

CONSULTATION DOCUMENT

Recommendation of the Eastern Caribbean Telecommunications Authority ("ECTEL")

To the National Telecommunications Regulatory Commission to consult on Draft Telecommunications Access to Facilities Regulations

Comment on Comments

March 26, 2009

1. On March 2nd 2009 the National Telecommunications Regulatory Commission received a submission from ECTEL containing ECTEL's recommendation for Draft Telecommunications Access to Facilities Regulations for [Member States].
2. A copy of the Consultation Document on "*Draft Telecommunications Access to Facilities*" is available on the ECTEL website (www.ectel.int) and copies can be made available upon request from the National Telecommunications Regulatory Commission.
3. The Initial Comments period was set for 3rd March 2009 to 24th March 2009.
4. ECTEL received comments from:
 - a. Cable & Wireless/LIME LIME
 - b. Digicel
 - c. Tele St. Lucia
 - d. Karib Cable/'
 - e. NTRC St. Vincent and the Grenadines
 - f. 21st Century
5. These initial comments are hereto attached and ECTEL now invites comment to these comments.
6. The Comment on Comments period will run from 27th March to 10th April 2009.
7. Following the Comment on Comments period, the Directorate will consider all comments received and then present revised Access to Facilities Regulations Council of Ministers with a recommendation for their adoption in the ECTEL Member States.

8. All responses to this Consultative Document should be written and sent by post, fax or email **no later than 4: 30 pm on 10th April 2009** to: -

Managing Director
ECTEL
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CASTRIES
St. Lucia
Fax: 1-758-458-1698
Email: consultation@ectel.int

Disclaimer

This consultative document does not constitute legal, commercial or technical advice. The consultation is without prejudice to the legal position of ECTEL's duties to provide advice and recommendations to the Ministers with responsibility for telecommunications and the National Telecommunications Regulatory Commissions.

The following are the comments submitted during the initial consultation period:

Digicel

The Bigger, Better Network.

Response of Digicel (St. Kitts – Nevis) Limited and Digicel (SVG)

Limited to the invitation by

NTRCs of:

St Kitts and Nevis, and

St Vincent and the Grenadines

to comment on the Consultation Document,

“Access to Facilities”

24 March, 2009

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1 INTRODUCTION

Digicel is grateful to the NTRCs and to ECTEL for the opportunity to comment on this important matter of public policy.

Digicel has numerous concerns about the draft Access to Facilities regulation. Mandated access to a competitor's assets is arguably the most aggressive of all possible regulatory remedies. There are complex economic issues involved which are not acknowledged in the draft regulations or preamble. There are difficult make or buy issues and implications for future investment that must be considered when looking at access cases. There is also a question about the regulatory resources that in some cases would be needed and the ability and efficacy of a small jurisdiction to provide those resources.

As will be seen throughout this submission, Digicel is strongly of the view that market forces should be permitted to operate for the vast majority of requests for access to facilities. Digicel respectfully submits that only where market forces will clearly fail should the regulatory process be at all involved, and, even then, only in the very specific circumstance noted in this submission.

In section 2, Digicel argues that there is a need for the regulator to be obliged to enter a public consultation process in respect of each access ruling. In section 3, Digicel discusses mandated access and essential facilities, and calls into question the efficacy of the regulations as they stand. In section 4, Digicel discusses the case of mandated access where there is no dominance. Section 5 deals with negotiated access; section 6 co-location; and section 7 outlines Digicel's concerns regarding procedural issues concerning prices for access. Digicel is of the view that very significant revisions to the draft regulations are in order, such that the revised draft should properly be subject to a further round of public consultations.

2 PUBLIC CONSULTATION

The draft Access to Facilities regulations give a great deal of discretion and very broad power to the regulator in regard to granting access to facilities. Digicel considers that it is not in the public interest to provide this level of regulatory power without also imposing on the regulator an obligation not to make a final determination in any particular case without first having consulted publically.

Moreover, any final ruling should include a regulatory impact assessment which would show that the application of the remedy in the particular case is in the public interest. This is a requirement in the EU and we believe this provision represents accepted best practice regulation.

The imposition of these obligations on the regulator is also advised due to the complexity involved in deciding whether access should be mandated and in arriving at terms and conditions of access to firm's assets. This is perhaps the most complex and disputed area of utility regulation.

3 ESSENTIAL FACILITIES AND DOMINANCE

In general, regulated access to a firm's assets is the most aggressive of all regulatory remedies. Mandated access should largely be confined to "essential facilities", meaning those assets that involve something resembling "super dominance": those assets that cannot be economically replicated in the medium term. A formal market definition is essential and, of course, dominance must be found as a question of fact in the particular situation as a necessary (although not sufficient) condition for a mandatory access remedy to be imposed.

Other cases where access may be mandated are severely limited. Ladder of investment theory suggests that some assets may be temporarily essential during and for a period following entry. In such cases, access could be temporarily granted according to several costing options, from the economic cost to the access provider to a "retail minus" rule. We have seen the latter remedy in the USA and in the EU in some cases where dominance in wholesale provision was established.

Digicel questions the efficacy in any jurisdiction with a very small population adopting similar measures as we have seen in the EU or USA. In this regard there are two points that are of key importance which Digicel would wish to raise:

- Because these issues are so complex, the regulatory costs tend to be substantial – indeed Digicel argues probably too substantial for the small numbers of subscribers in very low population countries to carry, i.e. adoption of such measures will not pass a social cost benefit test.
- Moreover, there are only a handful of regulators that have the regulatory economic expertise and capacity available to either do this task themselves or to select, manage, and interpret the results obtained from expert consultants, and then to implement the result according to best regulatory practice.

For these reasons, Digicel suspects that, except for the most important cases, mandated access regulations are not efficacious for small jurisdictions with limited resources.¹

¹ Interconnection is a form of mandated access but Digicel believes that the NTRCs and ECTEL are correct in their view that there are sound reasons for considering it separately from other potential access cases.

4 MANDATED ACCESS WITH NO DOMINANCE

The main concept inherent in the draft regulations which Digicel would respectfully disagree with is that access can be mandated where there is no market dominance. The one exception to this for which there seems to be little objection in best international practice jurisdictions, at least in principle, is in regard to certain environmentally sensitive sites. Throughout the world, these tend to be rather limited in number. Moreover, mandated access under the environmental argument should not be used in a permissive way which could be used by competitors to gain access without paying the full cost for it (including for the risk that Digicel bore when it invested in the relevant assets).

If the firm that would provide access is not dominant in the relevant market concerning the assets that are the subject of an access dispute, then Digicel considers that the circumstances in which regulated access could apply need to be outlined in the draft regulation in more detail. The legitimate circumstances that Digicel can envisage are where there is risk of permanent environmental damage or serious and sustained public disruption. There may be other cases that Digicel is not aware of, but Digicel respectfully submits that these need to be outlined in the regulation – at least in terms of the underlying principles.

The draft regulations specify that access may be granted to the following non-exhaustive list: *“towers, sites, underground facilities, wires, lines, terrestrial and submarine cables, wave guides, optic or other equipment or object connected therewith”*. None of these are usually considered essential facilities. For many of them no network operator will be dominant.

Digicel is not dominant in the provision of towers, sites, or wave guides. Access to them should not be granted for a reason such as to simply enable a competitor cheaper entry. Digicel suggests that no licensee is dominant in the provision of “towers” or “sites” or “wave guides”. Except perhaps in the most exceptional of circumstances and in regard to specific environmentally sensitive sites, Digicel does not believe it is in the public interest to impose access provisions involving these assets.

What is more, even where firms are dominant, super dominance would usually be needed before mandated access became the most appropriate remedy. This would require the Commission to assess what the likelihood would be of the bottleneck being technologically bypassed in the next few years.

There is nothing peculiar about the telecoms industry in this regard. Entrants in many other industries, regulated or not, would also like cheaper and easier entry by getting access to assets that an earlier entrant has invested in.²

² Firms that do not compete in the same markets with Digicel can negotiate access with Digicel. There is absolutely no basis for the regulator to involve itself in such arrangements.

It is respectfully submitted that it is simply not a regulator's job to facilitate easier entry by allowing access seekers an easy ride on Digicel's 'coat tails' where Digicel is not dominant in the relevant market.

5 NEGOTIATING ACCESS

In Digicel's view, the starting point in relation to draft Regulation 8 should be the principle that, subject to certain enumerated exceptions, Digicel is free to negotiate access with any party, free of any regulatory involvement. Unless the access is ultimately a matter specifically addressed by the access regulations, e.g. where the assets to which access is being negotiated are "essential facilities" or are covered by some fairly exceptional circumstances, Regulation 8 should have no bearing on a process of negotiation. Digicel respectfully submits that this ought to be clarified in the draft regulations.

6 CO-LOCATION

There are often a huge number of possible cell site location options for entrant mobile network operators. The choice of cell sites is dependent on the location of other cell sites. This is a simultaneous optimisation problem in network planning.

A mobile network which has a different network plan will find that rather few of its competitors' sites are optimally located for co-location purposes. The probability that a mobile competitor would need access to one of Digicel's sites in order to optimally locate one of its towers will be remote since our network plans will invariably be different. Digicel believes these issues need to be acknowledged in the draft Regulation 9.

In general, Digicel believes the section on co-location provides insufficient guidance as to when co-location should be mandated. Indeed, the preamble for regulation 9 seems to envisage a rather permissive attitude to mandated access for co-location, which we believe would be difficult to defend from the perspective of best international practice. For this reason among others, Digicel respectfully submits that a new draft regulation should be prepared that provides more clarity on why and when mandatory co-location will be imposed.

7 A REVERSAL OF ACCEPTED PROCESS

Digicel wishes to express its concern regarding draft Regulation 7. Digicel believes that best practice consultation involves the regulator explaining in writing its reasons for action and the remedies it considers most appropriate. Where this involves estimating costs, it has involved the

regulator setting out its preferred approach to estimating each parameter. The network operators are then invited to comment.

Digicel does not know of any jurisdiction where the regulator would turn this process on its head and compel the network operators to estimate their own costs. Digicel has serious concerns about the fairness of such a procedure and respectfully requests that this be amended and that there be a further round of consultations before the regulation is finalised.³

8 CONCLUSION

Mandated access to a competitor's assets is arguably the most aggressive of all possible regulatory remedies. Market forces should be permitted in all but exceptional circumstances. The associated regulatory overhead costs of a regulated access regime are large and so this is especially true in countries with very small populations. Without the regulator's powers being tightly specified, Digicel considers that the regulation substantially raises the investment risk perceived by current and potential future investors.

For this reason, Digicel respectfully submits that the powers of the regulator be bounded by principles and guidelines. In this regard, Digicel considers that the current draft regulations are under-developed. Digicel believes that it is strongly in the public interest that the regulations should also place obligations on the regulator which cover the following:

- To describe the circumstances in which mandated access may be granted
- To make clear that, except in the most exceptional of circumstances, the regulations will not apply if the potential access buyer is not a direct competitor of the potential access provider
- The requirement to consult about the *need* for mandated access in any particular case
- The requirement to consult about the *terms and conditions* of mandated access in any particular case
- The need for any mandated access ruling to be supported by a market definition and market analysis, and an analysis of the options for remedies
- The need for dominance to be established in the wholesale market

³ Moreover, if the costing principle was 'economic cost', this would likely involve the need for outside consultants at considerable expense. Digicel has a very small customer base from which to recover such costs, a point which has already been made above in section 3.

- A requirement that any access ruling should be supported by a regulatory impact assessment which would show that the application of the remedy is in the public interest.

Digicel respectfully submits that an amended regulation which addresses the points Digicel summarises above should be issued and a further round of public consultation be undertaken.

Genaline Bruce

From: Len Hornsey [lenhornsey@karibcable.com]
Sent: Tuesday, March 24, 2009 4:43 PM
To: consultation@ectel.int; ntrc@ntrc.vc
Cc: hollyanya@gmail.com; Glass, Kelly; jglass@karibcable.com; cadet@karibcable.com; Calvert Jones
Subject: Comments on Draft Access to Facilities Regulations Consultation Document

Comments from Karib Cable in regards to the above subject:

1. Para 4. and the document as a whole covers only the physical networks, facilities and components. This regulation entitled Access to Facilities, designed to clarify and provide more detail to that included in the Telecommunications Act 2001, should also include, or at least have reference to, the virtual and other less tangible elements of Access to Facilities. For example, whilst Number Portability is mentioned under Para 6 of Interconnection Regulations SRO 60 of 2008 it is not mentioned in the Draft Access to Facilities consultation document.
2. Para 5 Subsection (2) Whilst every infrastructure sharing agreement may be submitted to the Commission it is not necessary that the Commission approve each agreement. Should the commission disapprove of the rates and/or terms and/or conditions of an agreement then Para 5 (1) may be implemented.
3. Para 6 Subsection (2) (a) replace "anticipated" to "forecasted"
4. Para 6 Subsection (3) include text "This directive will be funded by the party negotiating for shared resource or through a USF funded NTRC project.
5. Para 7 Subsection (1) replace "owner of such facilities" to "owner of such facility"
6. Para 8 Subsection (2) replace "promptly" to "within 30 days"
7. Para 8 Subsection (5) Should include language to cover a resolution procedure of any problems arising out of such agreement be specified and that an arbitration period and the arbitration process also be specified
8. Para 9 Subsection (3) (d) "anticipated" to "forecasted"
9. Para 9 Subsection (3) include in the items that the Commission may take into account additional costs for the facility provider for maintenance as a result of the early and/or unplanned and/or increased maintenance overhead as a result of the un-forecasted adoption of the facility. And the accelerated or delayed impacts to the depreciation of the asset dependant on when the facility provider is directed to provide access to a previously unused asset.

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National Telecommunications Regulatory Commission
St. Vincent and the Grenadines

Ref. No. COR/ECTEL

March 23, 2009

Mr. Embert Charles
Managing Director
ECTEL
Vide Boutielle
P. O. Box 1886
St. Lucia

Dear Sir

Consultation on Access to Facilities Regulations

The Commission, having reviewed and discussed the consultation document, wishes to comment as follows:

1. While the Commission can understand the general objective of what these regulations are meant to achieve, it has some concerns on how ECTEL is approaching the issue, and there is also some concern that the draft regulations might be too broad in scope thereby creating possible conflict with the existing Interconnection Regulations and Dispute Resolution Regulations.
2. The regulations refer to "Access to Facilities Regulations". The Commission is of the view that this is too broad and should be reworded to be inline with the provisions of Section 48 of the Telecommunications Act. Infrastructure sharing is embedded in the section dealing with interconnection in the Telecom Act, which is logical, noting that they are closely related since the whole concept of interconnection depends on one provider actually using the facilities of another provider (sharing their facilities at a cost with the objective of reaching the customers of that provider). If we were to leave these draft regulations as worded, it could lead to

potential conflict with the existing Interconnection Regulations, since an issue could very well be interpreted by different parties to fall under different regulations (Interconnection or Access to Facilities). It is the Commission view that the regulations be targeted at accessing/sharing of only towers, sites and underground facilities as outlined in the Act. To do otherwise would be to go outside the provisions of the Act and can only lead to confusion in the market. The Act is very specific on this issue and unless the Act is amended, the regulations should always be inline with the Act. As drafted, it would seem that these regulations might be going further than what was envisioned on this issue in the Act. This is specifically relevant to what is outlined in regulation 6 on page 8.

3. The time frames outlined in regulation 8 page 9 appear to be too long. As outlined, a problem may take up to four (4) months to resolve while still being within the allotted timeframe. Parties having issues with infrastructure sharing would want to have it dealt with by the regulator within a shorter timeframe.
4. Regulation 8(4) under page 9 refers to procedures that the Commission may adopt. The Commission is of the view that any dispute under this regulation or any other regulation should fall under the jurisdiction of the Dispute Resolution Regulations and so should be stated.
5. The Commission is of the view that regulation 10 on page 10 of the draft regulations should be revised so that it would be applicable to all providers and not only dominant providers.
6. Regulation 11 page 11 refers to a code. Our Telecom Act does not refer to what a "code" is and whether the NTRC has authority to issue such codes. How does a code differ from what is currently provisioned within regulations? It seems that this "code" would have provisions that are similar to what are currently in regulations while noting that our current legislation does not give the NTRC authority to make regulations.

Having considered the above, the Commission is of the view that issues related to infrastructure sharing should be clearly restricted to towers, sites and underground facilities and should not be dealt with under a new set of regulations but should form part of the Interconnection Regulations. Any items that were planned to be part of a "code" should be incorporated into the Interconnection Regulations as well.

The Commission wishes to express our appreciation for being given an opportunity to comment on this consultation document.

Sincerely yours,

Apollo Knights
Secretary/Director
NTRC

Cc Mr. Cyrus Reynolds-Chairman/Board of ECTEL
Mr. Isaac Solomon- Director/Board of ECTEL



March 24, 2009

The Managing Director
Eastern Caribbean Telecommunications Authority
P.O. Box 1886
Vide Boutielle
Castries
St. Lucia

Dear Sir,

Comments on Draft Access to Facilities Regulations Consultation Document

Tele (St.Lucia) Inc. ("TeleSt.Lucia") respectfully submits these comments in response to Eastern Caribbean Telecommunications Authority's (ECTEL) Consultative Document for the Draft Access to Facilities Regulations ("the Draft").

Introduction

TeleSt.Lucia is an associated company of TeleBarbados a competitive service provider in Barbados. TeleSt.Lucia has a strong interest in providing services to the citizens and businesses of St. Lucia and is supportive of liberalization measures and using competition as a mechanism to promote lower prices and improved service. However, TeleSt.Lucia believes that, while ECTEL's intentions are good, the Draft Consultation Document casts to wide a net and will prove burdensome to competitors while not giving enough focus to the activities of dominant carriers like LIME.

Many nations have formally adopted pro-competitive interconnection policies as a mechanism to increase competition and diminish the market dominance of companies that have monopoly ownership over "bottleneck" local exchange facilities.

In the U.K. for example, Ofcom, the national telecoms regulator, begins its discussion of regulation for fixed line telecommunications with the following statement:

Ofcom has concluded that a new approach is necessary for the longer term, based on real equality of access to those parts of the fixed telecoms network which [British Telecom's] competitors cannot fairly replicate¹.

¹ Ofcom, "A New Regulatory Approach for Fixed Telecommunications," June 23, 2005.



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The Managing Director
Eastern Caribbean Telecommunications Authority

In the United States, the Telecommunications Act of 1996 established rules requiring Incumbent Local Exchange Carriers (the monopoly providers of local phone service) provide interconnection at rates based on forward-looking incremental costs.

A variety of other nations have adopted similar rules. While there are certainly some differences in approach across nations, there are three common threads intrinsic to all successful pro-competitive interconnection policies:

- a. They recognize dominant firms' ongoing control over bottleneck local exchange facilities and that, absent regulations to the contrary, dominant firms will naturally exercise the market power they derive from possession of these facilities to restrict competition.
- b. They impose a strict pricing standard on the dominant firms' interconnection, based on forward-looking incremental cost, to ensure that access to bottleneck facilities does not result in artificially inflated costs and prices, and restricted competitive output.
- c. They apply interconnection regulations only to dominant firms that control bottleneck facilities and do not impose burdensome regulations on the competing entrants upon whose success liberalization policy depends.

Interconnection Rules Should Apply Only to Dominant Firms with Bottleneck Control Over Local Facilities

The Draft, as currently written appears to apply to "every public network operator," regardless of their competitive position. Even competing firms attempting to interconnect with each other would apparently have to establish public prices for their privately negotiated transaction, provide collocation facilities, and be subject to review by both the regulator and the incumbent monopolist with which they are attempting to compete. Aside from the fact that such requirements leave new entrants open to anti-competitive "mischief" on the part of incumbent monopoly firms looking for methods to slow the advance of competition, such rules serve no public policy purpose.



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The Managing Director
Eastern Caribbean Telecommunications Authority

Competing firms possessing little market power will interconnect with each other without any regulatory interference when their interests coincide. Placing a regulatory body in a path to "supervise" such arrangements will simply slow the pace of interconnection. Indeed, the prospect of having their relationships with other non-dominant providers scrutinized by competitors will have the effect of discouraging entry and stifling competition.

The Rules for Dominant Operators Must Be Strengthened

St. Lucia and other member states in the OECS have a limited number of locations where interconnection facilities can be established. Therefore, rather than the complex series of negotiations between parties subject to final approval by ECTEL contemplated in the Draft, ECTEL should direct dominant operators to:

1. Designate their primary interconnection locations.
2. Direct that the Dominant Operator perform a forward-looking incremental cost study showing the economic costs associated with interconnection at the primary interconnection locations. This cost study should be made available for public comment and review by ECTEL. (This should be a relatively straightforward exercise--in the U.S. and Europe there were thousands of locations to examine, here there are only a few).
3. Provide a list of rates, terms, and conditions for interconnection for public comment and review by ECTEL.

Once Steps 1-3 are completed the results should be published as a Standard Interconnection Agreement under which any licensed carrier can purchase interconnection. ECTEL should then act to ensure that carriers abide by the terms of the Standard Interconnection Agreement. In the event that the Dominant Firm should negotiate more favorable terms with another party then these terms should be published, and all interconnecting parties should be allowed to opt into those more favorable terms.



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The Managing Director
Eastern Caribbean Telecommunications Authority

Finally, since rates will be based on forward-looking incremental cost, there is no need for an “insufficient capacity” rule. Such rules are prone to abuse by Dominant Operators hoping to delay or restrict competition. If the Dominant Operator lacks necessary capacity, pricing based on forward looking incremental cost will provide the means necessary for the Dominant Operator to recoup the costs of expanding its facilities to allow interconnection.

TeleSt.Lucia again commends ECTEL for continuing to push toward increased competition and a fully-liberalized telecommunications market. We believe that the recommendations contained here, will assist in achieving that goal.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patrick Hinkson', written in a cursive style.

Patrick Hinkson
VICE PRESIDENT

Hello.

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LIME

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March 24, 2009

The Managing Director
ECTEL
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St. Lucia

BY E-MAIL TO: consultation@ectel.int

Dear Sir,

Re: Draft Access to Facilities Regulation

LIME is in receipt of the captioned draft 'Access to Facilities Regulation' (the Regulations) and is pleased to share its views regarding the proposed draft regulations for access to facilities on behalf of all of its business units in the ECTEL countries. Failure to address any matter presented in the regulations is not to be interpreted as approval or support by LIME. LIME reserves the right to comment further on any of the regulations.

LIME agrees that regulations governing infrastructure sharing must apply to all telecommunications service providers. However, LIME is not convinced that new regulations are in fact needed. That ECTEL or an NTRC asserts '*a need to strengthen and clarify the rule*' with few additional details, as did the St. Vincent and the Grenadines NTRC in its 9 March 2009 letter launching the consultation on the draft regulations, does not necessarily mean that there is such a need or that the regulations are proportional to the need.

All LIME's comments on the Regulations are without prejudice to LIME's view that the Regulations are unnecessary and disproportionate.

LIME disagrees with ECTEL on three fundamental issues, which are:

1. The unreasonably wide definition of facilities for the purposes of facilities sharing.
2. That rates for facilities are to be cost based rather than commercially negotiated.
3. That all facilities identified are essential facilities

1. Unreasonably Wide Definition for the Purposes of Facilities Sharing

The definition of facilities in the Regulations should not exceed definition in the Telecommunications Acts in the ECTEL countries. The definition of facilities sharing is the widest that LIME has seen and is considered to be unreasonably wide. The inclusion of access to submarine cables is particularly egregious.

Further, while the extent of facilities sharing is unreasonably wide, ECTEL has not gone far enough in looking at facilities that may be available for sharing.

Although neither ECTEL nor the NTRCs currently have jurisdiction over the infrastructure owned by other providers outside of the industry such as Cable Operators, Broadcasters, Radio Stations and light and power companies, every attempt must be made to bring those providers under the umbrella of infrastructure sharing. The facilities of Cable Operators who do have a licence under the Telecommunications Acts in the ECTEL countries should fall under the jurisdiction of the NTRCs. Otherwise, operators will face the unacceptable situation where identical facilities are treated differently depending upon the identity of the owner of the facility (e.g. utility poles owned by telecommunications companies versus electricity utilities). This proposal is not far fetched given the convergence of telecommunications and broadcasting. Indeed such an approach may prove less contentious as more facilities are made available.

By way of example, in Jamaica, the Telecommunications Policy, February 2009 is proposing a converged Single National Regulator which would have jurisdiction over telecoms, including spectrum and the non-content aspects of broadcasting. This converged regulator is likely to have jurisdiction over a wider range of facilities.

2. Cost Based Rates for Facilities Sharing

Regulation 5 – Powers of the Commission

ECTEL has proposed that all agreements for facilities sharing are to be submitted to the NTRCs and that the NTRCs further invest themselves with the authority to approve the terms and prices. LIME regards this as a confiscation of its assets and an illegal appropriation of LIME's right to protect its legitimate interest through its terms and conditions.

In support of this assessment LIME makes reference to the existing tower sharing agreements. This agreement was originally between Cingular and Digicel and the rates were commercially negotiated. Both LIME and Digicel subsequently adopted this tower sharing agreement, including its rates. The industry has heretofore been self regulated, and the tower sharing agreement has never been submitted to ECTEL, but the arrangements have been operating without dispute for a number of years. Of course as with all agreements of this nature, sensitive sites are not available for sharing. However, the net result has been to limit the number of new cellular masts in the ECTEL States, and has clearly been in the public interest. This agreement has been extended to encompass use in Jamaica, Turks and Caicos, The Cayman Islands, and British Virgin Islands, and in all these markets, the identical terms at a minimum have been found agreeable by the negotiating carriers. It is

therefore not clear why ECTEL considers it necessary to interfere with, and potentially disrupt, a process that has functioned well all this time.

Regarding Submarine Cables, unless an operator has invested in its own submarine cable it has to purchase an IRU (Indefeasible Right of Use) in a cable system, which is akin to a lease agreement for the use of the fibre capacity. Most submarine cable systems are owned by a consortia, and so all members compete with one and another for the sale of capacity to domestic operators. Throughout the Caribbean, LIME has had to purchase IRUs where it has needed to augment its capacity. The rates and terms and conditions for these IRUs are commercially negotiated around the world, a situation which has not prevented effective competition, investment in new facilities or provision of innovative services in any country. Again, it is not clear why ECTEL considers it necessary to "fix" that which is not a problem.

LIME's retail business is currently investigating the possibility of offering equipment hosting services in the near future. These facilities would also be available to competing service providers. In addition, it is expected that these facilities would be easily reproducible by any other operator willing to make the same investment (in other words, operators would face the traditional "buy-or-build" decision). However, it is not clear that there would be any business case for investment by LIME in new facilities if the NTRCs were to be empowered to expropriate an operator's assets by mandating facilities sharing at rates and on terms and conditions that no two commercially-minded operators would negotiate, and to hand these facilities over to a competing operator to compete for the same retail customers. To put it more plainly, why build when regulations allow you to take?

LIME is also concerned that small arbitrage operators who do not wish to invest in networks in ECTEL countries, but wish to extract as much money as possible, would, through the draft regulations be permitted to exploit LIME's facilities, making the least investment possible while at the same time having the ability to make the greatest return by cherry picking locations and exchanges. These same operators when they are ready to so do exit the market quickly and painlessly as they have no assets in the ECTEL countries. LIME does not believe that over-reaching facilities access regulations, such as are being proposed, are in the public interest, particularly if they do not encourage investment in networks and growth of telecommunications in the country. There is also the issue of increased provision for bad debt as some operators will not pay or find themselves unable to pay for the service required.

The Regulations should be designed to support and encourage commercial negotiations, not substitute themselves for them. Anything other than commercially negotiated rates, terms and conditions will be sub-optimal for the industry and for the country. Should LIME have to share facilities, whether sharing its own facilities with others or sharing the facilities of others, it would do so on the basis of commercially negotiated rates as is the case now with tower sharing. Commercially negotiated rates for the use of infrastructure is the prevailing practice, and has been a successful arrangement for several years.

Regulation 6 – Obligations to Provide Access

ECTEL proposes, inter alia, that where physical collocation is not possible, the following would be considered:

- (a) virtual collocation
- (b) conditioning additional equipment space
- (c) optimizing the use of existing space

(d) finding adjacent space

LIME notes that ECTEL considers virtual collocation to be an option only where physical collocation is not possible and as such is considered second best or inferior. This ought not to be the case. Virtual and physical collocation should be equally acceptable means of collocating. In some cases collocation is meant to be virtual such as Mobile Virtual Network Operators (MVNOs). Rates determined for MVNOs are typically commercially negotiated.

LIME submits that the costs to make the specified options available and or workable must be borne by the party seeking to share the infrastructure. LIME does not support any alternative which may result in the reorganization of LIME's network for the benefit of a third-party.

Regulation 8 – Negotiating Access

The timeframe for interconnection should be the standard applied to negotiating access to facilities. On average, interconnection agreements take four (4) months or one hundred and twenty (120) days to conclude. Therefore a sixty (60) day timeframe for negotiating access, as proposed by ECTEL, is not practical and should be at least one hundred and twenty (120) days. Premature arbitration can also result in extended timeframes for completing negotiations.

3. That All Facilities Identified are Essential Facilities

Regulation 10

Regulation 10 requires dominant operators, in particular, to provide access to their networks. LIME is not aware that any service provider has been determined to be dominant in any of the ECTEL countries in respect of the provision of facilities. As ECTEL is well aware, LIME consented to being declared dominant in respect of the provision of retail fixed network services only, as part of the negotiations pertaining the first Price Cap Regime for ECTEL countries. This does not mean that any LIME company is in fact dominant in any given market. In any event since then the markets have developed with several new entrants providing a variety of services. Further, as ECTEL is also aware, it is inappropriate under best international regulatory practice to treat a company as dominant in all telecommunications markets simply because the company might be dominant in one given market. In other words, any presumed dominance in the retail fixed voice and Internet Access services markets does not mean that there is dominance in any other market, including that for the provision of access to facilities.

The explanatory notes to Regulation 10 suggest that Regulation 10 is intended to “*simply empower the Commission to require the dominant operator to give access where certain essential facilities are involved*”. LIME notes, however, that none of the proposed regulations for access to facilities or Regulation 10 itself actually refers to ‘essential facilities’. It would appear that the scope of Regulation 10 in fact far exceeds the drafter’s intent, and LIME recommends that a new sub-regulation be added to clarify that the obligations under Regulation 10 apply only to such facilities that may have been separately determined to be ‘essential facilities’. LIME is not aware that ECTEL has determined which facilities are essential and to whom.

In LIME’s view and without prejudice to any submissions that LIME may make in any such consultations, LIME submits that there are no facilities in any of the ECTEL countries that would

satisfy the criteria of being an essential facility. Even LIME's copper loops would not be 'essential' as it is clear from the entry of the cable operators into the fixed telecommunications markets that LIME's copper loop infrastructure is not necessary nor essential, for participation in the voice or Internet Access downstream markets. Further, ECTEL and the NTRCs should be reluctant to designate any facility as essential, given that such a designation could discourage investment in equivalent or alternative facilities, and anything that discourages investment in the ECTEL States is not in the public interest.

There is also reference to a telecommunications code in the draft regulations where such a reference does not exist in the Act. We submit that this creation of a code is ultra vires the main Act.

Conclusion

LIME anticipates that an evaluation of the Regulations will indeed reveal that the definition of facilities is unreasonably wide and that the Regulations themselves are not necessary. Moreover it is expected that the industry practice of commercially negotiated rates for the sharing of infrastructure will continue to prevail.

Please direct any communication in respect of this consultation to Melesia Sutherland Campbell at melesia.Campbell@time4lime.com.

Yours sincerely,


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Legal, Regulatory & Corporate Affairs

Comments from 21st Century St. Kitts and Nevis

Comments on Draft Access to Facilities Regulations

4. Application

Given the wide scope of items that are covered by the regulation, it appears that sharing spectrum is also covered by this regulation. If every operator is to have its own spectrum then the regulation should indicate that sharing of spectrum is not allowed.

Article 7 Prices for Access

(1) Prices for access to and use of different facilities may vary according to the Facilities involved, but must be just, reasonable and based on the costs of the Owner of such facilities.

In this situation it is not ok to just say that the cost must be just and reasonable and based on the cost to the owner. Experience has shown that the incumbent has a tendency to include other information in the cost of the infrastructure in their fully allocated cost methodology. Like the price cap calculations prices for the access should be based on the long run incremental cost model (LRIC). The asymmetry of information places the party requesting the access at the mercy of the service provider.

Secondly, the practice of demanding a whole year rent up front needs to be considered in the process. Traditionally, a lease requirement is for the first and last month's rental. By demanding a whole year's payment in advance is counter to what the regulations are trying to achieve that is cost effective entry into the telecoms market.

The regulation should stipulate:

- the methodology used to calculate the cost
- that the supporting data along with the proposed pricing derived should be submitted to the authority for approval

8. Negotiating Access

The article uses the word promptly in subsections 2 and 3 to indicate how soon thereafter receipt of a request for access should negotiations begin. Promptly for the new entrant and the incumbent means different things and have different implications for each party. Having had the experience of seeking interconnection using the same language 'promptly' it is instructive that a more definitive language be used such as 'within 7 working days' commence negotiations etc.

The reason for this at a maximum it can take 4 months to have a matter concluded which is a very long time in this changing telecom environment.

9. Co-location

The comments made in relation to the pricing for access is also applicable in this case.