basis in law since the OUR had never given an undertaking or promised to implement the maximum period. Therefore, a more realistic expectation would have been for a glide path that was less than the maximum suggested period of two years in light of the factor highlighted in section 7.4 above, which propelled this change. Furthermore, the OUR has properly exercised its discretion in keeping with its mandate and pursuant to the Act, since it has not only given its reasons in writing but has also invited stakeholders to make submissions for its consideration. Verge is of the view that instead of prolonging the glide path, LIRIC rates should be implemented with effect from July 1, 2017.

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Verge's decision not to respond to any particular issues raised in the Application for Reconsideration does not represent its agreement, in whole or in part. Verge hereby expressly reserves the right to address any further issues which may arise in relation to this matter at a later date.

Yours faithfully,

Austin Brown

Director

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