LIME

COMMENTS ON DRAFT TELECOMMUNICATION RETAIL TARIFF REGULATIONS

6 September 2010

Landline | Internet | Mobile | Entertainment

I. Introduction

1. CWI Caribbean Limited, on behalf of its affiliates Cable & Wireless Dominica Limited, Cable & Wireless Grenada Limited, Cable & Wireless St. Kitts and Nevis Limited, and Cable & Wireless St. Lucia Limited, all trading as LIME ("**LIME**"), is pleased to provide the following comments in response to the Commission's 5 August 2010 consultation document on the draft revised Telecommunications Retail Tariff Regulations.

II. General Comments

2. LIME believes that, generally speaking, competition brings the greatest benefits to consumers, through lower prices, new and innovative services and improved quality of services. Regulation is a poor and ineffective substitute for competition, as it requires regulators to substitute their judgment for that of the operators and the slightest misreading of the market and of market trends will lead to suboptimal results. This is why jurisdictions such as the United Kingdom, United States, and European Union, among others, generally limit the application of regulation only to those specific markets where a provider is found to be dominant. Even in those cases, regulation is required to be proportional to the issue being addressed, and no more intrusive or onerous than actually required to address the issue.

3. The application of regulation in any other circumstances is not necessary and will lead to suboptimal results for consumers and society in general. Unnecessary price regulation, in particular, distorts efficient entry and exit decisions of all market players, and prevents appropriate price signals from reaching consumers.

4. It is for these reasons that LIME is surprised by the approach adopted in the revised Telecommunications Retail Tariff Regulations (the "**draft Regulations**"). Whereas the current regime follows the international best practice adopted in the

jurisdictions noted above, the draft Regulations would mark a material departure from best practice and significantly increase the regulatory burden on operators in the ECTEL Member States, and for the first time regulate even unregulated services.

5. If a market is subject to effective competition, then by definition it is "self-regulating" through competition, and regulation by the state is unnecessary and may be harmful to consumers. LIME encourages ECTEL and the Commissions to remove any new provisions in the draft Regulations that would give the Commission jurisdiction over unregulated services.

III. Excessive Scope

6. Generally speaking, the role of the regulator is to protect consumers and social welfare when the structure of a market is so defective that the powerful and powerfully beneficial incentives of the competitive system cannot function. In such a case, regulation is nonetheless a stilted, artificial second best to competition; it cannot truly replicate competition. As well-known economist Daniel Spulber and prominent policy expert Gregory Sidak correctly explained in the *Yale Journal of Regulation*:

> [C]ould regulators "replicate" competitive outcomes in regulated markets even if they were inclined to do so? It is doubtful. Competitive markets require continual adjustment of prices and product offerings to changes in consumer tastes, incomes, and technological innovation. The informational requirements of such adjustments are not compatible with the costly, complex, and protracted administrative procedures that regulatory rulemaking requires. Regulators cannot be expected to react to, let alone anticipate, changes in customer preferences and supplier technology. To the contrary, excessive regulation can discourage innovation and capital investment, and thus lock in obsolete technologies. In short, transaction costs and information processing costs make it unworkable for regulators to attempt to supplant or recreate competitive outcomes. To suggest that

regulators can replicate the "invisible hand" of the market fundamentally contradicts Adam Smith's original point that policy makers should not interfere with the functioning of competition:

> The statesman, who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.

Regulation is a *proxy* for competition, not a *replica* of it. Rather than attempting to replicate the market, regulators should recognize that achieving market outcomes requires removing regulatory restrictions as telecommunications markets become increasingly competitive. Expanding the scope of regulation will only make it less, not more, plausible that regulators will be able to achieve market outcomes.[1]

7. Completely accounting for this vast complexity is not possible, which explains why it is in the public interest to replace regulation with competition expeditiously. Competition accounts for the success of our economy relative to planned or government controlled economies precisely because of the inherent limitations of regulation to effectively set prices that send the right signals to suppliers, investors, and consumers. As influential Harvard economist N. Gregory Mankiw explains,

> When the government prevents prices from adjusting naturally to supply and demand, it impedes the invisible hand's ability to coordinate the millions of households and firms that make up the economy. This corollary explains why taxes adversely affect the allocation of resources: Taxes distort prices and thus the decisions of households and firms. It also explains the even greater harm caused by policies that directly control prices, such as rent control. And it explains the failure of communism. In communist countries, prices were not determined in the marketplace but were

[1] J. Gregory Sidak and Daniel F. Spulber, "Deregulation and Managed Competition in Network Industries," *Yale Journal on Regulation*, 15, 117 (Winter 1998), p. 140 (emphasis added, footnotes omitted).

> dictated by central planners. These planners lacked the information that gets reflected in prices when prices are free to respond to market forces. Central planners failed because they tried to run the economy with one hand tied behind their backs—the invisible hand of the marketplace.[2]

8. For the reasons set forth above, the services provided by operators in markets where they have not been found to be dominant should not be regulated. If there is effective competition, then there is no need for regulation.

9. Regulation 5, however, would significantly increase the jurisdiction of the Commissions to set the rates, terms and conditions of all services, including "unregulated" services. Regulation 10 would also set the "minimum" terms for all contracts with customers, even for unregulated services.

10. This is very restrictive. If a market is sufficiently competitive that no operator is dominant in that market then, by definition, it is sufficiently competitive that regulation is not required. This means that any regulation of those markets is unnecessary and will waste resources. Furthermore, regulation of "unregulated" services will increase the direct regulatory burden on smaller operators, who will now have to spend more time dealing with the administrative and regulatory matters before they can bring services to market. It will also expand the activities of the NTRCs, who will need to engage additional resources to cope with the increased activity. However, the NTRCs are funded by the operators, which means even fewer resources would be available for use by operators to provide services to consumers.

11. Regulation 33 is another clear example of the negative impact of regulation in a competitive market. It is proposed that thirty days' notice be given of any proposed change to an existing unregulated service, that is, to a service that is recognized to be sufficiently competitive that regulatory intervention is not

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[2] N. Gregory Mankiw, *Principles of Economics*, Volume II, eds. Richard Schmalensee and Robert D. Willig, (Fort Worth, Texas: Harcourt College Publishers, 2001), p. 10-11.

necessary. If one operator were to introduce a change to their service (lower price, increased benefits, etc), any other operator wishing to respond to the change in the competitive marketplace, for example by reducing prices to match the competition, would have to wait at least a month before it could do so. If that change were so attractive in the market that the first operator felt compelled to respond, they too would then have to wait at least a month before they could respond. This means consumers will be denied the benefits of competition (lower prices) because of regulation, with the attendant disadvantage to operators. This would seem not to be in the public interest, or any stakeholder interest for that matter.

12. Imposing and/or retaining regulatory oversight of a market when it is unwarranted is not a cost-free decision, and in the end, it is the consumer that bears the cost of being denied the benefits of competition. Policies that unnecessarily interfere with, delay, or prevent competitive forces to function, or that seek to impose regulation on a competitive market, serve only harm to consumers and social welfare.

13. Research has demonstrated this to be the case. There is, in fact, ample evidence that overall, price regulation hampers the development of competition and harms, rather than protects, consumers. The results of some of these studies have been summarized by economist Robert Crandall and are described in Table 1 below. The table identifies a variety of industries in the United States that have undergone partial or complete deregulation and the consumer benefits that have resulted.

Table 1: Crandall Summary of Various Studies on Regulation: The Effects of Deregulation in the United States		
Sector	**Nature of Deregulation**	**Consumer Benefit**
Airlines	Total	33 percent reduction in real (inflation adjusted) fares.
Trucking	Total	35 to 75 percent reduction in real rates.
Railroads	Partial; rate ceilings and floors on "monopoly" routes.	More than 50 percent decline in real rates.
Natural Gas	Partial; distribution still regulated.	30 percent decline in consumer prices.
Telecommunications	Partial; local rates and interstate access charges still regulated.	More than 50 percent decline in long distance rates.
Banking	Consumer rates deregulated; entry liberalized.	Increase in rates on consumer deposits; improved productivity.

***Source**: Robert W. Crandall, "An End to Economic Regulation?" draft white paper. Final published in Competition and Regulation in Utility Markets, Collin Robinson (ed.), Institute of Economic Affairs, May 1, 2003.*

14. In a study by Professors Charles Fine and John de Figueiredo, which includes detailed case studies of the process of deregulation in the same industries considered by Crandall, the authors reach three fundamental conclusions, consistent with that discovered by Crandall:

> [1] Regulations change much more slowly [than] do markets and technology, and delayed deregulation can have large negative consequences for social welfare.
>
> [2] When outmoded regulations are relaxed or eliminated piecemeal, partial reforms can exacerbate the economic distortions, to the point of diminishing rather than increasing social welfare.

> [3] Whenever it comes, comprehensive deregulation invariably gives rise to an increase in innovation, growth, and social welfare gains.[3]

15. LIME submits that, as is the case with the existing Retail Tariff Regulations, regulation should apply to "regulated" services, that is, to services which are not subject to sufficient competition. Regulation should not extend to all the services offered by all telecommunications providers, as this would waste the resources of the operators and of the regulator, and lead to a suboptimal result for consumers.

IV. Excessive Discretion

16. One of the purposes of regulation is to clarify the application of the rules set out by the legislature in the enabling statute. LIME submits that the draft Regulations do not bring additional clarity, and in fact appear to leave too much uncertainty around the decision making.

17. Regulation 30, for example, in effect would allow the Commission extremely wide discretion to regulate tariffs irrespective of anything stated in regulations 15 through 29, "where it feels just and reasonable to do so". This would represent a significant increase in regulatory uncertainty as, no matter how an operator tried to comply with regulations 15 through 29, the Commission could impose something completely unanticipated through regulation 30.

18. Similarly, while regulation 6(2) sets out the alternative means of publication of tariffs, regulation 6(3) would allow the NTRC arbitrarily to substitute its judgment on the best means of communicating with customers for that of the operator, even though the operator has the closer relationship with its own customers. Regulation 8 would also allow the regulator to substitute its judgment

[3] Charles Fine and John de Figueiredo, "Can We Avoid Repeating the Mistakes of the Past in Telecommunications Regulatory Reform," Working Paper 2005-001, MIT Communications Futures Program, March 21, 2005, p. 11.

for that of the operator, by deciding for the operator how and when to charge prices for its services, even if those services are subject to effective competition. This is reversing the roles of the regulator and of the operator and, given that the regulator was not established or equipped to be a competitive operator, this can only lead to suboptimal results for consumers and for the market generally, and may harm the operator.

V. Modification of Licences

19. Regulation 21 would empower the Minister to modify a licence after a declaration of dominance by a Commission. LIME submits that this is unnecessary and that the specific process being proposed is not in the best interest of all stakeholders in the market.

20. A service provider's status as dominant or non-dominant is subject to changes in the market, which is considerably more dynamic than a licence document. A declaration of dominance does not need to be included in a licence, and it should be sufficient for there to simply be a determination of the Commission. If there were a lag between the Commission's determination and the action by the Minister, Regulation 21 could also lead to a situation where compliance with the Commission's determination could be in breach of the licence. It is simply far more advisable to keep the two separate.

21. However, notwithstanding this, LIME strongly objects to the proposal that the licence be amended "as if the provider had consented to the modification of the licence". The Telecommunications Acts provide for modification of a licence with the consent of the licensee, but there is no provision for deeming consent where there is no consent. Consent is a question of fact – it is either there or not – and the Minister is required by the Act to act differently depending on the factual

situation. LIME submits that any attempt to deem consent by operation of a regulation would be *ultra vires* the Act.

VI. Treatment of Bundles

22. Bundles of services are recognized in jurisdictions around the world as a consequence of growing competition and a means by which operators deliver value for money to consumers. This is a positive development for consumers, as consumer surveys have been finding for a long time that consumers value one–stop-shopping.[4] All operators should be permitted to engage in full and fair competition by responding to these competitive developments with their own bundles of services. Unfortunately, the draft Regulations appear to treat bundles as something to be avoided, despite being agreed to in the last Price Cap review process.

23. Regulation 9(1)(a) starts off by presuming that bundles are attempts to require consumers to purchase services that they do not require. This practice is in fact tied selling, not bundling. LIME recommends that the word "bundling" be replaced by the word "tying". This would align the regulations with standard regulatory practice around the world and would eliminate the presumption that bundling is, in and of itself, improper.

24. Regulation 36 would impose special rules on the introduction of bundles into the market. As noted earlier, LIME does not support the attempt to regulate "unregulated" services, and recommends that these provisions be limited to bundles involving regulated services. Further, as a whole Regulation 36 presumes

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[4] See, for example, Rebecca Blumenstein, "Package Plan: AT&T sees wireless as the key to its broader strategy of bundling its services," *The Wall Street Journal Online*, September 20, 1999; Shawn Young, "All in One: Buying bundles of telecom services can make things easier – and cheaper – for consumers. The trick is picking the right bundle," *The Wall Street Journal Online*, September 13, 2004; and "Consumers to Telecommunications Services Providers: Its Time to Up the Ante," *TMCnet News*, May 4, 2005.

that bundles are somehow improper or damaging to the market, and should be used as infrequently as possible and only where the benefits outweigh the presumed negative effects of the bundle. For example, it is not at all clear how the public benefits if unregulated providers proposing a new bundle are required to demonstrate how "consumers or providers are likely to obtain <u>considerable</u> benefits or efficiencies from the availability of the bundle" (emphasis added). In newly competitive markets, it is reasonable to expect operators to be constantly trying different tools and strategies to differentiate themselves, and the outcome of these efforts are benefits to consumers in the form of lower prices and innovative bundles. Firms change pricing plans in any market, but perhaps especially in markets that are newly competitive, simply to learn about the demand and find plans and levels that appeal to customers, respond to competition, and permit shareholders to earn a return on their investment. Some pricing plans may succeed and others may fail. The ability to attempt to meet customer needs and desires by changing prices in these many ways is hampered and impeded by pricing constraints, to the detriment of consumers. Therefore, the Commission should not deny the public these benefits simply because it decided that the benefits were not "considerable".

25. LIME recommends that the Commission review the draft Regulations to remove any presumption that bundles and other innovative ways of packaging services are inherently negative. In fact, bundles bring positive benefits to consumers and markets, and should be encouraged, given that it was agreed during the last Price Cap discussions, and ultimately it is the consumers who will decide.

VII Market Trials

26. LIME recommends revisions to Regulation 35 addressing market trials, as the current draft is unworkable and would reduce the benefits operators could bring to consumers and to the market through trials and promotions.

27. First, the market trial should be permitted to last as long as 90 days. A 90-day period would allow for at least two billing cycles to take place. This is important as one of the goals of a market trial is to measure consumer behavior in response to the new price or service. However, consumers often make decisions after experiencing the new price or service for a while, and 30 days would not give consumers enough time.

28. Second, LIME submits that the condition 35(3)(b) should be removed, such that the only condition on the eligibility of a trial is whether the trial complies with regulation 35(1). International best practice recognizes that trials and promotions of 90 days or less bring benefits to the market and to consumers, without harming the market or consumers. This is why they typically are excluded from the operation of a price cap plan, and do not need to be subject to the same rules and regulations as permanent price changes.

VIII "Rules Relating to Treatment of Consumers by Providers"

29. LIME submits that the proposed rules relating to the treatment of consumers are outside the scope of the draft Regulations, and are more appropriately placed in the *Telecommunications (Quality of Service) Regulations*. The Retail Tariff Regulations should address the rates, terms and conditions of regulated services only. Notwithstanding this, LIME notes that some of these rules increase regulatory uncertainty and should be removed or modified.

30. For example, regulation 11(2)(b) should be deleted. As drafted, it is so vague that all operators would be in a constant state of jeopardy. The operator would be required to ("shall") offer compensation, but "inconvenience" is such a vague, subjective term, that no operator or consumer would know what it means, or what the level of compensation ought to be.

31. LIME agrees that itemization on bills should be provided only upon request, but does not agree that it should be at no additional cost to consumers. LIME endorses the concept of eliminating unnecessary waste, including the waste associated with printing bills that are not necessary. Requiring a small fee for the printing of itemized bills encourages consumers to limit their requests to those situations where it is absolutely necessary, in other words, to reduce waste. The draft Regulations would do little to encourage "green" behaviour.

32. The disconnection policy that has been drafted into the draft Regulations will make it more difficult for operators to manage credit risks and bad debt. For example, regulation 13(2) would afford delinquent customers in some circumstances too long an opportunity to run up their bills before being disconnected. For this reason, the language in regulation 13(1)(b) is far better, as it allows the operator to tailor its policies to the circumstances. In addition, regulation 13(3) does not acknowledge that a bad credit risk is a bad credit risk, period. Operators should be permitted to refuse to supply a given service to consumers who have defaulted on bills for other services, as there is no reason that a person unwilling or unable to pay for one service will be any more willing or able to pay for another service. The regulation as drafted will simply force operators to accept unacceptable levels of risk and bad debt, which will increase costs to all consumers. Regulation 13(5) is also fraught with risk for operators. While LIME can appreciate the policy of not requiring a customer to pay for services not received, the regulation as drafted will allow seasonal or periodic customers to disconnect service temporarily, even where voluntary suspension of such service is not permitted, simply by manipulating the disconnection-for-non-payment policies. Operators should not be required to bear the burden of customers coming on and off the network frequently, and the burden of managing the recurring bad debt, for these types of customers.

IX. Conclusion

33. LIME looks forward to ECTEL's and the Commissions' favourable consideration and acceptance of its positions as articulated. Regulation should be limited to only those circumstances where absolutely necessary, and even then only to the extent absolutely necessary, and LIME believes that the draft Regulations, rather than forbear from the market which is now over 8 years mature as a competitive environment, seems to be reversing the progress made for the benefit of all stakeholders especially customers. The draft Regulations should be developing *ex-post* regulation, instead of *ex-ante* regulation, which is increasing significantly.

END DOCUMENT