CABLE &WIRELESS

Response to

Adoption in ECTEL States of Regulations Addressing Guidelines for Market Analysis, Access to Network Infrastructure and Wholesale Services, Infrastructure Sharing, Submarine Cable Access, Retail Pricing and Consumer Protection Regulation (Specific Rules for Consumer Protection in the Electronic Communications Sector)

Consultation Document [N0.2 of 2016]

April 19, 2016

Contents

SECTION 1

INTRODUCTION

1.1. CWI Caribbean Limited ("C&W") welcomes the opportunity to respond to ECTEL's Consultation Document on: Recommendation of the Eastern Caribbean Telecommunications Authority ("ECTEL") To the National Telecommunications Regulatory Commission to consult on Adoption in ECTEL States of Regulations Addressing Guidelines for Market Analysis, Access to Network Infrastructure and Wholesale Services, Infrastructure Sharing, Submarine Cable Access, Retail Pricing and Consumer Protection Regulation (Specific Rules for Consumer Protection in the Electronic Communications Sector) Consultation Document [N0.2 of 2016] For Implementation with the Electronic Communications Bill published February 1, 2016 ("the Consultation Documents").

1.2. This response is made on behalf of Cable & Wireless (St. Lucia) Limited to the National Telecommunications Regulatory Commission of St. Lucia; Cable & Wireless St. Kitts and Nevis Limited to the National Telecommunications Regulatory Commission of St. Kitts and Nevis; Cable & Wireless Grenada Limited to the National Telecommunications Regulatory Commission of Grenada; Cable & Wireless Dominica Limited to the National Telecommunications Regulatory Commission of Dominica; and Cable & Wireless St. Vincent and the Grenadines Limited to the National Regulatory Commission of St. Vincent and the Grenadines

1.3 Cable & Wireless will also be denoted as 'C&W'.

1.4 C&W expressly states that failure to address any issue raised in the Consultation Documents does not necessarily signify its agreement in whole or in part with any position taken on the matter by the NTRC or respondents. C&W reserves the right to comment on

any issue raised in the Consultation Document at a later date. The responses contained herein are preliminary and subject to change as better information becomes available.

1.5 All responses to this document should be sent to Ms. Geraldine Pitt at geraldine.pitt@lime.com and Melesia Sutherland at melesia.campbell@cwc.com.

SECTION 2

OVERVIEW OF C&W'S RESPONSE & RESPONSE TO ECTEL'S GENERAL QUESTIONS ON CONSULTATION

C&W's Overview

2.1 ECTEL presents the proposed draft Regulations and Guidelines set forth in Consultation Documents as necessary, appropriate and consistent with ECTEL's function as a regional regulator, to promote open entry, market liberalization and competition in telecommunications in ECTEL states. ECTEL further indicates that the legal predicate for these draft Regulations and Guidelines is the Revised Draft Electronic Communication Bill ("the Draft Bill") which is not yet enacted.

2.2 C&W support efforts to renew the legal framework and associated regulatory instruments to allow for the continued development of a robust competitive environment. However, we respectfully disagree that the expansive set of restrictions and controls proposed in the Consultation Documents will facilitate this objective. We believe that the broad scope of the proposed draft Regulations is overly intrusive and will lead to unintended consequences that impede competition and harm consumers.

2.3 In responding to the consultation on the Draft Bill, C&W commented on deficiencies such as (1) the imbalance of licensee rights versus obligations, (2) the tendency towards over-regulation - the prescriptive nature of the Bill, and unnecessary, burdensome and arbitrary rules. Unsurprisingly, these draft Regulations and Guidelines follow a similar pattern. Our additional concerns with the draft Regulations and Guidelines include the following:

i. Inaccurate and or imprecise definitions of key concepts leading to unfocused regulations that could precipitate unintended market consequences

ii. Inconsistent and confusing drafting

iii. Evidence based analysis supplanted by regulatory discretion as the basis for economic regulations.

iv. Use of incorrect policy prescription e.g. seeking to use access regulations to address affordability issues

2.4 With respect to imbalance of licensee rights and obligations for example, Section 2 on New Regulations speaks to the intention of the new regulations to provide ECTEL and the NTRCs with *"…a toolkit or set of potential obligations from which they may select to impose on licensees in order to remedy market failures…"* This approach highlights a serious flaw in ECTEL's approach to regulation, which assumes that regulations operate in a vacuum, without reference to the market context, and without a specific need to focus on identifying and rectifying market failure. This demonstrates a lack of awareness of how these regulatory interventions will impact the market outcome.

2.5 In addressing the background to the developments of these regulations, in paragraph 1.2, ECTEL makes reference to the fact that substantial investment is required to deploy the high capacity fiber networks needed to support the provision of an array of new services. It goes on to observe that the number of providers in these markets remain limited. However, we note that, if the desired competitive outcome is additional network investments, which is required to support the provision of new services, then achieving this goal will be elusive as the policy prescriptions outlined in the various sections do not support increased investments in networks.

2.6 Examples of differing policy approaches and outcomes from more mature markets, such as the EU and USA, are instructive. [1]A June 2014 study published by Centre for Technology Innovation and Competition, found that the disparities between broadband

[1] https://www.law.upenn.edu/live/files/3352

network expansion in the USA vs. Europe are attributed to the different regulatory approaches. Europe has relied on the principle of broadband as a public utility and a focus on service-based competition (which is essentially the approach ECTEL is advocating). The US has focused instead on promoting facilities-based competition in which new entrants are encouraged to construct their own infrastructure. The conclusion from the study is that the US approach has proven more effective in promoting next generation network coverage. While C&W is not advocating that ECTEL adopt wholesale any single approach from another jurisdiction, the study certainly underscores the need to adopt policy prescriptions in line with market context and expected outcomes.

2.7 In this regard *Annex B – Regulations on Access to Network Infrastructure and Wholesale Services* is an example of a policy prescription or regulatory intervention that does not create a balanced framework necessary to incentivize continued investment in network infrastructure in the next generation network environment.

2.8 In an industry that is dynamic and continually changing, international best practice dictates that to achieve the goal of market efficiency and robust and sustainable competition, concepts and principles that underpin policy, enabling legislation and regulations should be balanced in the treatment of various stakeholders' interests.

2.9 Our response to the different Annexes provide specific comments to explain and expand upon the overarching commentary provided in this section. In addition to addressing the substantive issues of this consultation we are compelled to address the issue of the short time allowed for this process. The consultation is quite extensive, as it covers six (6) areas encompassing significant policy implications for the telecommunications industry. Furthermore, the subject matter pertains to complex issues in a range of different areas, including technology, economics and finance.

2.10 We do not believe it is reasonable to tackle six critical regulatory issues as part of a single process without providing sufficient time. Even with the four (4) weeks extension ECTEL allowed in response to the request of the industry, the time to respond to the consultation is woefully inadequate.

2.11 From our extensive experience in the sector, across various markets, this is an overly ambitious objective at best. We do not believe that the time allowed for this consultation process is reasonable or sufficient to address the range and the gravity of the policy issues that are under consideration. Decisions that flow from this process will be critical to and have a long-standing impact on the development of the sector and by extension the economic development of the ECTEL countries. We urge ECTEL to allow stakeholders reasonable time to provide considered input to the process. This will allow the best opportunity to put in place a framework that is fit for purpose.

ECTEL's General Questions and C&W's Responses

1.*Having reviewed the draft Regulations, what are your overall views concerning set of regulatory obligations that may be imposed on operators under certain conditions (for example, but not limited to, after determination that an operator has SMP)? What do you see as the main advantages and benefits? What are your key concerns or misgivings?*

Answer

1.1 These Regulations represent a retrogressive change to the current regulatory regime in the ECTEL states. They are in some cases impractical due to the high level of technical oversight and responsibility they will demand from the NTRCs. NTRCs are not adequately staffed and ECTEL is not sufficiently resourced to ensure that these new powers will be exercised in a responsible and judicious manner. They will raise the cost of regulation significantly, and place extreme stress on the currently limited financial resources of the regulatory system. This will have a knock on effect which will lead to a demand for increased taxes and regulatory fees from operators to subsidize or fund this highly

increased level of regulation, reducing in turn the monies available to operators for investment in services and networks.

1.2 The Regulations will be extremely difficult for ECTEL to implement in a systematic way and to ensure a uniform or "harmonized" approach is adopted by NTRCs in all ECTEL states. ECTEL is creating new and excessive powers for the NTRCs with these new Regulations. The NTRCs will and can exercise their discretion independently of ECTEL and this significant expansion of regulations encourage decisions that are arbitrary, unharmonized and ultimately harmful to the market. The new regulations will discourage innovation and investment by making the ECTEL markets unattractive for new and existing market players.

1.3 The regulations represent a significant escalation of regulatory intervention and oversight, which we believe is harmful and unnecessary. While the proposed draft Regulations are said to be in response to the draft Electronic Communications Bill, they are a misguided, over-reaction to recent developments, such as the consolidation of Columbus Communications and Cable & Wireless, and recent attempts by some operators to control access to their networks by certain unlicensed OTT services. This over-reaction will upset the delicate balance the ECTEL system achieved at liberalization—that of promoting competition and investment while balancing the public and consumer interest—and thereby roll-back the significant progress made over this 17-year period. The magnitude of new restrictions and controls set forth in the draft Regulations and Guuidelines are unprecedented, and we are concerned that ECTEL has insufficiently articulated the reason or justification for this unwarranted and alarming escalation of regulatory powers. The philosophy of the draft Bill appears to be to "regulate everything" and the Regulations reflect this approach.

1.4 In sum, ECTEL is attempting to create an over-regulated telecommunications and ICT marketplace. It does not possess the technical, financial or human resources necessary to

effectively exercise the expanded oversight it is arrogating to itself and the NTRCs; it has insufficiently explained the market failures or bottlenecks which it perceives compel this legislative and regulatory overhaul; and it is creating a dangerously unstable regulatory environment which will be difficult to harmonize and manage, as NTRCs gain new and wide ranging authority they are at present ill-equipped to discharge.

2. *Having reviewed the draft Regulations, do you feel that the regulations properly and completely reflect the intentions of the Act (including both the current Act and the anticipated EC Bill)?*

Answer:

2.1 The Regulations are not inconsistent with the new philosophy of the Electronic Communications Bill, which is to increase levels of regulation and regulate in more areas than before. However, the significant expansion of proposed regulatory intervention will undermine the development and effectiveness of competition and ultimately discourage progress and innovation, as it creates a hostile environment for investment. We do not believe that the new proposed Regulations achieve a healthy balance between certain immediate consumer protections and long-term incentives to invest in infrastructure and promote market entry.

3. *Having reviewed the draft Regulations, do you consider any of the clauses redundant or conflicting? If yes, please provide examples and possible resolutions or suggestions.*

Answer:

3.1 Much work is needed to improve the drafting of the current regulations. This is quite separate from the fact that the Regulations are also overly broad in scope, substantively misguided and dangerous, and represent a fundamental change in the telecoms policy that has guided the development of the telecoms markets in ECTEL states for the last 17 years.

4. *Are there any other key provisions, which in your opinion should be included in the Regulations? If yes, please provide examples and possible provisions*

Answer:

4.1 The process of market liberalisation is to supplant regulation with market forces as competition develops. The extremely broad scope of the current proposals is contrary to the liberalisation process and is a radical departure from the existing regulatory ethos that have characterized the ECTEL states for the last decade and a half. If liberalisation is to succeed, then regulatory consistency and restraint are required, and unfortunately the proposed Regulations fail in both regards.

5. *What alternative suggestions if any do you have for addressing issues of competitive growth, fairness, and consumer protection?*

Answer:

5.1 The substantive rules of the current Telecommunications Acts achieve a fair balance between providing certainty for investors and creating a level playing field for competition. These rules have worked well and served the ECTEL region relatively well.

5.2 What is required are rules to promote greater efficiency and accountability of NTRCs and ECTEL, and to improve levels of transparency and reporting from both ECTEL and the NTRCs. Unfortunately the system proposed by ECTEL would promote bureaucracy, delay, inefficiency and a lack of accountability for decision making. The telecoms landscape is changing rapidly and ECTEL and the NTRCs lack speed in decision-making. There is insufficient transparency in how the funds provided by industry are utilized by ECTEL and the NTRCs, and neither institution provides any insight, transparency or consultation on their work-plans or corporate objectives and priorities. Since the regulatory system is funded by industry, this is unfair and not in keeping with best practice.

5.3 More importantly, increased regulation does not equal better or more competitive markets and in fact, increased regulation often discourages market entry. Unfortunately, rather than focusing on solving the institutional inefficiencies inherent in the ECTEL system, these proposed Regulations are creating a potentially dangerous regulatory landscape in which NTRCs will have hugely increased powers and responsibilities and the scope of regulation will escalate significantly. Yet there is no mechanism to ensure consistency in decision-making across the region and no means to ensure that NTRCs support and follow the guidelines of ECTEL, or that ECTEL is adequately responding to the local concerns and challenges of the NTRCs. This continues to be a problem, since while the Regulations attempt to take a "kitchen sink" approach to regulation, it does not promote clarity or certainty about the responsibilities or obligations of the regulators, all of which rely on the same pool of spectrum funds for their budgeting and operations. There can be no real accountability in such circumstances.

SECTION 3

ANNEX A - REGULATION ON "GUIDELINES ON MARKET ANALYSIS AND THE ASSESSMENT OF SIGNIFICANT MARKET POWER IN THE EASTERN CARIBBEAN TELECOMMUNICATIONS AUTHORITY (ECTEL) CONTRACTING STATES FOR ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES"

C&W comments on Market Analysis Guidelines

3.1 There are aspects of the Market Analysis Guidelines ("**Guidelines**") that provide a good foundation for evaluating market dominance or significant market power ("**SMP**"). Firstly, the Guidelines are founded on three cumulative criteria that we believe provide an appropriate starting point for investigating SMP. The cumulative nature of these criteria, and singling out of entry barriers as a separate criterion, rightly focus the analysis on entry barriers and de-emphasize market share as an effective means of identifying SMP.

3.2 Secondly, criteria for defining a relevant market appear to be correctly specified. In particular, the Guidelines accurately acknowledge that services need not be identical or equivalent to act as substitutes for one another, they need only be "sufficiently interchangeable."

Thirdly, with regard to market share there is acknowledgement that high market share alone "is insufficient to establish the possession of SMP," while a firm without a high market share "is unlikely [to] be in a dominant position in that market."

3.3 Fourthly, the Guidelines focus on the concept of a forward-looking approach and emphasize that any market power assessment must apply a forward-looking approach, which the Guidelines specify as a three-year period.

3.4 Unfortunately, there are also important aspects of the Guidelines that are not identified, poorly described and internally inconsistent. Firstly, as we explain in these comments, there are several instances where terminology is undefined or poorly defined. An important

example of this is with regard to the guidance offered on entry barriers. There is no discussion of what constitutes a barrier to entry, other than a recitation of terms, and these terms are not applied consistently across the Guidelines.

3.5 Secondly, while the Guidelines use the term "sufficiently interchangeable" to define a relevant market, this is subsequently ignored when describing the Hypothetical Monopolist Test, which applies a different threshold, that of equivalency. This latter guidance is not only inconsistent with the former, but is wrong. The concept of economic substitutability does not require services to be equivalent or of the same quality in order to be economic substitutes.

3.6 Thirdly, a similar inconsistency applies to guidance on applying a forward-looking approach. The Guidelines are initially clear, stating that all analyses are to be forward-looking, which "must be understood in the context of a time period of about three years." When evaluating the criteria for a SSNIP test, however, the Guidelines apply a forward-looking period of "a short time frame (e.g. 6-12 months)." This latter guidance is not only inconsistent with the former, but is wrong. Given that *ex-ante* regulations are to be applied over a future period, specified to approximate three years, the analysis used to justify these regulations must also consider this same time period.

3.7 Fourthly, and finally, the Guidelines offer muddled guidance on the use of market share. Indicating initially (correctly, in our view) that high market share alone "is insufficient to establish the possession of SMP," the Guidelines go on to conclude that high market share is determinative of dominance, "save in exceptional circumstances." This latter guidance is not only inconsistent with the former, but is wrong. In economics a low market share (if properly estimated) indicates a lack of market power and lack of necessity for further analysis; but a high market share by itself does not necessarily indicate the presence of market power. Rather, it indicates the need for a more nuanced assessment of the market and, in particular, an assessment of barriers to entry.

ECTEL Questions relating to Market Analysis Guidelines and C&W's Responses

1.*What is your view of the three cumulative criteria to be used to identify markets likely to be subject to ex ante regulation? These criteria are based on the EU framework for regulation of the electronic communications sector*.

Answer:

1.1 These criteria are identified in Sections 3(5) and 12(2) of the Guidelines, and are specified as follows:

> *(i) the existence of high and persistent barriers to entry;*
> *(ii) the absence of market developments toward a competitive dynamic; [and]*
> *(iii) the insufficiency of competition law alone to address these market failures.*

1.2 The Guidelines state that these criteria are cumulative, which means that all three criteria must be found applicable in the defined market in order for *ex ante* regulation to be considered a likely remedy. We believe these criteria provide an appropriate foundation to developing an analysis of market dominance or SMP. We agree with the Guidelines' emphasis on criterion (i) entry barriers. As a general matter, when entry barriers are low, markets are often thought to be effectively competitive even if there is little observable competitive activity. Markets can be highly competitive, however, even if entry barriers are substantial, which is why an examination of entry barriers alone is not generally dispositive and an evaluation of market conduct and performance must also be made.

1.3 Our critique of these criteria below pertains only to how they are applied in the Guidelines and is directed to criterion (i) entry barriers and criterion (ii) market dynamics.

Criterion (i) barriers to entry

Entry barriers are discussed in three separate instances in the Guidelines: Sections 3(3), 12(3), and 14(6). Our concern with these discussions is that there is no explanation in the Guidelines of what market characteristics are indicative of entry barriers, other than reference to a set of terms. What is more problematic, however, is that these terms are different and/or inconsistent across the three Sections, and not defined.

1.4 In the table below, we present the terms used to identify market entry barriers in each Section.

Regulation 3(3)	**Regulation 12(3)**	**Regulation 14(6)**
• positive externalities (club effects, for example)	• network externalities	• network effects
• significant investment costs	• access to financial resources	•
•	• sunk costs	• sunk fixed costs
• essential facilities	•	• limited access to essential inputs
	• economies of scale and scope	• economies of scale and scope
• regulatory barriers… [that] result from legal or regulatory limitations	•	• sector regulation
•	• vertical integration	• vertical restrictions of competition
•	• technological advantages	•
•	• diversity of services	•
•	•	• reputation

1.5 As one can see from this table, there are several inconsistencies in terminology and, without any discussion of what the terms mean, this can lead to confusion. One example is the use of three different terms—positive externality, network externality and network effect—to describe what we believe is a single phenomenon; namely, demand-side economies of scale. This is speculative, however, since there is only a single descriptor provided for one term, in parentheses, and no description for the other two terms. The parenthetical description—club effects—is likewise undefined in the Guidelines, so it too

does not offer clear guidance. Moreover, it is worth noting that all telecoms services produce a network effect of varying degree, so identifying this effect as an indicator of an entry barrier, without any further description, is effectively meaningless.

1.6 Another example is the inclusion of sunk costs and sunk fixed costs as indicators of an entry barrier. The word sunk is not defined and it is unclear why the latter term references fixed costs, which we interpret to be costs that do not vary over some range of output. A fixed up-front investment, however, is not considered an entry barrier, so long as that investment can be sold off if the investor decides to exit the market. For example, someone getting into the airline business has a large up-front investment to make in the form of obtaining an airplane. Nevertheless, to the extent that the airplane can be resold in a reasonably efficient secondary market, its cost, though expensive to the entrant, would not normally be considered an entry barrier.

1.7 A third example is the use of essential input and essential facility. However, what is an *essential* input or facility, and are we to assume the words input and facility are interchangeable?

1.8 These three examples highlight our concern with the lack of precision or sufficient guidance in the Guidelines. Given that entry barriers are fundamental to assessing market power, we believe more information should be provided to clarify the terminology used to characterize entry barriers.

1.9 Criterion (ii) market conduct and performance

Criterion (ii) speaks to market conduct and performance, and is described in Section 12(4) as follows:

> *The competitive dynamic in the market is measured through the evolution of the market shares of operators in the market, pricing behavior, diversity of offers and potential competition and other factors considered relevant by the Commission.*

1.10 Changes to market shares, pricing activity and the diversity of offers are important indicators of competitive activity, but there are other significant indicators that are equally important. One indicator is the impact of technology and technological change. Technology has had a profound impact on the nature and extent of telecommunications competition by, among other things, reducing entry barriers. Services provided over a number of new technologies or alternative technologies are increasing competitive pressure on traditional wireline services. In some instances, entities that would have been considered non-traditional service providers a few years ago are now offering customers packages of new services that are directly competitive with traditional fixed-line services.

1.11 Another consequence of technological development is how it changes and reduces the "specificity" of the capital investment in communications facilities and thereby further diminishes sunk costs as a barrier to entry. For example, investment in cable television facilities now can be expected to generate a return not only from providing pay television services, but also from telephony and high-speed Internet. Investment in traditional mobile voice and text telephony are now used to generate significant revenues from high-speed data and Internet access. To the extent the Guidelines can acknowledge and adopt an explicitly technologically neutral posture, this will provide greater guidance, encourage investment in alternative infrastructure where it is efficient, and further the development of intermodal competition.

1.12 Also, similar to our critique of criterion (i), the utility of these indicators can be significantly improved with a description of why and how market share, prices and product diversity are relevant in this context.

2. *The Guidelines also describe factors that the ECTEL and NTRCs should consider in defining relevant markets, including substitutability of supply and demand. What is your view on this method, and do you have any suggestions as to how the description in the Guidelines can be strengthened?*

Answer:

2.1 The criteria for defining a relevant market are set forth in Sections 8-10. We believe these criteria are well specified, with a few significant exceptions. With regard to demand substitution, the Guidelines accurately acknowledge that services need not be identical or equivalent to act as substitutes for one another, they need only be "sufficiently interchangeable." For instance, Section 9(1) reads:

> *Both products and services belong to the same market if they are sufficiently interchangeable by their users, especially in terms of the use made of the products and services, their characteristics, their pricing, their distribution conditions, mobility provided, and costs of "migration" from one product to another.*

2.2 This guidance, however, is subsequently ignored in the discussion of the Hypothetical Monopolist Test, in Section 10. In particular, a more narrow and restrictive test is specified in Section 10(2)(b), which indicates that consideration be given only to other firms offering "a product or a service equivalent to the products or services offered by the hypothetical monopolist." This is wrong and contradicts the substitution criteria set forth in Section 9(1). As acknowledged in Section 9(1), the concept of economic substitutability does not require services or products to be identical, functionally equivalent, or even of equal quality, in order to be substitutes and assert competitive pressure on each other.

2.3 It is not even necessary for *all* customers to view two services as sufficiently interchangeable for the services to be in the same relevant product market or to provide effective competition. All that is necessary is that a sufficient number of customers, over time, would be willing to switch between the services so that the producers potentially exert competitive pressure on one another. For example, it is not necessary for every consumer to have a wireless telephone, let alone to cease using wireline service, for wireless to be an effective substitute for wireline service in the market. While some customers may not consider wireless to be a good substitute or may never consider using wireless service, all that is necessary is that enough customers view them a substitutes to exert pricing discipline overall. One of the powerful virtues of competition is that when

one service exerts competitive pressure on another, all consumers benefit, even those who would never consider switching.

2.4 Another fundamental criterion specified in the Guidelines is the concept of a forward-looking approach. The Guidelines emphasize that any market power assessment must apply a forward-looking approach, given the primary objective is to ascertain whether *ex ante* regulation, applied over some future period, is appropriate and necessary.

2.5 The forward-looking approach is described in Section 3(9) as follows:

> *The Commission shall determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable by taking into account expected or foreseeable market developments over the course of a reasonable period. Such a reasonable period shall be for at least three years*

2.6 This approach is again emphasized in Section 8(2) in the context of defining the relevant market:

> *With regard to the forward looking approach referenced in subsection (9) of section 3, the goal of determination of relevant markets is to establish a multi-year regulatory framework. Therefore, all the issues and methods described below must be understood in the context of a time period of about three years.*

2.7 When evaluating the criteria for a SSNIP test below in Section 10(2)(b), however, the Guidelines specify a potential competitor as one who can enter the market "in a short time frame (e.g. 6-12 months)," which is contradictory to the forward-looking approach set forth previously in Section 8. The forward-looking time frame to be used to identify potential competition that is consistent with the instruction in Section 8(2) is three years, not 6-12 months.

2.8 Finally, the term "relevant market" is referenced throughout the Guidelines (by our count, appearing in 35 separate instances). We believe, therefore, it is important that this

term is understood and used consistently in the Guidelines. Unfortunately, there are two separate and contradictory definitions: in Sections 3 and 7.

Section 3(6) states:

> *A relevant market is a market that the Commission considers to be non-competitive on the basis of the above three criteria [entry barriers, absence of a competitive dynamic, and inadequacy of competition law]*.

Whereas, Section 7(2) states:

> *The use of the term 'relevant market' implies the description of the products or services that make up the market and the assessment of the geographical scope of that market.*

2.9 We believe the statement in Section 3 is misstated and if corrected, as follows, the contradiction is resolved:

> *A relevant market* ***for purposes of applying ex ante regulation*** *is a market that the Commission considers to be non-competitive on the basis of the above three criteria [entry barriers, absence of a competitive dynamic, and inadequacy of competition law]*.

3. *What is your view of the criteria listed for assessment of SMP?*

Answer:

3.1 Criteria for assessing SMP are set forth in Section 14 of the Guidelines. The discussion, however, focuses almost exclusively on a single criterion—market share. This is unfortunate because while market share is a component to assessing market power, under almost no circumstances is it alone determinative of market power.

3.2 Even more troubling, however, is Section 14's confused and inaccurate treatment of market share in identifying SMP. The discussion starts out generally in the right direction, by indicating in Section 14(2) that:

> *Although a high market share alone is insufficient to establish the possession of SMP, it is unlikely that a firm without a significant share of a relevant market would be in a dominant position in that market. Thus, Licensees with market shares of no more than 25 % are unlikely to enjoy a (single) dominant position in the market concerned, while single dominance concerns normally arise in the case of firms with market shares of over 40 %.*

3.3 What this indicates, in so many words, is that a low market share indicates a low risk of market power and is generally sufficient to reject a finding of SMP. In contrast, a high market share, while necessary to demonstrating market power, indicates only a higher risk of SMP and is therefore not sufficient to demonstrate SMP. If a company has a small market share, the market conditions are generally thought to be so hostile to market power that no further analysis is necessary. A large market share does not imply that a company necessarily has SMP or that there are barriers to entry, however. If a company has a relatively large market share in a market with relatively few providers, it is the greater *possibility* that the company has SMP that calls for the additional step of assessing barriers to entry and expansion. If barriers to entry and expansion by potential competitors are ultimately found to be low, then a company cannot exercise significant market power, even if it has a large market share.

3.4 The subsequent discussion in Section 14 is where the confusion begins, and contradicts the guidance in 14(2). In Sections 14(3) it states that, "according to the best international practices," high market share is determinative of a dominant position, "save in exceptional circumstances"; and in Section 14(5) it states that low market share is indeterminate of a dominate position and require "a systematic and rigorous assessment" in order to reject SMP. Finally, in subparts (a) and (b) to Section 14(5), it appears to revert to the earlier interpretation in 14(2) by noting that:

> *a) a high market share does not necessarily reflect dominance if the barriers to entry are low;*
> *b) a meaningful market share may also reflect the effectiveness of a given Licensee in innovation or quality of service.*

3.5 We note that in the economics literature, the approaches described in Sections 14(3) and (5) are *not* consistent with best practice. As a general rule, in economics a low market share (if properly estimated) indicates a lack of market power and lack of necessity for further analysis; but a high market share by itself does not necessarily indicate the presence of market power. Rather, it indicates the need for a more nuanced assessment of the market and, in particular, an assessment of barriers to entry.

3.6 While market share information has its place in competition analysis, it can be both misleading and unreliable, particularly in a market with a regulated history. Market share data can mask the true competitive situation for several reasons. The first and most fundamental reason that market shares can be a misleading measure of competition is that they compose a static picture of the market that does not reflect the presence or absence of entry barriers. Economists and antitrust agencies recognize that barriers to entry are critical to determining the ability of any firm in a market to exercise market power, and in fact the U.S. Department of Justice's *Merger Guidelines* devote an entire section to entry analysis.[2] If there are no significant barriers to entry, then market share is essentially irrelevant; no firm, no matter how large its market share, could exert significant market power for any length of time. Ease of entry, therefore, trumps market share.[3]

3.7 Second, market share is a particularly inappropriate measure of competition in a market that was previously a regulated monopoly environment, because an incumbent's market share tends to understate the degree of competition during a transition to competition, and tends to underestimate a competitor's future competitive significance. A market that was a protected monopoly may well be much more concentrated than an equally competitive

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2 See, US Department of Justice, *Merger Guidelines*, §9.0. Moreover, the Guidelines are suffused with considerations of supply responses and entry analysis in defining markets and in interpreting competitive indicators such as market share.

3 See, for example, Daniel F. Spulber, "Competition Policy in Telecommunications," in *Handbook of Telecommunications Economics, Volume 1, Structure, Regulation and Competition* (2002).

market without a regulated history. Market shares are "path-dependent;" i.e., they depend upon past market shares, even if the market is now highly competitive. An incumbent that prices competitively need not lose customers to competitors; if the incumbent's prices reflect the competitive threat, there is no incentive for existing customers to move. Customers nonetheless receive the benefits of competition even if the incumbent's market share does not change significantly.

3.8 When a firm's market share reflects its regulatory legacy, it is often more informative to look at the trend or change in market share over time than to look at the level of market share. Even this conclusion has exceptions, however, because, again, market share cannot capture the market characteristics that directly determine its competitiveness—namely, entry conditions.

3.9 Finally, market share measurements are often difficult to make because they require knowledge not just of one firm's quantity of output (revenue or capacity), but require knowledge of the quantity of output of all the other firms in the market as well. Typically, in any market, no one firm will know the outputs of its competitors. In order to provide an estimated market share, one must, therefore, attempt to estimate the services provided by each operator over their own facilities, a procedure which itself is subject to controversy.

3.10 For all of these reasons, we believe that market share, properly measured, may have a role in assessing market power, but it is a limited role and only a starting point to the investigation. If market share is to be used as a screen for SMP, however, then consistent with best economic practice, it should only be applied to reject a finding of SMP when market share is small.

4. *The Market Analysis Guidelines recognize that a Licensee may enjoy significant market power either individually or jointly with others. What is your opinion regarding the approach stated in the Market Analysis Regulations to assess the potential existence of collective dominance by more than one operator and the impact this may have on the market? (section 3.4)*

Answer:

4.1 Section 16 of the Guidelines speaks to issues regarding collective dominance. We have a single comment, at this time. Section 16(2) indicates that "[c]ollective dominance is likely to occur in oligopolistic markets characterized by a lack of effective competition and in which no single Licensee has significant market power." To the contrary, the empirical evidence indicates that the ability of firms to coordinate their actions and maintain coordination over time is extremely difficult, and rarely successful, even in concentrated markets. Therefore, given that collusion is extremely rare and unlikely, even in oligopolistic markets that appear to lack effective competition, a more accurate statement with regard to Section 16(2) might read as follow:

> *Collective dominance is **more** likely to occur in oligopolistic markets characterized by a lack of effective competition and in which no single Licensee has significant market power.*

5. *What are your views concerning the provisions authorizing the NTRCs or the ECTEL to collect all information they consider necessary to assess market power in a given market? (section 5)*

Answer:

5.1 We have no comments on or objections to these provisions at this time.

6. *What alternative suggestions if any do you have?*

Answer:

6.1 We have no further alternative suggestions on the Guidelines at this time, other those already articulated above in response to Questions #1-5.

SECTION 4

ANNEX B - REGULATIONS ON ACCESS TO NETWORK INFRASTRUCTURE AND WHOLESALE SERVICES

C&W's Comments on Access to Network Infrastructure and Wholesale Services

4.1 Enactment of the proposed regulations would be a retrograde move from current regulations, which apply to all operators. The fundamental purpose of "sharing" regulations is the efficient and harmonized use of infrastructure in a country. All network operators have infrastructure, so public policy is far better served by applying the regulations to all operators. Accordingly access to network infrastructure should be properly treated under Infrastructure Sharing Regulations at Annex C. Moreover since all network operators have infrastructure, SMP cannot be the tool to use to facilitate sharing since other network operators can have the same or similar facilities as an SMP provider. Clearly the sharing of infrastructure must be governed by broader, more universal principles.

4.2 Since ECTEL already has Wholesale and Access regulations in its toolkit it begs the question as to why ECTEL would be proposing these regulations, especially in view of the threat of adverse consequences for the ECTEL countries. In particular, these regulations are likely to have a chilling effect on investment in new technologies and facilities. New entrants will be asking themselves the question of why they ought to invest in building new networks in ECTEL countries when they could let an incumbent take the financial risk and buy access to that incumbent's network at potentially confiscatory rates that do not reflect the financial risk assumed by the incumbent.

4.3 Incumbents, conversely, will be asking themselves why they should build new or upgraded networks when the benefits but not the risks of those new networks will be taken from them or, if they do decide to build or upgrade, whether it is not advisable to wait until after new entrants have built (thereby reducing the risk the new entrants will seek to take

from them) or to build only to meet their own immediate demand even if it would have been more efficient and cost-effective and better for the country as a whole, to build for future demand as well.

4.4 In C&W's view, ECTEL should in fact be asking the following threshold questions:

i. Why are these new regulations necessary, given that ECTEL already has Wholesale and Access regulations in its toolkit?

ii. What will be the impact on operators' investment decisions, consumer welfare and the long-term development of telecommunications services and networks, if these regulations are introduced?

iii. Are the regulations consistent with the objects of the Telecommunications Act, in particular "open entry, market liberalization and competition in telecommunications" and "introduction of advanced telecommunications technologies and advanced services"?

iv. Why should the requirement to "share" services and facilities be limited to SMP operators?

4.5 It is only after ECTEL has determined these questions that ECTEL should be asking itself whether to regulate and then what to regulate. By jumping straight to the "what" questions asked in this section, ECTEL is missing the most important part of the analytical exercise that it should be undertaking, and prejudging all of these other matters without considering any evidence or analysis.

4.6 In our view, the new regulations are not necessary.

ECTEL Questions relating to Wholesale Access Regulations and C&W's Responses

1.*The Wholesale Access Regulations identify the following Wholesale Network Infrastructure and Services, the provision of which may be imposed on a SMP Licensee. under ex ante regulation*

a. Wholesale Access provided at a fixed location;
b. Passive Backhaul Infrastructure;
c. Special Wholesale Service
d. Dedicated Connections and Capacity (wholesale leased lines)

What is your view of the type of infrastructure and services subject to potential access obligations noted in the draft regulation? In your view, are there any other components of infrastructure and/or services that should also be subject to wholesale access obligations where SMP is found?

Answer:

1.1 See paragraph 4.4 of Section 4 immediately above. Moreover, for reasons to be discussed in greater detail below, it is a significant disincentive to mandate that operators provide a) Wholesale Access provided at a fixed location; b) Passive Backhaul Infrastructure; c) Special Wholesale Service and d) Dedicated Connections and Capacity (wholesale leased lines) to a competing Licensee. Such rules will lead to operators shelving many of its investment decisions to maintain existing infrastructure, as well as build out new infrastructure.

2.*The main goal of this regulation is to provide that Licensees can obtain effective access to the infrastructure and services specified, where such obligations are imposed on a SMP Licensee. In your view, will the regulation provide sufficient clear and concrete obligations to make effective such access?*

2.1 Additional work is needed to tighten the drafting of the proposed regulations to prevent confusion on how to interpret them and possibly legal challenges. For example, the same abbreviation is often used to refer to several different terms, some industry jargon used in the regulations is not defined, and in at least one instance the provisions include a material determination of fact even though ECTEL has conducted no analysis or consultation on the matter.

(a)*With regard to Wholesale Access provided at fixed location*
i. *what is your view of the relevance of imposing VULA instead of or in addition to traditional LLU, taking into account the evolution of networks toward NGA architecture?*

Answer:

2.2 These proposals if adopted will hurt competition in the ECTEL Member States. Such an approach may introduce a facade of competition, which would ultimately be unsustainable and ineffective. The imposition of VULA, LLU, or access to ancillary

infrastructure (including dark fiber) will facilitate an entity to enter the market and without making a strong investment commitment within the ECTEL Member States, enable it to roll out a pan-regional network "on the backs" of other providers. However, such an entity would be a mere margin gatherer. Having made no real capital investment in the region, it would be able to exit the market as quickly as it entered to the detriment of consumers. It would under-cut the companies that made the real investment and provide little investment to continue to build out their networks. This would be a likely but absurd outcome.

2.3 The primary objective of public policy ought to be to encourage new investment in the ECTEL countries. Competition, and benefits to consumers in the form of new services and better value will flow from that investment, as operators will seek to make a return on their investment. Unfortunately, as noted earlier, the proposed regulations will discourage new investment or, at best, result in a delay in investment. The net result is likely to be a delay in the evolution of networks in the ECTEL countries towards Next Generation Access (NGA) architecture. We fail to see how it is in the public interest for our countries to be left behind the rest of the world because of a poorly conceived regulatory framework. In our view, it is not in public interest to impose on SMP operators mandated LLU or VULA requirements.

ii. *The draft regulations provide that, the NTRCs on ECTEL Recommendation may mandate access to ancillary infrastructure (for example, dark fibre or ducts) in order to promote effective competition. Do you think this provision is useful? Insufficient? Do you have any suggestions to clarify these obligations?*

Answer:

2.4 No operator in the ECTEL states should be required to make available its dark fiber to other licensees. Any entity that wishes to participate in the Retail Market should be required to invest in fiber to facilitate its services. Only by taking such an approach will the EC Bill and the regulations ensure that the rules maintain the incentives for all operators to invest in fibre-based networks earlier rather than later.

2.5 As noted above, the goal of public policy should be to encourage investment in new facilities and the upgrade of existing facilities. An operator which is not willing to invest in fibre (in the absence of poorly conceived regulations which create a disincentive to investment) is likely not willing to invest in the country generally, and is really there only to make a quick profit off arbitrage and exit simply and easily in the future once the easy money is gone. While consumers might have benefited in the short term from lower prices, the country would be left with ageing infrastructure and the remaining operators would have insufficient margins to make the necessary investments. The requirement to provide access to dark fibre, therefore, will be counter-productive and harmful to the long term welfare of consumers and the country.

2.6 It is, however, more reasonable to mandate access to ducts, providing the prices are not confiscatory and reflect the risk assumed by the operator who invested in the infrastructure. While there is a strong public interest in encouraging new construction and investment (similar to the public interest in encouraging the deployment of fibre networks), there is a countervailing public interest in limiting the disruptions to the road system and public convenience while new ducts are being laid in the ground. On balance, therefore, mandated access to underground support structures is reasonable, providing the terms of that access are reasonable.

b. *The Wholesale Access Regulations provide that NTRCs may require an SMP Licensee to make available Special Wholesale Services (sometimes more commonly referred to as "White Label" services), provided at a discounted price from the retail prices at which the SMP Licensee offers such retail service. What is your view of this provision? Should the Regulations add further detail or specificity, for example as to how the price discount should be calculated?*

Answer:

2.7 Current wholesale regulation allows for provision of White Label services. These services are useful for new entrants who are not interested in investing in a country, and would prefer to make a quick profit through services-only competition. Consumers may

benefit in short run, but the ECTEL countries will be harmed in long run as network operators cancel or delay investment as their margins decline. This is clearly not in public interest.

2.8 We encourage ECTEL not to add more detail or complexity to the proposed regulations. Regulation has a cost, and ECTEL should seek to regulate only as a last resort and, where it regulates, limit that cost of regulation. The current position is to make that discount, which is approximately 20%, the subject of negotiation. The simplicity and effectiveness of this discount far outweighs the burden of having ECTEL or the NTRCs attempt to regulate the discount.

c*.With regard to access to Passive Infrastructure:*

i.*The draft regulations provide the option to impose access to Underground Facilities such as ducts and dark fiber, or any other passive infrastructure belonging to an SMP operator and needed by other Licensees to provide broadband services. What is your view on these obligations? Which elements of such passive infrastructure should be included in these mandates, and how should they be specified?*

Answer:

2.9 Please see response to question 2(a)(ii) above. Mandated access to ducts and other "support structures" can be reasonable, but all operators should be subject to same obligation, not just operators with SMP. An undue focus on SMP operators only does not encourage harmonized or efficient use of infrastructure, and can lead to competitive distortions in the market as new entrants secure exclusive rights to areas or infrastructure. Unlike with ducts and other support structures, no public policy is served by requiring access to dark fibre.

ii*.What is your view of the proposed measures to ensure compliance and prevent undue refusal of access requests by SMP Licensees Are the required justifications and technical details that SMP Licensees must provide in support of such refusal appropriate and sufficient?*

Answer:

2.10 ECTEL is asked to clarify this question. We are not quite understanding what is being asked.

iii.*More generally, do you have any suggestions to improve the effectiveness of the proposed access obligations to passive backhaul infrastructure?*

Answer:

2.11 ECTEL's question presupposes a need for the proposed access obligations. As noted earlier, we do not believe there is a need to change any regulations, and it appears ECTEL has prejudged the matter without a proper investigation or analysis. Our suggestion, therefore, is not to implement these proposed regulations.

d. *With regard to the provision of Dedicated Connections and Capacity (wholesale leased lines)*
ECTEL considers that this type of access obligation is required to ensure competitive market development and encourage new entrants to the market, by making available affordable wholesale transmission capacity. What is your view of these obligations? Are they appropriate and necessary to support effective new competition? Are the provisions sufficiently detailed and specific to achieve the intended goal?

Answer:

2.12 We disagree these obligations are necessary in the ECTEL countries. Internationally, each ECTEL country already has two separate submarine cable systems landing there. There is therefore competitive supply and no issue in obtaining international leased lines from existing subsea capacity providers. Domestically, ECTEL's objective ought to be to create a regulatory environment which encourages investment in network facilities, such that new entrants would be able to self-supply any leased lines they need. In any event, C&W has been offering wholesale leased lines for years, even in absence of these regulations and before promulgation of the current Wholesale Regulations. There is, therefore, clear evidence that these proposed regulations are not required.

3.*Do you have any other comments on the proposed Wholesale Access Regulations, for example, but not limited to:*

a*.The mandatory content of Reference Access Offer which SMP operators may be obliged to published (section 10 of the draft regulations);*

Answer:

3.1 Regulation has a cost, which is invariably passed on to consumers, whether via price reductions that do not occur or new investment which does not occur (because regulations make things too difficult or take away opportunities to make a return). The requirement to provide a RAO in the absence of any evidence for any demand for any of these wholesale service is one such cost, and is unreasonable. ECTEL's proposal would force an operator to create a full-fledged RAO covering a broad suite of services, when there is no evidence that any or all of these services are in fact required in the market. The exercise to create the RAO would, therefore, be a very poor use of time and resources. At most, the obligation to provide a RAO should be limited to those services for which demand is demonstrated and only after demand is demonstrated (i.e. provision of service negotiated).

b.*The other obligations that may be imposed on SMP operators such as non-discrimination, accounting separation obligations, tariff control;*

Answer:

3.12 Please see our earlier responses above. Each of these obligations add costs, and the benefit (let alone the need) has not been demonstrated.

c.*The mechanism of dispute resolution, in order to improve the effectiveness of this process.*

Answer:

The dispute resolution process is redundant. There are already Dispute Resolution regulations which apply, and including these dispute resolution provisions here will only lead to conflict and confusion.

SECTION 5

ANNEX C – INFRASTRUCTURE SHARING REGULATIONS

ECTEL Questions Relating to the Infrastructure Sharing Regulations and C&W's Responses

1. *What is your view of the necessity and the applicability of a regulation requiring sharing of electronic communications infrastructure, recognizing that these obligations apply to all Licensees, not only SMP Licensees?*

Answer:

1.1 It is not uncommon for obligations for sharing of certain passive infrastructure to be imposed on all licensees. To a certain extent, sharing of certain infrastructure, such as towers, poles and ducts, is a natural and reasonable obligation to impose on all licensees in a market. These obligations promote seamless communication between multiple networks, efficiency, reduced costs and discourage unnecessary duplication of certain infrastructure which it may be undesirable to duplicate for public policy, public health or other reasons.

1.2 In principle therefore, C&W supports limited access to passive infrastructure where the circumstances make this desirable. We believe that the ideal regulatory approach to this issue is to permit licensees to negotiate terms and conditions on a commercial basis, and that regulatory intervention should only be required as a last resort in circumstances where access to the infrastructure is required in the public interest but the parties cannot come to a reasonable agreement.

1.3 This said, imposing a wide or broad duty to provide access to all infrastructure is dangerous, unnecessary, and fundamentally anti-competition. It is dangerous both for technical and commercial reasons. A blanket obligation to share infrastructure exposes a market to free-loading market entrants whose primary purpose is to extract rents and value

from the market while making minimum or limited investments socially, economically and otherwise. Multiple infrastructure and infrastructure competition actually promotes resilience of communications, which is a major advantage in the ECTEL countries which are prone to hurricanes and other types of natural disasters.

1.4. Competitors who are serious about entering the market will want to make robust investments in infrastructure to give them a competitive advantage, and any rules on sharing should encourage that innovation and entrepreneurship.

1.5 Finally automatic infrastructure sharing results in under-investment in infrastructure and ultimately means that customers are served by overburdened, limited architecture which cannot meet their needs. Where there is competition in retail markets, there can also be robust competition for the roll-out and deployment of telecoms networks. Such competition ultimately leads to greater innovation, value and diversity of available technology for consumers.

1.6 For these reasons, the obligation on infrastructure sharing imposed on licensees at large should be limited to certain basic, passive infrastructure which, for public policy reasons, should be shared in order to achieve some clear and strategic objective with clear and unequivocal social value. For example, sharing telephone poles reduces the need for multiple poles which would be impractical to duplicate generally. However, automatic infrastructure sharing obligations should not be imposed on local loops or fibre networks, for example.

2. *What infrastructure should be subject to such an obligation?*

Answer:

2.1 Only towers, poles and ducts.

3. *What is your view of sections 6, 7 and 8 of the Infrastructure Sharing Regulations, which provide that the Commission may require the establishment by Licensees of forward*

deployment plans and may require coordination of such deployment plans (including identification by the Commission of geographic areas where systematic sharing of new BTSs must be implemented by Licensees through measures including framework sharing agreements)?

Answer:

3.1 These provisions are invasive, practically difficult to implement for the NTRCs, expensive for both the NTRCs to administer and for operators to satisfy, and ultimately misguided. As currently drafted, the regulations would require the production of annual deployment plans, the publication of information relating to all towers and ducts, as well as on mobile and fixed networks. These requirements for production of sensitive commercial pieces of information, would impose significant burdens on licensees and expose them the risk of disclosure of sensitive commercial information which could result in significant harm. The costs alone required to produce the data on towers and ducts on an annual basis for example, would be significant, as not all operators currently produce or track the relevant information with the frequency required by these provisions.

3.2 The Regulations also somewhat optimistically or naively presupposes that each licensee will be in a position to develop their deployment plans in a reliable and predictable manner. It would require private companies to develop an approach to investment and network rationalization which is completely impractical or unrealistic due to a range of circumstances affecting operations.

3.3 Of even greater concern is that the regulations require that new base station deployment must be designed so as to accommodate at least one third party, to include both the tower, and the entire BTS. The regulations consider it irrelevant if this requires building more than is needed by the operator. The operator's options would be to go looking for someone to share the additional investment, or else increase the prices for sharing by up to 15%. Ironically, this would probably only reduce the likelihood of other parties sharing. As such, the regulations would force investment in infrastructure which might never be used. The

rules would also increase the costs of entry and of operations, since effectively, every operator would be compelled to design and build its network for more than its needs.

3.4 Moreover, if space is not available in or on an existing facility to accommodate a third-party sharer, the regulations make it possible for the Commission to order the infrastructure licensee to make space or find alternative space. If space is limited at a site, the Commission can order the infrastructure owner to justify what is already there "in order to ensure that relevant sharing opportunities are maximized". In effect the Commission could order a network operator to modify its network to accommodate a third party, thereby substituting its own inexpert judgment for the commercial decisions of the network operators.

3.5 Cumulatively, these are invasive and draconian regulations which have no precedent in the Caribbean.

3.6 Regulations 6-9 also require the Commission to develop network planning, assessment and review capacity and skills which is likely to be difficult and expensive to develop and maintain. This will require the NTRCs to exercise discretion and judgment in an area it is ill-equipped to manage, namely the network deployment plans of a commercial operation.

3.7 These provisions do not speak to any role for ECTEL, but even in that case, the necessary resources, skills and capacity required to review these plans and provide strategic direction to industry would be difficult to replicate in every NTRC and difficult if not impossible to create within ECTEL, at least not without adding significant costs to ECTEL's operating budget. In an attempt to limit costs, ECTEL or the NTRCs could conceivably obtain the assistance of specialist consultants. However, the challenges in these circumstances would be that licensees, even in circumstances where they were willing to cooperate with ECTEL on these requirements, would not be willing to have sensitive commercial information shared with third parties. Moreover, consultant costs to enable the NTRCs to discharge these function would likely be prohibitive.

3.8 These requirements are ultimately misguided. They represent an unnecessary and invasive proposal which go beyond the normal standards for sharing. There is not one Telecommunications Act in the entire Caribbean which even contemplates such an intrusive and arguably dangerous requirement. Ultimately, these provisions are not required to achieve fairness and transparency in sharing of towers and similar elements of the network.

4. *What is your view of Section 9, which specifies features required of any new BTS, in order to make possible the sharing of a new BTS with at least one third party operator.*

Answer:

4.1 We repeat the arguments made in response to question 3 above. This is an intrusive, overly prescriptive and ultimately completely unnecessary proposal. It represents an attempt to substitute the regulator's judgment to an issue better left to the commercial acumen of licensees involved in commercial negotiations, albeit subject to broad policy obligations and requirements. Ultimately, all that is required is that licensees be made subject to obligations to share towers, and for the only ground of refusal to be technical infeasibility. Matters of power, space, and the like can be addressed in circumstances where any operator claims these are unavailable.

SECTION 6

ANNEX D – INTERNATIONAL ELECTRONIC COMMUNICATIONS ACCESS TO ESSENTIAL FACILITIES AT CABLE LANDING STATIONS REGULATIONS

Summary of C&W Comments on International Electronic Communications Access to Essential Facilities at Cable Landing Stations Regulations

6.1 We would note first a few fundamental concerns with the underlying premise of these proposed Cable Landing Station ("CLS") Access Regulations.

6.2 The first is that the discussion on page 11 of the Consultation Document clearly assumes that there has been market failure, and that future subsea cable builds are unlikely. However, ECTEL does not present any evidence to demonstrate that this is the case or, consequently, that these Regulations are required as a remedy.

6.3 The second is that ECTEL is basing the statutory authority for these proposed Regulations on the Electronic Communications Bill. Given that this Bill has not yet been enacted, the legislative basis for this subordinate legislation is unclear and ECTEL is running the risk that the proposed regulations may in fact be ultra vires. In any event, it seems a poor use of the limited resources of ECTEL, the NTRCs, operators and other interested parties to be consulting on regulations which depend on statutory provisions which have not been enacted, let alone presented to any legislature or debated.

6.4 The third is that the "objective" set out in regulation 3 is over-reaching. The function of a regulator is to "set out the conditions for fair access" in order to support "the development of a competitive electronic communication market". However, it is the function of the operators within that market to bring lower prices and new services to consumers. It is not within the remit of the regulator to do this. We recommend, therefore

that the words "and ensuring significant reductions in international communications charges" be deleted from regulation 3.

6.5 In addition to these fundamental concerns, we consider that a number of the definitions are problematic. For example, despite being use in the definition of "access facilitation", and despite being a specialised term used the world over, "essential facilities" is not defined. Within the definition of "access facilitation", the use of the term "interconnection" is incorrect. Interconnection is the connection of two different networks, which is not the case with access to subsea capacity at a CLS (which instead involves a party using facilities it built or leased to access its own capacity on the subsea cable). The more accurate term would be "connection".

6.6 The definition of "colocation" is also poorly worded. As drafted it has no limits, other than the "facilities and resources" must be provided by the CLS Licensee to the Eligible Operator. Given that this could conceivably be anything located anywhere in the country, not just at the CLS, even a retail service provided at the opposite end of the country would be considered, for the purposes of these proposed CLS Access Regulations, "colocation". This result is absurd. At a minimum, the words "within the cable landing station" should be appended to the definition.

6.7 The definition of "Eligible Operator" is circular, as it can be reduced to "an Eligible Operator is entitled to request access". However, nothing in the definition explains the basis for this entitlement or eligibility, with the exception that ISPs and IXPs are included in the definition. There, is therefore, no way for any party to assess whether an operator is "eligible" if they are not otherwise an ISP or an IXP. This deficiency needs to be addressed.

ECTEL Questions relating to the Submarine Cable Access Regulations and C&W's Responses

1. *What is your view of the necessity and the applicability of a regulation mandating access*

and co-location to any submarine cable landing station?

Answer:

1.1 We consider that there is no need for the type of mandated obligation that the question and the proposed CLS Access Regulations contemplate. Regulations should be applied only where there is evidence of a problem, and in this case there is no evidence of a problem.

1.2 The issue to be addressed, if there is in fact an "issue", is not access to the cable landing station but rather access to capacity on the subsea cable landing at the CLS. However, persons selling capacity service have a very strong commercial incentive to arrange for access to that capacity because otherwise it cannot be used and therefore would not be bought. Further, consortium-owned subsea cable typically have provisions in the consortium agreements requiring landing parties to provide access to capacity sold to in-country third parties.

1.3 In other words, normal market forces ensure the availability of access to capacity sold on subsea cables and there is, therefore, no "issue" that needs to be addressed by regulations. Indeed, ECTEL has presented no evidence in this consultation or in the Consultation Document that there is a "problem" that needs to be "corrected". Mandatory provisions such as regulation 5(1)(a) are therefore not necessary.

1.4 Similarly, provisions such as regulation 5(1)(b) are also unnecessary and unwarranted. If two subsea cables already land in the same CLS, neither the parties owning the cables nor the party operating the CLS have any reason or incentive not to cross-connect capacity on the two cables. Such cross-connection only serves to increase the value and utility of the capacity on the subsea cable and of the CLS and the parties have, therefore, a commercial incentive to provide the facility. Again, ECTEL has not provided any evidence

that persons have been unable to cross-connect capacity on two cables landing in the same CLS, or that there is any "problem" here requiring a regulatory obligation to correct.

1.5 Without prejudice to the foregoing, we note that the use of the term "interconnect" in regulation 5(1)(b) is not advisable. "Interconnection" typically describes the connection of two different networks controlled by two different parties to allow for end-to-end communication. In the case of subsea capacity, a party typically seeks to connect its own capacity on two different cables, in other words, two parts of the same network. The term "connect" or "cross-connect" would lead to less confusion in this context.

1.6 Similarly, a mandate to provide landing facilities at a CLS for a third-party subsea cable, such as in regulation 5(1)(c), is also unnecessary. CLS licensees have no incentive not to provide access to their CLS to third-party subsea cables. As noted above, such shared access enhances the value of both cables and of the CLS. Further, CLSs are not inherently difficult to build or uneconomic to reproduce, therefore, an existing CLS licensee would gain nothing by refusing access to its CLS. Whether an additional cable does in fact use an existing CLS is properly a matter for commercial negotiation between the party landing the cable and the CLS licensee. Mandated access is not necessary.

2. *What is your view of the obligation imposed on a CLS Licensee to provide operators seeking access the option to access capacity on an IRU basis and on a lease basis?*

Answer:

2.1 International best practice is to create and apply regulations and rules only where there is evidence of a "problem" that needs to be addressed, and to limit the scope of such regulations and rules only to the extent necessary to address the problem. Regulation is inherently less effective than the market for promoting consumer welfare, and should be used sparingly.

2.2 In this particular case, the normal modus operandi is to sell capacity either on an IRU or lease basis, depending on the amount of capacity required, the length of time it is required, and the other needs of the purchaser. It is difficult, therefore, to see why a regulation, such as regulation 5(2), would be needed in the ECTEL region to mandate what subsea capacity owners already do.

3. *Regarding the proposed CLS Reference Access Offer:*

- **a)** *Do you have any comments on the time frame for submission of a draft CLS Reference Access Offer to the NTRC within sixty (60) days from the date of commencement of the Submarine Cable Access Regulations?*
- **b)** *Do you have any comments on the content of the CLS Reference Access Offer, as described in Schedule 1 of the Submarine Cable Access Regulations?*

Answer:

3.1 This question presupposes the need for and utility of a Reference Access Offer ("**RAO**"), and focuses on a few technical aspects of the RAO. This strongly suggests that ECTEL has already made up its mind about the need for the RAO even before bringing these proposed CLS Access Regulations to the public for comment, and therefore has improperly fettered its discretion. We invite ECTEL to take a step back and consider the rationale for an RAO before considering the technical details of such a document.

3.2 We disagree that the detailed provisions mandating the development and submission of an RAO in regulations 6, 7 and 8 are required or advisable. While they look good on paper and might make sense in a larger economy such as a Western European country, they need to be considered in context. In the ECTEL countries, a CLS Licensee will necessarily have a limited number of potential customers for its services – by definition, they are not services provided to the general public, and some of the limited number of telecommunications licensees will choose to do business with the other CLS Licensee(s) in the country. Further, each arrangement will be bespoke. Colocation in particular will be

bespoke as those agreements depend on availability and configuration of space in a specific CLS. Where there is limited demand and limited standardisation, putting time and effort into the development of a RAO is not the best use of an operator's limited resources.

3.3 With respect to the specific questions, and without prejudice to our view that an RAO is not required or advisable, we submit that 60 days is an insufficient period of time for a party to examine all CLSs in all ECTEL countries and attempt to create a standard one-size-fits-all document (or even 5 standard on-size-fits-all documents).

3.4 It is also unclear what ECTEL is seeking to achieve with the structure of charges set out in Schedule 1. While an O&M charge makes sense in the case of an IRU, with a long-term purchase of subsea capacity, it makes less sense with respect to the facilities used to access the capacity. The customer is not "purchasing" any rights to the CLS and then paying O&M charges for the portion of the CLS over which they have acquired long-term rights. Rather they are acquiring the right to access the capacity they own. This can be paid for on an annual basis in the same way as acquiring the right to access leased capacity.

4. *Provision of Backhaul Circuits*

- **a.** *What is your view of imposing on a CLS Licensee the obligation to provide backhaul facilities and, where another service provider has requested provision of a backhaul circuit, the obligation to facilitate the interconnection between the operator seeking access and the said service provider at the CLS?*
- **b.** *Do you have any suggestions in order to improve the effectiveness of this obligation?*

Answer:

4.1 It appears ECTEL is confusing the activities of a CLS Licensee with those of a domestic in-country licensee. It is possible for the person to hold both a CLS Licence and a domestic Individual Licence, and therefore to be in a position to sell backhaul to persons who have bought subsea capacity. However, conceptually the provision of backhaul is a service

provided by a domestic licensee not a CLS Licensee. The main activity of a CLS Licensee is to land the subsea cable and provide access to the capacity on that cable. Indeed a CLS Licensee could decide to limit their business to those operations. A regulation mandating a CLS Licensee to provide backhaul would force them to enter into a business and to construct facilities that were not part of their plan.

4.2 We note as well that there is no public policy reason for forcing the CLS Licensee to build and sell backhaul facilities if they do not want to. The domestic licensee who wants access to their capacity can either build their own domestic network to do so, or purchase the necessary facilities from other domestic licensees. Forcing the CLS Licensee to be a third option when this was not part of their commercial plan is unnecessary and a poor allocation of resources in the market.

4.3 A CLS Licensee has a commercial incentive to facilitate the connection of a domestic backhaul circuit to capacity on a subsea cable landing at its CLS. Without this connection, the capacity on the subsea cable has no commercial value and its owner would not be able to sell it. If there is a commercial incentive to facilitate connection, then there is no need for a regulation to mandate the facilitation of that connection. As noted earlier, regulation should be used only as a last resort and only to the extent necessary to address a problem for which there is evidence. This regulation would impose an unnecessary obligation to address a problem that has not been shown to exist.

4.4 We note that ECTEL questions did not touch upon many of the other important sections of the proposed CLS Access Regulations, such as the standards to be applied for setting prices and the other terms and conditions of service. As before, we remain concerned that ECTEL may have prejudged these matters even before bringing them to the public for comment, and therefore improperly fettered its discretion.

4.5 Without prejudice to our view that the proposed CLS Access Regulations are not necessary, we disagree with the requirement in regulation 13 that the prices for "access facilitation" and "backhaul" ought to be cost-oriented. Such services are bespoke and negotiated between knowledgeable businesses. There is no public policy that would be advanced by interfering with commercial negotiations or by imposing any particular cost standard. We note that there are at least two CLS Licensees in each ECTEL country. A purchaser of subsea capacity is not going to buy such capacity without also enquiring into the cost of accessing that capacity. If one CLS Licensee charges an excessive price for access to capacity at its CLS, the potential customer will simply take its business to the other CLS Licensee. In other words, competition will ensure prices are reasonable, and a regulation is not necessary. A regulated price standard is particularly unnecessary for backhaul services, as the customer will have multiple options including self-provision.

4.6 We strongly oppose the inclusion of regulation 13(4). The purpose of access to the CLS is to allow an "Eligible Operator" to access its own capacity on the subsea cable. It is not to allow that Eligible Operator to use the CLS as a base for its own commercial operations in lieu of building or buying its own building facilities. If the Eligible Operator requires grooming services, it should do so at its own offices or else enter into separate, commercially-negotiated arrangements with the CLS Licensee.

4.7 Similarly, the requirements regarding Service Quality Levels are matters that should be left to the parties to negotiate. One operator may be prepared to make a different trade-off between quality and price than another, and the regulatory regime should accommodate this flexibility.

4.8 Finally, we are concerned with the way in which regulation 16(2) was drafted. In its current form, it suggests that an Eligible Operator whose access services have been terminated cannot be compelled to pay more than 3 months of charges – irrespective of the actual level of debt the Eligible Operator might owe to the CLS Licensee. This is grossly

unfair to the CLS Licensee and removes any incentive for the Eligible Operator to pay for the services it has received. We recommend that regulation 16(2) be deleted.

5. *Co-location: do you have any comments on the obligation imposed on CLS Licensees to provide co-location services as described in clause 17 to 22 of the Submarine Cable Access Regulations draft?*

Answer:

5.1 As noted previously, no evidence has been offered to suggest that these obligations are required. International best practice would dictate that no regulation be imposed unless it has been demonstrated to be necessary, and it is unfortunate that ECTEL has chosen, in this regard, not to aspire to international best practice.

5.2 Without prejudice to our views that none of these provisions are required to be mandated by regulation, it is clear that the timeframes set out in the various parts of regulation 17 are far too short. A request for physical colocation cannot reasonably be reviewed and determined within 10 calendar days, given the fact such a request includes matters such as the loading on the building structure, capacity of the building's environmental systems and electricity supply and simple availability of space that all need to be considered. It is also surprising that the regulations are so inflexible that they do not even permit the CLS Licensee to ask questions or to seek clarification of the request. A regulatory regime that requires a party to refuse a request in lieu of seeking clarification is simply unreasonable.

5.3 It is also unusual that, per regulation 17(5), a failure to conclude a colocation agreement can become actionable within 15 calendar days of submission of a request, in other words, only 5 days after the decision that a colocation is feasible. It is unreasonable to expect any commercial parties to have any discussions and finalise all documentation within 5 calendar days. This short time frame is all the more unreasonable in light of regulation 10(2), which provides for two months to conclude an access agreement. While even two

months is a rather short period of time, parties can at least entertain the possibility of entering into an agreement within that timeframe. ECTEL has not offered any explanation for the difference between regulation 10(2) and regulation 17(5), and we cannot see any reason for it. We recommend, therefore, that both regulations apply the same 2-month timeframe.

5.4 Regulation 20 provides for access to the CLS by named personnel of the Eligible Operator. We note that it may not be possible at all CLSs to provide for secure and separate access to the Eligible Operator's equipment because the CLSs, especially the legacy ECFS stations, were not designed and built with third-party access in mind. Security and integrity of the equipment at the CLS is critical to any CLS Licensee. Such Eligible Operator personnel will therefore need to be escorted by CLS Licensee personnel during such access, at the Eligible Operator's expense, even if the Eligible Operator personnel has been vetted by the CLS Licensee. We recommend a regulation 20(3) be added:

> *Eligible Operator personnel shall be escorted at all times by CLS Licensee personnel, at the Eligible Operator's expense, while they are within the Cable Landing Station or other facilities controlled by the CLS Licensee, unless other arrangements have been agreed between the parties.*

5.5 The timeframes in regulation 22 will put the CLS Licensee in jeopardy, notwithstanding the CLS Licensee's best efforts, and should be reviewed. For example, regulation 22(1) assumes that the CLS Licensee will always have at least 12 months' notice of closure of the colocation site. While this may often be the case, it cannot be guaranteed, especially where the CLS Licensee does not hold title to the underlying property. However, the regulation has no scope or flexibility to accommodate shorter timeframes. Similarly, regulation 22(3) assumes that the CLS Licensee's right to occupy the space used for colocation will invariably continue past the mandatory minimum three-year contract term. Again, it is not inconceivable that a request for colocation be received within the last three years of a CLS Licensee's right to occupy the space. The CLS Licensee will not be able to guarantee a three-year contract term, yet the regulation mandates it and does not include

any flexibility to accommodate any exceptions. This needs to be addressed if the regulations are to be reasonable and effective in the real world.

5.6 Finally, we note that regulation 22(4) suffers from the same perverse deficiencies as regulation 16(2). As drafted, it limits an Eligible Operator's obligation to pay fees to the charges payable for a six-month period, irrespective of the Eligible Operator's actual level of debt to the CLS Licensee. This is gross unfair and commercially unviable, and must be deleted.

6. *Tariffs: The EC Bill and the Submarine Cable Access Regulations provide that the CLS Licensees shall determine charges on the basis of cost oriented principles. Under this regulation, the NTRC has the authority to impose on offers by CLS Licensees the rates which it has determined by its own cost calculations on the basis of information at its disposal or, in a transitional manner, on the basis of international benchmarks.*

> **c***) Do you have any comment on these principles, or how they should be applied by the NTRCs?*
>
> **d)***Do you have any suggestions on the key issues that should be addressed in the Regulations with respect to the cost accounting methods to be established by the NTRC?*

Answer:

6.1 We note that ECTEL has again referred to the Electronic Communications Bill, which has not been enacted in any of the ECTEL countries. It is inappropriate to use this Bill as the statutory basis for the proposed CLS Access Regulations and we refer ECTEL to our earlier comments on this matter.

6.2 As noted in the case of charges for access and backhaul, we disagree that ECTEL should impose any cost-orientation standards for colocation services. These services are going to be bespoke and are best addressed through commercial negotiation.

SECTION 7

ANNEX E – RETAIL PRICING REGULATIONS

Summary of C&W comments on Retail Pricing Regulations

7.1 There are several aspects of the Retail Pricing Regulations that are of significant concern to C&W. Firstly, we believe the scope of the Regulations goes well beyond what are reasonable consumer protections from market failure, and pursues a degree of market intrusion that will impede competition and produce unintended consequences harmful to consumers. The Regulations would be improved were they limited to addressing issues of market failure and promoting the development of effective competition.

7.2 Secondly, in several instances, the Regulations exhibit a misunderstanding of economics and how anti-competitive effect is achieved. For instance, the Regulations do not appreciate that for unilateral conduct to be a successful anti-competitive strategy, the perpetrator must have SMP. Absent a dominant position in the market, a strategy to exclude, predate, discriminate, or price squeeze will necessarily not succeed. While such a strategy will produce tangible short-run benefits for consumers, it will necessarily fail to eliminate competition over the long-run.

7.3 Thirdly, the description of anti-competitive conduct—especially as it applies to predation perpetrated by an operator with SMP—assumes that conduct by a licensee to exclude competitors from a market is per se harmful to competition. This is not accurate or meaningful guidance, however. It fails to appreciate the very nature of healthy competition is to limit one's rivals' profitability and viability. Therefore, as we discuss in greater detail in our comments below, a meaningful description of predatory pricing cannot focus on the impact to competitors (which is, in fact, irrelevant), but must instead focus on the impact to competition and consumers.

ECTEL Questions relating to Retail Pricing Regulations and C&W's Responses

1. *What is your view of the provisions relating to identification of services that may be subject to retail pricing regulation, due to lack of competition or SMP (sections 6, 7, 8)? Do these provisions adequately reflect the intent of the EC Bill? Please suggest any specific changes or improvements.*

Answer:

1.1 The provisions set forth in Sections 6-8 appear to be consistent with the intent of the EC Bill. We offer no suggestions on changes to these Sections. We do, however, have a general concern with the overall scope of the Retail Pricing Regulations. In several instances, the Regulations go beyond what we believe are reasonable consumer protections from market failure, and provide a level of market intrusion that is harmful and inappropriate.

1.2 For instance, Section 9 sets forth terms for mandating "basic affordable service packages" on disparate services, from mobile voice, mobile data, and fixed broadband, while Section 4 provides extremely broad regulatory authority to intervene "to set, review and approve tariffs for *any* licensed electronic communications services," which we understand to include both regulated *and* unregulated services (emphases added). We note here that this broad, ambitious scope is misplaced, and that consumer welfare is better served by regulations limited to addressing market failure and promoting effective competition.

1.3 Market competition generally is the best way to bring the greatest material well-being to the greatest number of people. When there is competition in a market, it is both unnecessary and undesirable to impose artificial regulatory requirements on participants in the market. It is unnecessary because markets function more effectively to protect customers than can regulation. More importantly, it is undesirable because regulatory restrictions are not innocuous in competitive markets. By preventing or hindering providers from quickly raising, lowering, restructuring, targeting, bundling, or otherwise

changing prices, regulation impedes service providers in their ability to respond to competition, to differential cost conditions, to customer-specific demands and preferences, and to changing market conditions, to the detriment of social welfare and economic efficiency. Moreover, regulation can prevent a company from correcting prices that have been distorted by years of regulatory oversight. If such a company cannot price in response to these legitimate market factors, the company is restricted in its ability to effectively meet customer demand, and customers suffer.

1.4 In addition, regulation distorts not only prices, but decisions about service quality and service characteristics. In markets, companies receive constant real-time feedback about the aspects of service that customers care most about. Part of the dynamics of competition is the efforts competitors make to try to create competitive advantages for themselves by responding to and anticipating customers' desires. Regulators' attempts to prescribe quality standards or service characteristics are necessarily a blunt instrument that, at best, pale in comparison to the nuances of the market mechanism, and more likely, divert companies' resources away from investment where it would be most valued. As professor Alfred Kahn noted in his seminal book on regulation,

> *If the decision to regulate were nothing more than a decision that competition was in some way or other inadequate to serve the public interest, and if regulation itself merely supplemented such competition as prevailed, there would still be problems of making those decisions but there would be no general regulatory dilemma. The general dilemma arises from the fact that the decision to regulate is, typically, a decision also to restrict competition, not just to supplement it in one way or another, but to supplant it.*[4]

1.5 It is a fundamental tenet of economics that, under the proper circumstances, competition is the best way of providing the greatest welfare to society. Accordingly, it is crucial that these Regulations be suitably constrained to address market failure and engender true, efficient competition that fosters society's goals of a robust

[4] Alfred Kahn, *The Economics of Regulation* (1971), p. 1 (emphasis in original).

telecommunications infrastructure, availability of new services and packages of services, and prices that are commensurate with the resources efficiently used in producing the services and consistent with market demand.

2. *What is your view of the proposed establishment of Basic Affordable Service Packages (section 9)? Will this be an appropriate and effective means to ensure access to affordable service by low-income consumers? How should the prices for such basic services be determined?*

Answer:

2.1 As discussed in our response to Question 1 above, we believe that mandating all licensees to offer Basic Affordable Service Packages is unwise and potentially harmful. The appropriate and most effective means of promoting service affordability is by removing unreasonable entry barriers (structural and regulatory) and promoting effective, sustainable competition, especially inter-modal competition between mobile, traditional fixed and cable operators. More importantly, however, we believe mobile and data services are already affordable in the ECTEL states.

2.2 First of all, mobile penetration already far exceeds 100 percent of the population in the ECTEL states, and according an ECTEL-sponsored survey from 2014, over two-thirds of these mobile subscribers already own a smartphone.[5] This is a remarkable finding, considering that less than five years prior, smartphone penetration in the Caribbean was effectively nil. Moreover, according to the same 2014 survey, of those without a smartphone, less than 3 percent indicated it was because licensees' data services were unaffordable.[6]

[5] Broadband access and use in the ECTEL Member States (http://www.ectel.int/index.php/resources/publications?download=98:broadband-survey-2014), see, Individual Questionnaire, #38.

[6] *Ibid*., see, Individual Questionnaire, #39.

2.3 Secondly, while it is appropriate that such a requirement, if imposed, be applied symmetrically to all licensees, as is contemplated by the Regulations, it could still produce very large unintended distortions that impede or deter investment. With the deployment of super-fast mobile 4G LTE on the horizon, the large investments necessary to make this deployment a reality, the growing convergence of mobile and fixed telephony, and the already widespread usage of smartphones, imposing an affordability requirement on licensees, or in particular a single mode of competition—e.g., fixed broadband—could act as a barrier to entry. Price constraints, even in the name of affordability, can make competition unprofitable for certain segments and/or certain areas, thereby creating a regulatory barrier to entry that forestalls entry, further investments and distorts the development of competition in unintended ways.

3. *Do the provisions on anti-competitive pricing, including Price Squeeze (sections 10 and 12) adequately identify and define the range of potentially anti-competitive pricing behaviour that may require intervention? What are your views on the extent or risk of such practices? Should some provisions or practices be strengthened, and how?*

Answer:

3.1 We do not believe the issues described in Sections 10 and 12 on anti-competitive pricing are adequate or accurate. Several terms, such as "predatory pricing" and "anti-competitive club effect" are introduced, but are not described or identified in any reasonable fashion. Both terms are described in Section 2, but neither description is adequate. The term "club effect" is described simply as "a condition [where] a good or service depends on the number of other users," which characterizes the condition of *all* network services and is thus effectively meaningless in identifying a club effect.

3.2 An anti-competitive club effect is a complicated phenomenon that requires a number of conditions to hold in order for it to have an anti-competitive effect—one being that the perpetrator possess significant market power. None of these conditions, however, are discussed, let alone identified.

3.3 This raises another, more general, deficiency with the regulations articulated in Sections 10 and 12. In particular, sub-parts (1) and (2) of Section 10 describe anti-competitive conduct applicable to all licensees, whereas Section 12 and sub-part (3) of Section 10 describe anti-competitive conduct applicable only to SMP licensees. What is not appreciated is that for the unilateral conduct described throughout Sections 10 and 12 to be a successful anti-competitive strategy, the perpetrator must in all instances have SMP. Absent a dominant position in the market, a strategy to exclude, predate, discriminate, or price squeeze will necessarily not succeed.

3.4 The term "predatory pricing" is described in Section 2 as a "pricing strategy under which an SMP Licensee deliberately sets low prices for a given retail service…with the goal of undermining the profitability and ultimate commercial viability of [] competitors." While the description accurately limits its applicability to SMP licensees, it does not offer a meaningful distinction between predatory and competitive pricing. After all, all competitors hope to limit their rivals' profitability and viability—that is the nature of competition.

3.5 A meaningful description of predatory pricing, therefore, cannot focus on the impact to competitors, as is done in Section 2 of the regulations. Instead, it must focus on the impact to competition and consumers. Harm is inflicted on competition and consumers from a predatory strategy only if the following two conditions hold:

> *Stage (1)*—an SMP licensee prices below cost and this below-cost price subsequently forces its rivals to exit the market; and
>
> *Stage (2)*—once the SMP licensee has expelled its rivals, it can then successfully raise its price to a supra-competitive level for a duration sufficient to recoup the losses incurred in Stage (1).

3.6 The specific deficiency in the Regulations' description of predatory pricing again leads to a more general deficiency. The exclusionary strategies articulated in Section 10 and 12

are only harmful if the perpetrator can recoup its losses, which we described above as Stage (2) of a predatory strategy. This issue of recoupment is a necessary criterion to identifying exclusionary behavior that is anti-competitive. If the likelihood of recoupment is low, then anticompetitive exclusionary conduct is unlikely.

3.7 However, there is no mention or acknowledgement of the recoupment concept anywhere in Sections 10 or 12, or anywhere else in the regulations. Instead, the potentially exclusionary conduct identified in these sections is falsely suggested to be harmful per se if it is found to exclude.

3.8 The U.S. Federal Trade Commission, who is responsible for investigating anti-competition claims, such as predatory and exclusionary conduct, we believe effectively characterize this two-stage process, as well as the delicate trade-off involved in evaluating such claims, as follows:

> *Can prices ever be "too low?" The short answer is yes, but not very often. Generally, low prices benefit consumers. Consumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time. A firm's independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition. Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare. This strategy can only be successful if the short-run losses from pricing below cost will be made up for by much higher prices over a longer period of time after competitors leave the market.*

3.9 Our remaining comments on Section 10 are editorial:

i. Section 10(3)(c) describes what is, in effect, a price squeeze and is, therefore, redundant with Regulation 12. We suggest moving Section 10(3)(c) to be included in Section 12.

ii. Section 10(3)(d) on cross subsidization is but a type of leveraging, which is discussed in Section 10(3)(b). We recommend combining the former with latter sub-section.

iii. The remedies specified in Section 10(4)(a) and (b) are identified as applying only to violations of conduct specified in Section 10(1) and (2). However, should not these remedies also apply to conduct specified in Section 10(3)?

4. *Under what circumstances should the NTRCs impose Price Cap regulation rather than direct pricing controls, as outlined in this regulation (sections 11, 16, 17)? What are the advantages and disadvantages of each approach? What guidance should this regulation provide as to their implementation?*

Answer:

4.1 Please see our response above to Question #1, regarding what we believe is the appropriate scope of pricing regulations.

5. *What are your views on the provisions relating to prohibition on undue price discrimination, particularly the option for the ECTEL and NTRCs to prohibit or control differential pricing between on-net and off-net calls? What would be the impact of such limitations on the market?*

Answer:

5.1 There is again use of jargon in this section of the Regulations that is not described or identified. The term "undue price discrimination between similarly situated customers" or even "price discrimination" does not appear in the interpretations section (Section 2). What conduct constitutes price discrimination or undue price discrimination, and what do the Regulations consider to be similarly situated customers?

5.2 In addition, Section 14(3)(c) makes reference to a "terminating interconnection call charge", which we find ambiguous. Are the Regulations referring to the retail price for off-net calls, the wholesale interconnection charge paid to an interconnected licensee, or

something else? We believe these are issues that need to be addressed in the Regulations if they are to offer reasonable guidance to stakeholders.

5.3 Section 14(3) speaks to possible remedies, in the event a licensee's off-net prices are found to constitute "undue price discrimination." What is missing from this and Section 14, in general, is an indication that allegations of anti-competitive price discrimination require the perpetrator to possess SMP. Absent market power, the allegation does not hold. Furthermore, even where the perpetrator has SMP, instances of price discrimination that are anti-competitive are quite rare and, just as in the case described above with respect to exclusionary conduct, the impact of this conduct is most frequently harmful to competitors, but beneficial to consumers.

5.4 Differential pricing can occur for a variety of reasons. These reasons can be related to cost, but they need not be. A non-cost related reason could be a response to competition. Where an operator faces competition, it will take action to retain these customers and a typical customer-retention strategy is to reduce customers' prices. The potential for such pricing behavior to have anticompetitive (exclusionary) effects that harm consumers depends on whether the prices are predatory, which requires a showing that (1) the prices are below the licensee's cost and (2) recoupment is likely. If the pricing in question is not predatory then it may be harmful to competitors, but it poses no problem for competition or consumer welfare, and the Commission should not discourage or prevent it.

6. *What are your views on the procedures for implementing price controls (section 17)? Will this be an appropriate and effective mechanism for addressing prices of non-competitive services? What are the advantages and disadvantages? What alternatives should be considered?*

Answer:

6.1 Procedures for implementing price controls are set forth in Section 18, and again there is reference to jargon that we believe requires a description or explanation. Section

18(5)(a) and (c) include the terms "unfairly distort competition" and "unduly discriminatory manner," respectively. What distinguishes fair from unfair distortions to competition? And what are the criteria that make discriminatory conduct unduly? We believe these are issues that need be clarified in the Regulations if they are to offer reasonable guidance to stakeholders.

6.2 There are also other issues in this section of the Regulations that require clarification. Section 18(1)(d) provides the Commission 60 days to approve or disapprove a tariff, but does not specify the status of a tariff if the Commission does not take action within this 60-day period. We assume that the tariff is presumptively approved after the expiry of the 60-day period and this needs to be clear in the Regulations.

6.3 Finally, Section 18(2)(e) states that if the Commission does not issue an opinion within the five working-day period, set out in paragraph (c), then the licensee may consider the proposed new tariff presumptively approved. The Regulations need to indicate whether this presumption of approval also applies following the specified 1-month extension period.

7. *What are your views on the provisions relating to promotions and market trials? Are the time limitations on such trials sufficient? Will the provisions ensure that competitive pricing prevails? Please suggest alternative language, if any.*

Answer:

7.1 Section 23 indicates that all determinations made under these Regulations will be published on the Commission's website and available at its office. We believe that all licensees affected by any determination should also receive a copy of the document by mail or electronic mail in advance of or concurrent to the publication of that determination.

7.2 Finally, Section 22 begins at sub-section (9). Therefore, it would appear that sub-sections (1)-(8) are missing or sub-sections (9)-(12) should be relabeled (1)-(4), respectively.

SECTION 8

ANNEX F - CONSUMER PROTECTION REGULATION (SPECIFIC RULES ON CONSUMER PROTECTION IN THE ELECTRONIC COMMUNICATIONS SECTOR)

C&W's General Comments on Consumer Protection Regulation

8.1 ECTEL addresses four (4) main issues under Consumer Protection Regulation. These are Provision of Information, Customer Contract, Advertising and Promotion and Complaints Handling.

8.2 C&W's comments on the Consumer Protection Regulation are to be read in conjunction with its comments on the relevant sections of the Electronic Communications Bill published October 13, 2015 and Quality of Service Regulations published June 2015.

8.3 Many of the issues addressed by ECTEL under the sections '*Provision of Information*' and '*Customer Contract*' are addressed by C&W's General Terms and Conditions for Residential Service and Service Specific Terms and Conditions for each service, that is Specific Terms and Conditions for Landline Service, Mobile Service, Mobile Data Service and Sale and Rental of Equipment. These Terms and Conditions were approved by the NTRCs before implementation by C&W in 2008 as well as any subsequent amendments thereafter.

8.4 C&W's Terms and Conditions are accessible on its website together with information on its products, services and billing information.

8.5 With regards to Quality of Service standards and commitments mentioned by ECTEL, C&W makes reference to its responses to ECTEL's Quality of Service Consultation. This consultative process is not yet complete and so until then C&W is unable to make any pronouncements on quality of service commitments. We however do reference a section of that response which states that: '*Notwithstanding the intention of the Electronic Communications Bill to invest the Commission with the authority to impose and amend*

quality of service standards, this authority is not a reality and is without effect until the Electronic Communications Bill is passed into law. C&W is mindful that until then, the authority to amend the service quality criteria and parameters abides with the Minister. Accordingly, coming out of this consultation, the Commissions must, in accordance with the Regulations, make a recommendation to the Minister of the proposed and agreed changes to the service parameters and criteria'.

ECTEL Questions and C&W's Responses

1. *Do the provisions addressing Licensee obligations with respect to provision of information to consumers (sections 4, 5, 6) adequately define these responsibilities? Are these provisions reasonable and sufficient? What further detail or specifics, if any, should be included?*

Answer:

8.6 These requirements are reasonable and sufficient. C&W agrees that consumers should be provided with all relevant information so that they can make informed decisions. C&W provides consumers with information on the price of its services in its standard Terms and Conditions of service which are available on the website of each, individual business.

2**.** *In particular, are the requirements in section 5 for publication of tariffs for services by Licensees sufficient?*

Answer:

8.7 The requirements in section 5 are sufficient.

3. *Do the requirements in section 12 for specific billing information provide sufficient information to customers so that they may fully understand their bill?*

Answer:

8.8 The requirements of section 14 on specific billing information will help customers to better understand their bill. Currently C&W bills are aligned with ECTEL's specification at 14(3)(d). C&W bills specify the amounts due for each service and the method of calculation of tariffs for any service on which bills are based, including the number,

location, and duration of calls, number of SMS text messages, amount of data transmission, or other relevant measures of usage.

4. *The Rules contain several key provisions regarding advertising by Licensees, and the types of information and promotional methods that may or may not be employed, to protect consumers from unfair or misleading practices (sections 14 to 21). In your view, will adoption and enforcement of these provisions adequately prevent such inappropriate marketing tactics? Are there any important "unfair commercial practices" currently used in ECTEL markets that are not addressed? Are any of the provisions too burdensome for Licensees? Please suggest any improvements or additional options.*

Answer:

8.9 C&W believes that customers should not be subjected to unfair or misleading practices. The challenge in enforcing the rules arises because the rules are subjective and therefore open to reasonable interpretation. Operators will also be challenged in deciding how much information to put in an ad based on ECTEL's proposal. Finally ECTEL is putting forward itself as judge and jury in competition matters which is contrary to natural justice.

5. *In your view, do the requirements for net neutrality (section 29) appropriately balance consumer and operator needs and concerns?*

Answer:

8.10 ECTEL's proposals on net neutrality have never balanced the interest of consumers and operators. Net neutrality facilitates the provision of services by Over-The-Top ("OTT") providers. These providers are not licenced to provide services in ECTEL countries, they do not pay taxes or contribute to Universal Service Funds ("USF") in ECTEL countries and they do not pay network owners, like C&W for the use of their networks. At the same time OTT providers are earning significant revenues from customers in ECTEL countries such that there is are dramatic reductions in voice revenues for all regional providers.

8.11 ECTEL and the NTRCs have refused to level the playing field by removing restrictions on local operators like paying licence fees, taxes and contributing to USF so that local providers can become as competitive as the OTTs. Alternatively, they have

refused to regulate the OTTs by subjecting them to licence fees, taxes and USF Contributions. As long as ECTEL's approach favours OTTs, there can be no balance of consumer and operators needs and concerns. As long as ECTEL promotes net neutrality to mean that '… users must have access to all content and applications regardless of the source….' these regulations will never achieve the right balance. This approach is short sighted. By insisting on an absolute approach to OTTs, ECTEL will undermine the ability of operators to monetize their investments and earn a reasonable return on the networks they have established. This will in turn lead to reduced investment to both maintain existing networks and to expand and upgrade networks into new areas or to improve performance and the quality of services available to consumers. As the networks suffer due to under investment, consumers will no longer be able to benefit from the reliable technology and performance which made access to OTTs possible and attractive in the first place. Ultimately therefore, consumers will suffer. These regulations therefore favour the immediate, short term benefit for customers of short term, immediate access to existing OTTs, and ignore the need to protect the investments of providers who make these services available to their subscribers. Accordingly, the requirements for net neutrality do not appropriately balance consumer and operator needs and concerns.

6. *What are you views on the process for complaints handling by the Licenses as described Part IV of the draft regulations. Are the provisions of the aforementioned Part IV likely to ensure that customers who make a complaint to a Licensee shall be treated with fairness and courtesy, and their complaint shall be dealt with objectively and efficiently by the Licensee?*

Answer:

8.12 Customers must be empowered with the information they need to make informed choices. A transparent process for complaints handling empowers customers because the knowledge of the process enables customers to hold organisations accountable for what companies like C&W say they will do. In accordance with Part VI of the proposed regulations customers are to be treated with fairness and courtesy and complaints dealt with

objectively and efficiently. C&W does caution however, for reasons to be discussed below, that it is not practical to have a category of 'urgent' complaints.

C&W'S Comments on Specific Regulations

Section 3. Objectives

9.1 With regards to the objectives of the Regulations, Cable & Wireless acknowledges that the nature of some services, like broadband, will vary based on distance from the exchange so the quality of these services will vary based on geographic location. On the matter of net neutrality the Explanatory Note to the Regulations state that '*net neutrality exists, meaning that customers can access and use any internet content, applications and services they choose, as long as that content does not violate public policy or basic rights'*. C&W observes that copyright inherent in the work of content providers is a matter of public policy and a basic right for the copyright owners. In that regard some content that customers try to access over the Internet will not be available to them because of copyright restrictions and not because of network restrictions.

Section 13. Cancellation of Contracts by Customer - Minimum Terms

9.2 C&W wishes to better understand the exact meaning of regulation 13(3). At this time, when a customer cancels a contract before the end of the commitment period, the customer is liable for payment of an early termination fee.

9.3 Cable & Wireless requests that ECTEL explain how it arrived at its figures for the early cancellation fee at section 13(6)(a) noting that the service provided to customers varies and the industry is not just about handsets. ECTEL is in danger of oversimplification.

9.4ECTEL proposes that a customer subject to early cancellation fees must be provided with a minimum 15 days trial period. ECTEL does not specify in the proposed regulations that a customer must pay for all services used during the trial period but C&W presumes that ECTEL is not saying that charges incurred for service are not to be paid. ECTEL

however needs to be explicit in saying that any charges incurred during a trial period must be paid and before the contract is terminated.

9.5 Also since termination of a contract could happen within fifteen (15) days, as proposed by ECTEL, there is the possibility of persons taking a service with the intention of cancelling within 15 days and hoping to avoid payment of services. To counter this perverse incentive C&W may have to consider taking deposits on contracts or provide customers with the option of (a) early cancellation for which there would be a deposit or (b) no early cancellation for which no deposit would be required. Notwithstanding option (b) C&W assures customers that redress will be provided where a customer, under a contract, cannot access or make use of the service ordered.

9.6 ECTEL suggests that '*a Licensee may establish reasonable limits on the use of voice, text, and data services for the trial period'*. This could be a useful provision except for the caveat that limiting the use of the service could cause the service to actually be below the customers' expectation and encourage early cancellation.

9.7 Return of a device in near new condition upon early cancellation also has its challenges. Once a device has been pulled out of its packaging and used it becomes difficult, if not impossible, to recover its value from another customer because it is a used item. So the viability of this approach is questionable. Moreover C&W can clearly see how such a provision would be open to abuse, again as customers take up a service which includes a phone with the intention to do early cancellation. Perhaps consideration should be given to including a charge for the phone in the deposit as considered in option b above.

9.8 C&W supports its disabled customers. The issue is whether the nature of the disability affects the ability of the customer to use the service. C&W has the same challenges with a trial period for disabled customers as identified above. Notwithstanding, in instances where it is found that there are genuine service issues preventing any customer from accessing or making use of the service paid for, the Company does act to provide redress. ECTEL is

asked to define disability since without more the term remains vague and must a disabled customer appear in person to attest to their disability?

9.9 ECTEL has directed that the Company is to provide notification of expiry of fixed term contracts 90 days before expiry. This requirement may not always be commercially practical or desirable. .

Section 15. Plan With Set Value

9.10 Even where real time billing is feasible, it is not possible to provide real time billing for roaming services under a Plan with Set Value because our overseas partners are the ones who send the data records to us and our billing system is not interconnected to the billing system of our roaming partners. Roaming charges can take days and weeks to be received.

Section 16. Sales by Phone and Internet

9.11 ECTEL is asked to clarify sections 16(1) and 16(2). The intent of the sections is unclear to C&W.

Section 18. Prohibited Actions

9.12 ECTEL is asked to clarify section 18. (4). Is the section referring to the expiry of credit only or does it also contemplate the expiry of SIMs? Notwithstanding C&W interprets that promotional credit is excluded from the provisions of this section.

Part V Advertising and Promotions

9.13 C&W agrees that advertising and promotions must fairly present to customers the nature of the product or service that they are being encouraged to purchase. ECTEL should note however that in the case of mobile service a customer is not confined to a particular geography. So it is possible that a particular speed of say data service is advertised which may not necessarily be available in the geography in which a customer resides but which

becomes available to a customer as the customer moves about to different geographic locations in the country.

9.14. Both Jamaica and Barbados have independent, competition authorities whose remit encompasses most aspects of the measures that ECTEL is seeking to promote to protect customers. These competition authorities address competition issues across the entire spectrum of industries not just telecoms. The rules that ECTEL is promoting apply only to the telecoms industry and so it would suggest that there continues to be asymmetric regulation of the telecoms industry when compared to other industries which also advertise and promote services. C&W suggest that it would be useful for ECTEL to advocate for a competition authority across the ECTEL states because ECTEL has set itself up to be both judge and jury which is contrary to natural justice.

9.15 Fundamental as the matter of natural justice is, whether ECTEL or the NTRCs are empowered by current legislation or even the yet to be passed Electronic Communications Bill with such wide ranging powers over competition matters such as advertising and promotions is debatable. The NTRCs would need the machinery to police the proposed code and we are uncertain how that would be managed or funded. Because several of the provisions proposed by ECTEL are highly subjective to interpretation and application C&Ws fears that it will be too easy for operators to run afoul of the provisions and the provisions will provide too many opportunities for operators to bring frivolous claims against each other. In effect, providers could use the provisions as a tool to affect the revenues of their competitors. How then does ECTEL propose to neutralize this kind of opportunism?

9.16 ECTEL also has to consider that there are different types of ads and this distinction has not been made. Further where the advert in questions is printed or a photograph, one has to be judicious and practical in the amount of information that can be placed in it. Typically C&W directs customers to where they can find additional information on the ad offering which is usually a website.

Part VI Complaints Handling

Section 33 (3) (g)

10.1 It is not practical to suggest that there is a category of complaint that is urgent and a category that is not urgent because each customer will consider that their matter is important notwithstanding the complaints of other customers. It is best to have a standard approach to handling all complaints.

Section 34(5)(b)

10.2 Having resolved a complaint to the best of its ability, C&W would have exhausted its ability to satisfy a customer. If the customer is dissatisfied with the resolution, and since only C&W can resolve the issue, C&W could not offer recourse to any other entity.

SECTION 9

CONCLUDING REMARKS

9.1 Cable and Wireless welcomes reasonable opportunities to provide input towards the development of the regulatory framework in ECTEL states. In this case we believe that gravity of the issues being considered merit more time to comprehensively treat with the various issues. In this response we have endeavoured to cover the issues as comprehensively as possible given the constraints.

9.2 In general Cable and Wireless has serious concerns with ECTEL's approach to market regulations. We urge ECTEL to consider the feedback we have provided in this response, and to reconsider an approach based on heavy regulation of the market based on assumptions, instead of relying on market forces and regulating only where necessary as demonstrated by evidence. The Chair of the Canadian Radio-television and Telecommunications Commission recently noted at the start of a consultation on basic telecommunications services that regulation must be evidence-based, and he challenged participants to:

> *"Demonstrate to us, using evidence, that the public interest and the specific situation in each region justify action by the CRTC. Explain to us why market forces are currently insufficient to respond to the public's needs."*

9.3 We look forward to engaging ECTEL and the various NTRCs on these issues in the coming months. We believe that outcome of any regulatory intervention should be to ensure the sustainable and robust development of the sector. This is pivotal to the socio economic development of ECTEL states.

END