



Fair Trading Commission

Decision on Cable & Wireless (Barbados) Ltd.

Notice of Motion to Review

Interconnection Guidelines

Decision No. FTC04/04
2004

Date: February 19,

DECISION

Cable & Wireless (Barbados) Limited (“hereinafter referred to as the Applicant”), has applied for 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 (hereinafter together called “the Decisions”) being dissatisfied with the said Decisions which comprised of:

The first Decision dated the 30th June 2003, document FTC 03/03 Interconnection Guidelines - Accounting, Costing and Pricing Principles “Pricing Guidelines” advised the Applicant that it was required to use certain principles in determining interconnection costs.

The second Decision also dated the 30th June 2003, document FTC 03/04, established the Interconnection Dispute Resolution Procedures “Dispute Procedures” advised the Applicant and other service providers of certain procedures which they were required to utilise in resolving disputes which may arise between them.

The third Decision mandated the Applicant to file a Reference Interconnection Offer (RIO) within 30 days of the date of the Order dated the 1st of July 2003. The Commission notes that the RIO was filed by the Applicant on August 22, 2003 and is of the view that there is no useful purpose in considering a review of this Decision.

The Notice of Motion to Review was filed on the 15th day of July 2003 and the Applicant made written submissions on the 7th day of November 2003.

The Commission duly considered the submissions of the Applicant and note that the major complaints of the Applicant were:

- (a) the level of guidance provided by the Commission in relation to critical matters was insufficient;
- (b) that insufficient information was provided to the Applicant during the consultation process leading up to the Decisions and that the Decisions were generally unreasonable.

The Commission is of the view that in establishing the Pricing Guidelines it was setting a framework for the procedures and governing principles to be applied in determining the interconnection costs. The Pricing Guidelines were not intended to be exhaustive and the said Pricing Guidelines contained sufficient guidance.

The Commission is also of the view that where it is establishing principles or guidelines by way of a consultation process, that consultation process is intended to obtain the views of interested parties. That process is not intended to be an inter partes hearing or to be treated as a matter which is *lis pendens*. The Commission is firmly of the view that consultation does not include the entitlement to assurances as to the form of solutions, does not include the assurance that any particular solution will be accepted, nor does it include the right of one party to have access to the comments of another party. Each party was entitled to state his views and the Commission as the decision maker was entitled to and did consider all views. The Applicant participated in the consultation process.

In respect of the Applicant's complaint that there was insufficient time to meet the deadlines, the Commission draws attention to Rule 7 of Statutory Instrument 2003 No. 104 Utilities Regulation (Procedural) Rules, 2003 which provides for extensions of time. In the circumstance where the Applicant was of the view that the time allocated to complete any activity required by the decisions of the Commission was inadequate the Applicant should have made an application for an extension of time and support that Application with

evidence showing in particular the progress made in respect of any particular activity and an explanation of why an extension was needed.

The decision dated June 30, 2003 which established Interconnection Guidelines - Accounting, Costing and Pricing Principles -

In its Motion for Review the Applicant had submitted, inter alia, that the Commission

- (a) failed to provide sufficient guidance regarding the basis on which the interconnection tariff schedules are to be developed for RIO;
- (b) having permitted use of the FDC historical approach in deriving interconnection rates for the first three-month period in order to facilitate the production of cost oriented rates by the Applicant, failed to provide any or sufficient guidance regarding the basis of the model;
- (c) failed to give guidance on joining costs;
- (d) failed in the guidelines to identify dedicated interconnection cost items; and
- (e) having required that charges be developed for each feasible point failed to give guidance so as to predict the actual joining services that will be required.

The Commission will deal with the above submissions seriatim.

The Commission is of the view that the guidelines were not intended to be exhaustive and were intended to provide a general basis for the development of tariffs. Accordingly the Commission holds that sufficient guidance was given.

The Commission notes that in its decision FTC 03/03 Paragraph 12 the Commission's rationale for selection of the referenced historical approach was

that, "...data is generally available from the dominant carrier's accounting or engineering records and from other telecommunications equipment manufacturers, thus it should be possible for the dominant carrier to apply this methodology without delay."

The Commission was aware that the Applicant was in the process of developing an allocation model based on FDC historical cost. The Commission will examine any such model submitted and analyse it against the criteria embodied in the Pricing Guidelines and use it to evaluate the charges. Accordingly the Commission holds that sufficient guidance was given.

The Commission notes that Section 25 (2) of the Telecommunications Act 2001-36 provides as follows:

- "(2) Interconnection services referred to in subsection (1) shall
- (a) be offered at points, in addition to network termination points offered to the ends-users, subject to the payment of charges that reflect the cost of construction of any additional facilities necessary for interconnection;"

The Commission is of the view that the said section directs that interconnection facility costs should be directly charged to a requesting carrier if the facilities in question would not have been required but for the requesting carrier's desire to interconnect. The guidelines specifically refer to the costs relating to connecting activity which includes joining costs. The Commission is therefore of the view that sufficient guidance was given.

The Commission is of the view that it would be unable to stipulate a particular interconnection cost item which is a variable and which is dependent on (i) the parties involved and (ii) the services offered. The

Commission is also of the view that these matters would be the subject of negotiations and would be best addressed during the interconnection negotiation process.

The Commission is of the view that it would be unable to stipulate points of interconnection or associated points costs as these are variables which are likewise dependent on the parties involved and the services offered and as such would be addressed by the parties during the negotiation of the interconnection agreements.

The Decision dated June 30, 2003 which established Interconnection Dispute Resolution Procedures

In its Motion for Review the Applicant submitted, inter alia, that the Commission

- (a) failed to take into account relevant considerations such as the Applicant's costs when it directed that benchmarks are to be used in the absence of an approved RIO or where a RIO has not been filed within the time frame stipulated;
- (b) fettered its discretion on the issue of costs pursuant to Section 46 (1) of the Fair Trading Act; and
- (c) acted contrary to the principles of natural justice in setting time periods in respect of the non referring party in paragraphs 20-23 of the Dispute Procedures.

The Commission will deal with the above complaints seriatim.

The Commission notes that Section 25 (2) of the Telecommunications Act 2001-36 requires that the dominant carrier **offer** charges that are cost oriented. The Commission is of the view that benchmarks would be used in the event that there is no approved RIO and that such an approach is in keeping with

the spirit of the said provision of the Act. The Commission is of the view that where the Applicant has failed to file a RIO and to provide evidence of its costs the Commission cannot be blamed for failing to consider such costs.

The Commission is of the view that the costs referred to by the Commission in the Dispute Procedures are those the Commission itself will have to incur in order to stage or facilitate the hearing and do not relate to other parties' costs.

The Commission is of the view that there has been no breach of the rules of natural justice and that the prescribed time periods will facilitate timely resolution of the disputes. In addition the Commission extended the facility for comment to the non referring party in order to ascertain whether the parties acted in good faith as required by the Act. The Commission is of the view that adequate time was given considering, inter alia, (i) the particular circumstances (ii) commercial activities and the need to handle matters expeditiously. In any event the parties always have the right to request an extension of time and give grounds for the same.

The Applicant complains that the Commission has no jurisdiction to make interim orders. By virtue of Section 6 of the Telecommunications Act the Commission is mandated to exercise its regulatory functions in respect of the Utilities Regulation Act, Fair Trading Commission Act and the Telecommunications Act. Section 34 of the Fair Trading Commission Act authorises the Commission to make orders it does not restrict the nature of the order. It is contemplated that no order will be made unless there is a hearing.

The Commission is of the view that the requirements of paragraph 17 - 22 of its Dispute procedures do not constitute a breach of the rules of natural justice and is not contrary to law in that the sole decision to be made by the Commission at that juncture is whether it should intervene, to resolve the

dispute. The Commission is not determining rights at that time. If the Commission decides to intervene the opportunity to be heard will be granted. If the Commission decides not to intervene a party will not be prejudiced. The Commission's intent is not to make an adverse finding without a hearing.

The Commission draws attention to Section 31 of the Act which provides that the Commission should resolve disputes only where it is satisfied that the parties have negotiated in good faith...

SUMMARY

The Commission having duly considered all the submissions of the Applicant is of the view that there is no evidence which established that the Commission erred in law or in fact or that it failed to take into account matters which it ought to have taken into account or conversely that it took into account matters which it ought not to have taken into account. In the circumstances the Commission has decided not to vary the said Decisions.

Dated this _____ day of February 2004.

.....
Cyrilene Benskin-Murray (Mrs.)
Commission Secretary