DRAWN & PREPARED [redacted]

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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 "*Utiilities 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

NOTICE OF MOTION FOR REVIEW

TAKE NOTICE that CABLE & WIRELESS (BARBADOS) LIMITED (hereinafter referred to as "the Applicant") **HEREBY**, in accordance with Section 36 of the *FTC Act,* Section 105 of the *Telecommunications Act* and Rules 49 and 50 of the *Utilities Regulation Act 2000-30 Procedural Rules*, applies for a review of the Decisions of the Fair Trading Commission ("The Commission") dated the 30th day of June 2003 and the 1st day of July 2003 more particularly defined below (hereinafter together called "the Decisions") being dissatisfied with the Decisions on the grounds more particularly stated in this Notice of Motion.

1. The Applicant's interest in the Decisions relates to the fact that the Decisions require the Applicant to take certain steps and to make certain services available based on the provisions of the Decisions, all of which are likely to have an adverse impact on the Applicant's business.

Grounds for Review

2 (a) **All of the Decisions**

In relation to all of the Decisions, the ground for review is that the Commission in failing to provide the Applicant with an opportunity to review the submissions of other parties in response to the Commission's Consultation Papers (dated April 4, 2003 – Document Nos. FTC 03/01 and FTC 03/02) and to provide a response thereto,

acted unreasonably and erred in law and jurisdiction by breaching the principles of natural justice, and failed to carry out its statutory duty pursuant to Section 4(4) of the *FTC Act* to consult with the Applicant as that term is properly understood in law - specifically by failing to provide the Applicant with an opportunity to know and respond to the case it had to meet.

2 (b) **July 1st 2003 Order to File a Reference Interconnection Offer (RIO) with the Commission (hereinafter called the "RIO Order")**

The grounds for review in relation to the RIO Order are as follows :-

1). The Commission in requiring the Applicant to file a Reference Interconnection Order (a "RIO") within 30 days acted unreasonably and erred in law, jurisdiction and fact, and in particular, in light of grounds 2 and 3, failed to provide the Applicant with a sufficient period of time in which to develop the rates for interconnection and other terms and conditions underlying a RIO.

2). The Commission in requiring the Applicant to file a RIO erred in law, jurisdiction and fact and acted unreasonably and prematurely in failing to provide any, or any sufficient guidance regarding the basis on which the interconnection tariff schedules are to be developed for the RIO, with the result that the Applicant will be unreasonably required to incur the substantial cost and effort in developing the charges for interconnection without reasonable or any assurance that the Commission will grant its approval to the charges. This raises an important matter of principle concerning the Commission's establishment of the necessary foundation for the derivation of cost-oriented charges for interconnection and other tariff rates in accordance with the *Telecommunications Act*. In particular:

(a) The Commission has yet to accept the use of a costing model which is in fact capable of deriving the interconnection charges required to be filed as part of a RIO. This is of particular concern given that the model under review by the Commission since December 2001 (the Costing Allocation Model, or "CAM") is not capable, with the Commission's knowledge, of either (i) the classification of major interconnection activities or (ii) the attribution of costs to interconnection services. Consequently, CAM cannot be employed in order to derive interconnection charges. Furthermore, the Commission has not yet adopted the Enhanced Allocation Model ("EAM"), as recommended by the Applicant. This latter model is capable of both of these tasks, as well as fulfilling the Commission's stated preference for the use of activity-based costing, which is a feature of EAM but not of CAM.

(b) The Interconnection Guidelines, Document No. FTC 03/02, hereinafter referred to as the Guidelines,do not

identify dedicated interconnection cost items or where such specific guidance is provided, it is either confusing or inconsistent with accepted international industry practice. By way of example: (i) the guidelines provide little or no guidance as to how the Applicant is to charge for "Interconnection Joining Costs" (that is, costs associated with building, maintaining and testing the physical linkages between the Applicant's and the interconnecting carriers' networks), which are conventionally charged to the specific interconnecting carrier only; (ii) 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; and (iii)"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 nor is the method of cost recovery clear.

(c) 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 carrier. Consequently it is difficult to predict the actual interconnection joining services that will be required since these are subject to commercial negotiations with licensed Carriers.

3). In requiring the Applicant to file interconnection charges prior to the Applicant bringing rates for domestic services in line with their costs (which the Government Policy has committed to achieve pursuant to the Memorandum of Understanding between the Government and the Applicant made the 16th day of October, 2001 – hereinafter referred to as the "MOU"), the Commission has acted unreasonably and erred in law, jurisdiction and fact, since either (i) the resultant access deficit charges will be higher than necessary (albeit separately identified), or (ii) the Applicant will be prevented from earning a reasonable return on its capital, contrary to Section 3(2)(b) of the *Utilities Regulation Act*. Either result is contrary to the public interest, contrary to the Government Policy on regulation set out in the MOU and in the relevant enactments and raises an important matter of principle concerning the requirement pursuant to Sections 6(1)(b), 6(1)(d) of the *Telecommunications Act* as well as the requirement of Section 8 of the *Telecommunications Act* that the Commission exercise its powers and perform its functions "consistently with the purposes and objects of this Act ... ".

4). In requiring the Applicant to file interconnection charges, the Commission has acted unreasonably and erred in jurisdiction, law and fact by failing to take into account Government Policy as outlined in the provisions of the MOU that provide for three phases for the implementation of liberalisation and consequently three phases for interconnection. Specifically, the staged approach to liberalisation agreed to pursuant to the MOU would only require the Applicant to file charges for interconnection with mobile carriers at this time.

2 (c) **30th June 2003 Decision Establishing Interconnection Guidelines – Accounting, Costing and Pricing Principles (hereinafter called the "Interconnection Guidelines")**

The grounds for review in relation to the Interconnection Guidelines are as follows:-

1). In determining that the appropriate costing standard for estimating interconnection charges shall be fully distributed cost (FDC) historical approach for the first three months, FDC current cost approach for the next 6 months and total service long run incremental cost (TSLRIC) thereafter, the Commission acted unreasonably and erred in law, jurisdiction and fact by failing to provide the Applicant with a sufficient period of time in which to develop these three costing standards and in failing to provide the guidance necessary for the application of these costing standards. This raises an important matter of principle concerning the Commission's establishment of the necessary foundation for the derivation of cost-oriented charges for interconnection and other charges in accordance with the *Telecommunications Act*.

2). The Commission has acted unreasonably and erred in jurisdiction, law and fact by failing to take into account Government Policy as outlined in the provisions of the MOU that provide for three phases for the implementation of liberalisation and consequently three phases for interconnection.

3). The Commission in ruling 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, acted unreasonably and erred in law and jurisdiction by failing to follow the requirement that charges for interconnection be cost-oriented, as required by Section 25(2)(e) of the *Telecommunications Act* .

4). In the alternative to ground 2 (c) 3), the Commission in ruling 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 charges for interconnection, acted unreasonably and erred in law and jurisdiction by failing to take into account relevant considerations – that is, the Applicant's costs – and by taking into

account irrelevant considerations – that is, benchmark rates taken from other jurisdictions.

5). The Commission in ruling 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, acted unreasonably and erred in law and jurisdiction by failing to follow 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* .

6). In relation to the Commission mandating the FDC Historical approach for the first three months specifically, the Commission acted unreasonably and erred in law, jurisdiction and fact in failing to provide any or any sufficient guidance regarding the basis on which model shall be used for the attribution of costs to interconnection services in order to develop the relevant charges. By way of example, although the Applicant presumes that the Commission would agree that use of regulatory asset lives is most appropriate, the Commission has not provided any guidance in relation to this issue.

7). In relation to the Commission mandating the FDC current cost approach for the next six months specifically:

(a) the Commission acted unreasonably and erred in law, jurisdiction and fact in failing to provide the Applicant with an adequate period of time in which to develop a current cost account model, consistent with international industry experience; and

(b) the Commission acted unreasonably and erred in law, jurisdiction and fact in failing to provide the Applicant with the guidance required 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 which of two alternative capital maintenance conventions is appropriate;

(ii) determination of the asset valuation principles appropriate to the different types of technologies used by the Applicant;

(iii) calculation of the applicable CCA adjustments; and

(iv) determination of the valuation dates.

As a result, the Commission in making the Interconnection Guidelines effectively failed to take into account a relevant consideration, that is, the Applicant's costs.

8). In relation to the Commission mandating TSLRIC as the approach commencing 9 months after the Decisions specifically:

(a) the Commission acted unreasonably and erred in law, jurisdiction and fact in failing to provide the Applicant with an adequate period of time in which to develop a TSLRIC model and without establishing a separate consultative process regarding the appropriate parameters for a TSLRIC model, consistent with international industry experience; and

(b) in the absence of a separate consultative process regarding the appropriate parameters for a TSLRIC model, the Commission acted unreasonably and erred in law, jurisdiction and fact in mandating the Applicant's development of a TSLRIC model without first taking any steps to establish the following critical parameters:

(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.

9). In requiring the production of financial records, the Commission has acted unreasonably and erred in law, jurisdiction and fact by failing to determine a number of parameters for the production of such records. In particular:

(a) The Commission has failed to give guidance on whether the disaggregated 'regulatory' statements should adopt the Commission's regulatory asset lives in determining the value of the underlying assets.

(b) 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) The Commission has given no indication of when (during each year) 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 problem where the driver is not an objective measured volume quantity – for example, activity drivers established by activity surveys.

(e) Interconnecting carriers are likely to challenge the Applicant's use of their confidential information in producing Appendix 2 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.

2 (d) **30th June 2003 Decision establishing Interconnection Dispute Resolution Procedures (hereinafter called the "Dispute Procedures")**

The grounds for review in relation to the Dispute Procedures are as follows :-

1). The Commission in determining that it will make interim orders for interconnection acted unreasonably and erred in law and jurisdiction in that it lacks the statutory authority to make interim orders of this or any other nature.

2) The requirements of paragraphs 17 to 22 inclusive of the Dispute Procedures constitute a breach of the rules of natural justice and are contrary to Law insofar as they require the non-referring party to respond to the Commission as to whether it should intervene to resolve the dispute without having before it the Official Report and Letter of Application referred to in Rule 18 which together constitute the gravamen of the Referring Party's complaint and without which the Non-referring party will be seriously disadvantaged in being unable to adequately or at all to provide comments as required under paragraph 20.

3). The Commission will be acting wrongly and in breach of S 46 (1) of ***The Fair Trading Act 2000-31,*** by binding itself and fettering its discretion on the issue of costs in the first instance by providing that costs will be borne equally by the parties irrespective of the conduct of the parties, the nature of the Application, the merits of the Application and any other relevant or pertinent concerns and given that the awarding of costs and the allocation thereof should at all times be non-discriminatory and should result in fairness to all parties.

4). The time periods allowed to the Non-referring party under paragraphs 20 and 23 of the 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 (2) rules will also constitute a breach of S 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.

5) 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.

3. The Applicant would crave leave of the Fair Trading Commission to add, amend, vary and/or amplify the abovementioned grounds for review prior to the Hearing of the Review.

4. The Applicant requests a stay in the implementation of the Decisions, pending the determination of this Motion For Review. On balance, a stay of the Decisions is justified as there are no licensed carriers at this time other than the Applicant.

5. The Hearing of this Motion will be heard at such time and date as fixed by the Fair Trading Commission.

6. The name, address and telephone and fax numbers of the Applicant are as follows :-

Cable & Wireless (Barbados) Limited
Windsor Lodge
ST. MICHAEL

Telephone No. 292-1203
Fax No. 436-9847

7. Documents in relation to this Motion may be served on :-

Mr. Donald Austin

whose address for service is C/o. the Applicant as stated above.

Dated the 15th day of July 2003.

P.K.H. Cheltenham, Q.C.
Counsel for the Applicant

B.L.V.Gale, Q.C.
Counsel for The Applicant

TO : The Fair Trading Commission