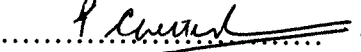


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BARBADOS

NO. OF 2003

IN THE MATTER of The
Utilities Regulation Act Procedural
Rules 2002.

AND IN THE MATTER of the
Utilities Regulation Act 2000-30
(the "*Utilities Regulations Act*")
the Fair Trading Commission Act
2000-31 (the "*FTC Act*") and the
Telecommunications Act 2001-36
(the "*Telecommunications Act*") of
the Laws of Barbados.

AND IN THE MATTER of the
Application by Cable & Wireless
(Barbados) Limited for a Review
of the Decisions of the Fair
Trading Commission dated the
30th day of June 2003 and the 1st
day of July 2003.

CABLE & WIRELESS (BARBADOS) LIMITED

APPLICANT

AFFIDAVIT IN SUPPORT OF
NOTICE OF MOTION FOR REVIEW AND STAY OF PROCEEDINGS

I **DAVID CHARLES VRANCKEN** of Blue Waters, Antigua, but
presently on a visit to this island hereby **MAKE OATH AND SAY** as
follows:



1. I am the Vice President, Regulatory Finance, for Cable and Wireless West Indies with responsibility for regulatory finance of the Applicant and I have been authorized to swear this Affidavit on behalf of the Applicant.
2. The matters herein deposed are from my own personal knowledge, from information provided by other managers as well as from the records of the Applicant, to which I have access.
3. I am closely involved in the determination of the arrangements for interconnection of licensed carriers to the public telecommunications network of the Applicant.
4. I am the holder of a Bachelors Degree in Economics from University College London and I am a Chartered Accountant and a member of the Institute of Chartered Accountants of England and Wales. I am also qualified by experience, having previously held the position of Head of Regulatory Finance with BT Group plc, in the United Kingdom for the period 1989 to 1992.
5. Pursuant to exclusive licences granted by the Government of Barbados to the Applicant on the 1st day of October 1991, and the 30th day of October 1984 (as amended by Amendment No. 1 dated the 21st day of November 1991), the Applicant is the sole authorised provider of telecommunications in Barbados for the domestic telecommunications services, (including mobile), and international telecommunications services, respectively. These licences both expire on the 30th day of September 2011.
6. The Applicant and the Government of Barbados signed a Memorandum of Understanding (MOU) on the 16th day of

October, 2001 wherein the Applicant agreed to surrender its exclusive licences prior to the year 2011 in consideration of the Government performing certain conditions precedent contained in clause 4 of the said MOU.

7. These conditions precedent have not yet been fulfilled by the Government of Barbados.
8. The Applicant is presently the only licensed telecommunications carrier in this Island.
9. By letter dated 1st July 2003, the Fair Trading Commission (hereinafter referred to as 'the Commission') issued its Decisions on:
 - i. Interconnection Guidelines- Accounting, Costing and Pricing Principles (Ref: FTC 03/03), and
 - ii. Interconnection Dispute Resolution Procedures (FTC 03/04).
10. In the said letter, the Commission also directed the Applicant to file a Reference Interconnection Offer (RIO) with the Commission within thirty days of the 1st day of July 2003.
11. By letter dated 2nd July 2003, the Permanent Secretary of the Ministry of Energy and Public Utilities notified the Applicant that the Interconnection Policy which was enclosed therewith, had been approved by the Cabinet of Barbados.
12. The Applicant has also been designated as dominant pursuant to section 26 of the *Telecommunications Act 2001-36* and the *Telecommunications (Declaration of Dominance) Regulations 2003 – S.I. 75 of 2003*.
13. Under section 26 of the *Telecommunications Act*, the Applicant is required to file with the Commission, a RIO

that sets out the terms and conditions upon which other licensed carriers will be permitted to interconnect with the interconnection provider's public telecommunications network.

14. The Applicant is still the only licensed telecommunications carrier in this Island.

15. In the Decision FTC 03/03, The Commission has directed that the appropriate costing model methodology for computing interconnection charges is to be comprised of three separate and disparate costing standards and methodologies. These are: (1) fully distributed cost (FDC) historical approach which is to be in existence for three months, followed by (2) the FDC current cost approach to be in existence for six months, followed by (3) total service long run incremental cost (TSLRIC) model to be used thereafter. Consequently, the Applicant is obligated to develop and implement these three distinct costing methodologies within a time frame of nine months. This approach is unreasonable for three principal reasons – (i) while the Commission is aware that the Applicant has developed a costing model in accordance with the FDC historical approach, the Commission has not to date reviewed or adopted that model (ii) the time scales for development of the FDC current cost and TSLRIC are less than what might be reasonably expected to produce a model of an appropriate and acceptable standard, and (iii) there is no evidence to suggest that the Commission has undertaken a review to ensure that the benefits to be achieved from implementing such methodologies outweigh the administrative costs of their introduction.

- The adoption of such methodologies is not likely to be proportionate to the local telecommunications market.
16. On the 19th day of December 2001, the Applicant submitted a Cost Allocation Manual (CAM) to the Commission for its review. This CAM was submitted in accordance with the MOU which requires the Applicant to “develop an accounting separation model and which satisfies concerns about cross-subsidy between regulated and unregulated services”.
 17. Whilst the Commission has made periodic requests of the Applicant in its review of this CAM, the Commission has not approved the CAM to date.
 18. In the interim, the Applicant has advised the Commission that since costing is an iterative process, it has proceeded to develop an Enhanced Allocation Model (EAM) which is capable of providing a greater level of detail on the cost and profitability of individual services and of facilitating the determination of interconnection charges.
 19. The Applicant has advised the Commission that the CAM in its present form is wholly unsuitable to determine interconnection charges and to classifying major interconnection activities, or attribution of the costs thereof. Consequently, the CAM cannot be used to derive interconnection charges.
 20. On the 4th day of July 2003, the Applicant presented the Commission with an overview of the EAM.
 21. FTC 03/03 does not provide any guidelines regarding the basis on which the interconnection charges or tariff schedules are to be developed for the RIO.

22. In relation to the Commission mandating the application of FDC Historical Cost approach for the first three months specifically, the Commission failed to provide sufficient guidance regarding the basis on which that model shall be used to attribute costs to develop charges for the relevant interconnection services.
23. In relation to the Commission mandating the FDC current cost approach for the next six months specifically, the Commission has not provided the Applicant with an adequate period of time in which to develop a current cost account model, which is consistent with international industry experience.
24. The Commission has also not provided the Applicant with guidance in order for the Applicant to make the necessary determinations and to develop the data crucial to conducting a valuation of the Applicant's current costs, in particular:
- (i) determination of the asset valuation principles appropriate to the different types of assets used by the Applicant;
 - ii) calculation of the applicable Current Cost Accounting adjustments; and
 - iii) determination of the valuation dates.
25. In addition, the guidelines do not give consideration to the Applicant's costs in complying with the Commission's directives including how such costs should be recovered.
26. In relation to the Commission mandating TSLRIC as the costing approach commencing nine months after the Decisions, the Commission acted unreasonably by not

providing the Applicant with an adequate period of time within which to develop a TSLRIC model and consistent with international industry experience. In addition, the Commission did not carry out a separate consultative process regarding the appropriate parameters for a TSLRIC model. In determining the appropriate parameters, the following are critical:

- (i) top-down or bottom-up modelling approach;
- (ii) 'best-in-use' technology;
- (iii) forward looking costs;
- (iv) efficient size (requiring theoretical optimisation of the network) and design of the network (based on theoretical capacity provisioning rules);
- (v) efficiency of the operator;
- (vi) valuing assets on a modern-equivalent asset basis;
- (vii) cost volume relationships of all major categories of cost in the provision of services; and
- (viii) appropriate depreciation policy.

27. The Commission has not completed the consultation process and the Applicant has not been afforded the opportunity to comment on representations and submissions made by any other party. By failing to complete the consultation process with the Applicant, the Applicant has been prejudiced and disadvantaged.

28. By requesting that the Applicant deliver a RIO within 30 days of the date of the issue of the Guidelines and the

Commission's Decision, the Applicant has not been afforded the opportunity to develop a RIO which can be reasonably expected to conform with those guidelines and regulatory framework.

29. In requiring the production of financial records, the Commission has not set several parameters which are essential for the production of such records. In particular:
- (a) whether the disaggregated 'regulatory' statements should adopt the Commission's regulatory asset lives in determining the value of the underlying assets.
 - (b) Whether, the Interconnection Guidelines require reconciliation between the Applicant's regulatory and statutory accounts, without regard having been given to the implementation and practical aspects of this requirement. For example, differences in the relevant Cable & Wireless operating companies from year to year prior to their amalgamation.
 - (c) When, in relation to each of the Applicant's financial years do disaggregated Profit & Loss and Capital Employed statements need to be compiled.
 - (d) The requirement to publish cost drivers on a quarterly basis represents a significant issue where the driver is not an objective measured volume quantity – for example, activity drivers established by activity surveys.

30. Interconnecting carriers are likely to challenge the Applicant's use of their confidential information in producing the Interconnection Activity Report required in Appendix 2 of the Interconnection Accounting, Costing and Pricing Guidelines as it requires their off-network sales information to be placed on the public record and thereby will be made known to all other competing carriers and the public. In a competitive environment, commercial viability is enhanced by business practice confidentiality.
31. In this island, some domestic telecommunications services provided by the Applicant are cross-subsidized predominantly by international telecommunications services. This results in the consumer not being charged for the full cost of the domestic services utilised. Consequently, a deficit on the provision of such local services arises. In such circumstances, it is common that such deficits are reduced by moving towards cost oriented pricing by the process of domestic rate rebalancing. In the absence of any retail charges for fixed network calling, there are few retail charges within which the Applicant can subsume a local service deficit contribution rate. If the local service deficit contribution rate is applied to only those services for which retail charging exists, the significantly lower call volumes give rise to a deficit recovery rate which would vastly increase the

effective cost of interconnection to both the Applicant and new and competing carriers. Furthermore, the continued absence of retail charges for domestic fixed line calling could not be described as cost-orientation of such services.

32. In the *Telecommunications Act* the Government of Barbados is committed to the movement to cost oriented pricing. If the Applicant is required to establish fixed network interconnection charges prior to bringing the rates for domestic services in line with their costs, the resultant local service deficit contribution unit charges will be significantly higher than might otherwise have been the case had cost oriented prices existed. The likely negative result is that it will be more difficult to attract or sustain investment in the telecommunications sector by new entrants. Therefore the Government's liberalisation of the telecommunications sector may fail.
33. Consequently, the Applicant will be unable to earn a reasonable return on its capital employed in the provision of domestic calling services, contrary to stated Government policy as well as to the legislated principles.
34. The Commission has ruled that (i) in the absence of an approved RIO, (ii) where a RIO has not been filed in the time frame stipulated by the Commission, and (iii) where there is a dispute with respect to interconnection charges, it will use benchmarks to

establish rates for interconnection. When cost information is accessible from the Applicant, use of benchmarks may be in direct contravention of the requirement that rates for interconnection be cost-oriented as required in the policy of the Minister dated the 23rd June 2003, and section 25(2)(e) of the *Telecommunications Act*. In any event it is doubtful that an appropriate benchmark can be found in other jurisdictions when compared with cost-oriented rates within Barbados due to issues depending on the existing circumstances including inter alia, population size, geography, topography, governmental policy, investors, and state of liberalization.

35. The Interconnection Guidelines set out in Document Reference No. FTC 03/02, hereinafter referred to as the Guidelines, do not adequately identify or describe the interconnection services likely to be provided by the Applicant to interconnecting carriers.

36. The Guidelines provide little or no guidance as to how the Applicant is to charge for "Interconnection Joining Costs" that is, the new costs associated with building, maintaining and testing the physical linkages between the Applicant's telecommunications network and the interconnecting carriers' networks. These costs are conventionally charged to the interconnecting carrier only and are therefore carrier specific. Furthermore, such charges reflect the specific circumstances of the nature, scale and intended location of physical interconnection, inevitably requiring the Applicant to

undertake commercial negotiations with any appropriately licensed, parties requesting interconnection.

37. The Guidelines identify the "Cost of Providing Interconnection Equipment" which the Commission describes as being common costs usually recovered by all interconnecting parties, when the accepted method is that such interconnection equipment by definition is usually dedicated to a specific carrier as part of the Joining Service and thus the associated costs are chargeable solely to that carrier.
38. "Interconnection Specific Costs" (that is, the costs associated with provisioning the interconnection, billing interconnection services and managing relationships with interconnected carriers) are neither clearly identified in the Guidelines, nor is the method of cost recovery clear.
39. The Guidelines require charges to be developed for interconnection at each feasible point in the network. However, no determinations have yet been made regarding the actual joining services to be required by licensed carriers since the Applicant is the only licensed carrier to date.
40. The Guidelines do not clearly acknowledge that the dominant carrier would be required to interconnect with carriers in accordance with the three distinct phases of liberalisation, namely Interconnection with Mobile Carriers in Phase I, Domestic Carriers in Phase II and

International Carriers in Phase III. The Commission has acted unreasonably by not taking into account Government Policy.

41. In relation to Dispute Procedures in the FTC 03/ 04, the Commission lacks the statutory authority to make interim orders in relation to dispute procedures or procedures of any other nature.
42. The requirements of paragraphs 17 to 22 inclusive of FTC 03/04 constitute a breach of the rules of natural justice and are contrary to Law. The Guidelines requires that the non-referring party notify the Commission whether the Commission should intervene to resolve the dispute without the non referring party having seen the referring party's Official Report and Letter of Application. In such a case, the Non-referring party will be disadvantaged in being unable to adequately or at all to provide comments as required under paragraph 20.
43. In paragraph 38 of FTC 03/04, the Commission appears to be fettering its discretion on the issue of cost, in contravention of Section 46 (1) of the *Fair Trading Commission Act 2000-31*.
44. The time periods allowed to the Non-referring party under paragraphs 20 and 23 of the said Dispute Procedures to provide its comments and to file its official report respectively, are such as to be unfair to the Non-referring party and to be in breach of the rules of natural justice in that they will not allow the Non-referring party adequate

time and opportunity to comment on the case as presented by the referring party. Furthermore, these two rules will also constitute a breach of section 18(8) of *The Constitution of Barbados* in that they violate the requirement that all persons to civil proceedings (including in this instance the Non-referring party) are entitled to a fair hearing within a reasonable time.

45. The procedures themselves are incomplete in that they do not address pertinent issues including but not limited to the withdrawal of referrals, amendment of reports, procedures at hearings, presentation of evidence, order of arguments, disclosure or discovery of documents and to the extent that they do not provide any guidance specifying the manner in which these matters are to be dealt with, the resulting likelihood of which is that a party will be deprived of a fair hearing within a reasonable time.

46. By reasons of the matters stated aforesaid, a stay of the Commission's Decisions FTC 03/03 and FTC 03/04 is hereby requested for the following reasons:

- a) Firstly, there are a number of serious issues to be determined including inter alia,
 - i. The content and form of the RIO are intimately dependent on the Guidelines set by the Commission and of which the Applicant has requested a review.
 - iii. The Commission has not made a determination of the Applicant's

request for the review of the Guidelines. The thirty day timeframe within which the Commission has mandated that the Applicant develop and file an RIO which is required to comply with the Guidelines is unreasonable, unjust and infeasible.

- iv. The Guidelines do not comply with standard industry practice
- v. Implementation of benchmarking by the Commission in the absence of the filing of a RIO may be contrary to the *Telecommunications Act* which requires that charges be cost-oriented.
- vi. Cost oriented pricing has not been achieved.

b) Secondly, implementation of the Guidelines in their current form will cause irreparable harm to the Applicant, the interconnecting carriers, and potentially the Barbadian consumer.

c) Finally, considering that the movement to cost oriented pricing has not been achieved and in the event that the Applicant is required to submit a RIO, some interconnection charges contained therein will be significantly high. As a result, some carriers which require interconnection may lose interest in the Barbados market. Other interconnecting carriers will endeavour to recover these high interconnection charges from the consumer through high retail prices. This could

significantly impact some consumers and jeopardize the Government's liberalization initiatives. Consequently, the public will be better served by maintaining the status quo until the Commission has (i) conducted the review of the Decisions pursuant to the Applicant's Notice of Motion, for Review, (ii) completed the consultation process with the Applicant to agree inter alia an appropriate framework for the establishment of costing of interconnection charges, and appropriate framework for interconnection and a reasonable timeframe for the submission of a RIO, and (iii) determined this matter.

47. I make this Affidavit in support of the Application by the Applicant for review of the Commission's Decisions referred to aforesaid and a stay of proceedings.

SWORN TO by the deponent)
the said **DAVID CHARLES**)
VRANCKEN at Wildey in the)
parish of Saint Michael)
on the 29th day of July 2003)

D. Vrancken

Before me:

Harding
Justice of the Peace
HANDERSON L. HARDING
JUSTICE OF THE PEACE

