



# Fair Trading Commission

## DECISION

Reference Interconnection Offer - Phase 1 RIO v1.0

No. 4 of 2003

Date: October 28, 2003



# FAIR TRADING COMMISSION

## REFERENCE INTERCONNECTION OFFER

### INTRODUCTION

1. The Fair Trading Commission “the Commission” established by the Fair Trading Commission Act 2000-31, is the independent regulator of international and domestic telecommunications services and electricity services.

2. In carrying out its duties as an independent regulator, the Commission must operate in a transparent, accountable and non-discriminatory manner. Consultative documents and the public consultation process are the main ways in which the Commission discharges its responsibilities relating to transparency and accountability.

3. In addition, the Commission is specifically charged under the Fair Trading Commission Act to consult with interested persons when it is discharging certain functions.

4. Section 4(4) of the Fair Trading Commission Act 2000-31 states:

“The Commission shall, in performing its functions under subsection (3)(a), (b), (d) and (f) consult with the service providers, representatives of consumer interest groups and other parties that have an interest in the matter before it.”

## Legislative Background

5. The telecommunications sector is regulated by the Commission as well as the Minister responsible for Telecommunications.

6. Section 26(1) of the Telecommunications Act 2001-36 , “the Act” states that the dominant carrier is required to file a Reference Interconnection Offer “RIO”, with the Commission, which sets out terms and conditions for interconnection. These terms and conditions are set out in section 26(2) of the Act.

7. Pursuant to Section 27(3) of the Act, in deciding whether or not to approve the RIO, the Commission was required to and did:

(a) consult with the carrier providing the RIO and any other carriers likely to seek interconnection to that carriers network and

(b) have regard to:

- the interconnection principles set out in section 25;
- the interconnection policy specified by the Minister;
- the need to promote competition;
- the long term interests of end-users; and
- the submissions, whether oral or written, of the carriers providing and seeking interconnection.

8. In arriving at its decision whether or not to approve, the Commission also took into consideration the Fair Trading Commission’s Interconnection Guidelines - Accounting, Costing and Pricing Principles Doc No. FTC 03/03 and the Dispute Resolution Procedures Doc. No. FTC 03/04 issued on July 01, 2003 and also, those principles embodied in Section 25 of the Act.

### **Consultation Process**

9. On August 22, 2003, Cable & Wireless (Barbados) Ltd, "C & W" filed a RIO with the Commission. Interested parties were invited to submit written comments on the RIO by September 8, 2003. The Commission also afforded these interested parties the opportunity to make oral submissions.

10. Submissions were received from Digicel (Barbados) Ltd. "Digicel", Sunbeach Communications Inc. "Sunbeach", AT&T Wireless "AT&T" and the Barbados Consumer Research Organization "BARCRO".

11. On September 29 - 30, 2003 a conference was held, at which oral presentations were heard from Digicel, Sunbeach, AT&T, BARCRO and C&W.

12. Respondents were thereafter given the opportunity to submit final submissions to the Commission.

13. In reaching its decision the Commission took into consideration the written and oral submissions of all parties.

14. The Commission wishes to thank the parties who participated in the consultative process.

## REFERENCE INTERCONNECTION OFFER

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

16. The Commission has accepted an undertaking from C&W at the RIO Conference held on 29 and 30 September 2003 and in its responses dated 6 October 2003 and 20 October 2003 which spoke to the correction of errors or omissions that they identified in the RIO.

17. In this decision each section of the RIO was assessed sequentially. Where the Commission disapproves a section or part thereof it has outlined its reasons.

18. **Legal Framework**

Clause 1	Definitions and Applicability	<b>Approved</b>
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Clause 2	Duration	<b>Approved in part</b>
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Duration - The Interconnection Guidelines - Accounting, Costing and Pricing Principles Paragraph 13 states that "the Commission considers that the FDC Historical Cost approach should be applied only for a limited time frame of three (3) months." C&W should remove the reference to a five year duration to ensure conformity with the referenced Guidelines.

Clause 3	Interconnection	<b>Approved</b>
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Clause 4	Forecasting, Ordering, and Provision of Interconnect Capacity	<b>Approved</b>
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21. Under "MPP", the mobile subscriber pays for both outgoing and incoming calls to the mobile phone. C&W has responded to these suggestions in its letter to the Commission dated October, 06, 2003 entitled "Response to submissions regarding Cable & Wireless's Reference Interconnection Offer" noting that:

*"RPP is the current regime for fixed to mobile calling and unless or until that regime changes, the only way forward in the RIO is to address the current regime. C&W has accordingly drafted its RIO to reflect the existing RPP environment."*

22. The mobile sector is not regulated by the Commission, therefore the approval and implementation of CPP is not directly within the purview of the Commission.

**23. The Commission is aware that the policy for CPP is under consideration by the Ministry responsible for Telecommunications and that a draft policy document has been issued. In the circumstances it would be inappropriate for the Commission to make any decision on this issue, at this time.**

Clause 9 – Charges and Payment

**Approved in Part**

Provisions in this section are approved save and except those pertaining to the Access Deficit Charge "ADC".

Access Deficit Charges

**REFUSED**

24. C&W has stated in the Memorandum in respect of the Barbados Phase 1 RIO v1.0 that all usage tariffs include a charge element to recover access deficit. C&W asserts that this access deficit charge is necessitated by the absence of rate

rebalancing. In clause 9.8 of the Legal Framework it is stated that *“To the extent that C&W is permitted to rebalance its rates such that its Access Deficit changes, the Access Deficit Contribution shall be amended ....”*

25. The Commission has no authority to consider an ADC within the framework of the RIO. The Commission notes that the ADC is intertwined with the Universal Service Obligation. The Commission is of the view that the submissions of C&W and the respondents are best considered within the rubric of prescribing the ADC and its interrelation with the Universal Service Obligation.

26. The Commission further notes a prerequisite for the establishment of an ADC is that the Minister responsible for telecommunications designates in writing a Universal Service Carrier. Until such time no entity can be authorised to legitimately charge or accept an ADC.

**27. The Access Deficit Charge proposed in the RIO will not be permitted to go into effect. In addition the Commission will not approve an interconnection agreement that contains an ADC that has not been prescribed in accordance section 35 of the Act.**

Clause 10 - Variation of Charges

**Approved**

Clause 11 - Billing

**Approved**

Clause 12 - Transitional Provisions

**Approved in Part**

28. Provisions in the Transitional Provisions section are approved save and except clauses 12.2 and 12.3 described below.

**Transitional Provisions - International Services(12.2)**

**REFUSED**

29. Clause 12.2 C&W RIO states that the Telco shall not use any service... outside of the scope of its licences including but not limited to: originating, transmitting, or terminating international calls. In addition Cable & Wireless notes that:

*“...prior to Phase III, conveyance of international calls incoming to, or outgoing from, new entrants must be conveyed via Cable and Wireless’s international network. Cable & Wireless considers these services to be wholesale services and is currently developing them so that they will be available to new entrant carriers on non-discriminatory terms once interconnection agreements have been reached and those carriers are ready to provide service.”*

30. Respondents have indicated a concern that the RIO does not address the terms and conditions under which C&W will provide outgoing and incoming international call services to the other licensed operators during the phases of Cable & Wireless’ exclusivity. The concern is that a cellular operator who is not able to originate or terminate international calls to and from Barbados will face a competitive disadvantage.

31. The importance of international services to the new entrants is such that there can be no delay in establishing the terms under which C&W will provide those services. In order to ensure that such prices “facilitate the policy of market liberalization and competitive pricing” the rates and other terms of that offering should be the same as those provided by Cable & Wireless to its own mobile entity.

**32. C&W is required to provide the Commission within 14 days with charges for international origination and termination services to other licensed**

**mobile operators. These charges and related terms and conditions must be the same as those it imposes on its own affiliate mobile operator. The Commission further requires that full pass through of avoidable costs that result from the call being originated or terminated by another operator be facilitated.**

33. Respondents questioned the right asserted by C&W to terminate with the provision of the Services pursuant to the RIO with immediate effect<sup>1</sup> if “C&W believes, on reasonable grounds that the Telco has breached the terms of this Clause 12”

34. The Commission is of the view that the language of the RIO appears to bypass any due process and permits C&W to act on its own initiative and be the sole adjudicator of whether a violation has occurred.

35. Section 67 (1) of the Act specifically ascribes the responsibility for compliance with international bypass rules to the Minister responsible for Telecommunications. The procedures to be followed by the Minister are outlined in section 68 and include the content required in a Prohibition Order (section 69) and the time required for a response to a ‘show cause’ order. These provisions take precedence over the language proposed in the RIO.

**36. As clause 12.3 of the RIO is not consistent with Section 67 (1) of the Act, the Commission is unable to authorise its use and cannot condone the arbitrariness of the process. The relevant clause should be amended to reflect the intent of sections 67 – 69 of the Act.**

Clause 13 – CLI

**Approved**

Clause 14 – Numbering

**Approved**

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<sup>1</sup> Legal Framework Clause 12.3

Clause 15 – Services Performance and Standards      **Approved**

37. The Commission notes that an issue has been raised regarding the resolution times for service restoration. C&W indicated that provisions related to performance remedies and damages in cases of poor performance are unnecessary and cited the case of other Caribbean countries where to date the issue has not arisen. C&W opined that the provisions in the RIO are adequate to cover eventualities of poor performance.

38. To meet the test of non-discrimination and reciprocity, as well as to maintain any to any communications at acceptable levels of service quality, the RIO should include reciprocal provisions for performance remedies with damages in cases of poor performance and poor service quality based on verifiable and predetermined indicators.

39. The Commission notes that the resolution times specified in the RIO could allow service to be interrupted for a full business day (8 hours) with no penalties but however recognises that this is a reciprocal issue and these are matters which may be better left to the parties to negotiate.

40. **Nonetheless, the Commission takes the issue of service quality very seriously, as part of its responsibility to consumers. If service interruption becomes a source of degraded consumer service, the Commission will intervene vigorously.**

Clause 16 – Safety and System Protection      **Approved**

Clause 17 – Prevention of Fraud      **Approved**

Clause 18 – Confidentiality      **Approved**

Clause 19 – Not USED	
Clause 20 – Intellectual Property Rights	<b>Approved</b>
Clause 21 – Authorised Representatives	<b>Approved</b>
Clause 22 – Review and Amendment-	<b>Approved</b>
Clause 23 – Suspension and Termination	<b>Approved</b>
Clause 24 – Effects of Termination	<b>Approved</b>
Clause 25 – Force Majeure	<b>Approved</b>
Clause 26 – Liability	<b>Approved</b>
Clause 27 – Relationship of the Parties	<b>Approved</b>
Clause 28 – Representation of the Parties	<b>Approved</b>
Clause 29 – Severability	<b>Approved</b>
Clause 30 – No Waiver	<b>Approved</b>
Clause 31 – Entire Agreement	<b>Approved</b>
Clause 32 – Assignment	<b>Approved</b>
Clause 33 – Notices	<b>Approved</b>
Clause 34 – Dispute Resolution	<b>Approved</b>
Clause 35 – Publicity	<b>Approved</b>
Clause 36 – Insurance Provisions	<b>Approved</b>
Clause 37 – Approval of Agreement	<b>Approved</b>
Clause 38 – Governing law and jurisdiction	<b>Approved</b>
Clause 39 – Counterparts	<b>Approved</b>
Clause 40 – Reference Interconnect Offer	<b>Approved</b>
Clause 41 – Deposits	<b>Approved</b>
<b>Service Descriptions – Schedule 2</b>	<b>Approved in Part</b>
<b>Part 1 Joining Services</b>	<b>REFUSED</b>

41. C&W has indicated in its comments C&W's Response to Submissions of AT&T Wireless on the RIO) that it has already commenced the process for purchasing interconnection equipment. C&W noted that "As the Commission may be aware; C&W has recently taken steps, in conjunction with the new entrants to commence the process for ordering interconnection equipment." This is repeated throughout the Response, without reference to consultation with new entrants. For example, in C&W's response to the submissions of BARCRO on the RIO, C&W notes that:

*"...it has taken numerous steps to expedite the process of liberalization in Barbados, including, most recently, by deciding to order interconnection equipment in advance of a valid interconnection agreement."*

42. While the Commission recognizes the steps that C&W have taken to facilitate interconnection, the Commission is concerned about the apparent absence of a) consultation with the new entrants prior to acquisition; and b) transparency of the acquisition process.

43. Unless otherwise negotiated, the Commission expects that the charges and Terms and Conditions for Joining Service provided by C&W to its own cellular operation would be available to other operators on a non-discriminatory and transparent basis.

44. Within the RIO provision must be made to give the operator the option to provide the joining equipment.

**45. C&W should amend the RIO to reflect that each party is permitted to charge its own price if it purchases the equipment to the extent that the price is arrived at in a transparent and non-discriminatory manner.**

Part 2 – Terminating Access Service –	<b>Approved</b>
Part 3 - Special Access Service -	<b>Approved</b>
Part 4 – PSTN Transit Service -	<b>Approved</b>
Part 5 – Other Services	<b>REFUSED</b>

*Domestic Fixed to Mobile Service*

46. Fixed to Mobile Service is specifically referenced in Part 5 of this Schedule 2. C&W indicated that a tariff was required for this service because “...the fixed operator (C&W) receives no revenue from its fixed subscriber for calls made by that subscriber to mobile phones.”

47. No evidence was presented to the Commission to demonstrate that C&W incurs an additional cost for originating a call to a mobile operator compared to its costs for originating a call to a fixed line customer.

48. The Commission has difficulty in accepting C&W’s response that it receives no revenue from its fixed subscriber for calls made by that subscriber to mobile phones. The fact that national calls in Barbados are provided at a fixed monthly rate bundled with monthly access fees does not equate to “no revenue” as the revenue earned from national calling is bundled together with revenue from access fees into the monthly subscription charge.

49. The Commission does not accept the view that Cable & Wireless incurs incremental costs from the calls made by fixed subscribers to mobile phones. Neither has Cable & Wireless presented any established transfer pricing mechanism for this service to its mobile subsidiary. The Commission, therefore

finds that the inclusion of the fixed to mobile charge is inconsistent with the principles of interconnection, specifically section 25 (2) (c).

**50. C&W is required to provide the data to show that the charges proposed are no less favorable than those offered to the C&W mobile entity.**

*Mobile to Mobile*

51. In response to the query that the RIO is deficient in respect of service description and associated tariff for mobile to mobile traffic, C&W has indicated that the RIO has provisions for the carriage of some mobile to mobile calls using the PSTN Transit Service described in Part 4 of the service description but that there was a need to modify the RIO to include calls from other mobile operators to and from C&W mobile network.

52. C&W has indicated the omission was inadvertent and has agreed to make the appropriate amendments to the RIO to give effect to this identified deficiency. C&W indicated that they will file a proposed approach to this issue for inclusion in the RIO.

**53. The Commission directs that the appropriate amendments be made to the RIO to account for all aspects of mobile to mobile service.**

**Service Schedule - Schedule 3 -The Commission approves this section on the condition that where relevant the necessary amendments are made in accordance the Commission's decision stated previously<sup>2</sup>.**

Parameter Schedule - Schedule 4

**Approved**

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<sup>2</sup> Joining Services, Domestic Fixed to Mobile, Mobile to Mobile

**Joint Working Manual – Schedule 5 - The Commission approves this section on the condition that where relevant the necessary amendments are made in accordance the Commission’s decision stated previously.**

**Tariff Schedule – Schedule 6 - The Commission approves this section on the condition that where relevant the necessary amendments are made in accordance the Commission’s decision stated previously<sup>3</sup>.**

**54. The Commission hereby DECLARES that the approved portions of the RIO identified above come into effect from the date of this Decision**

Dated this 28<sup>th</sup> day of October 2003.

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<sup>3</sup> Joining Services, Domestic Fixed to Mobile, Mobile to Mobile

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