CABLE & WIRELESS LIMITED, dba FLOW
COMMENTS ON COMMENTS ON

THE CONSULTATION DOCUMENTS

"MARKET ASSESSMENT OF REGULATED AND UNREGULATED RETAIL SERVICES AND PROPOSED RECOMMENDED REGULATORY MEASURES FOR RETAIL SERVICES IN THE ECTEL MEMBER STATES"

AND

"PROPOSED CHANGES TO REGULATION 17(c) OF THE DRAFT ELECTRONIC COMMUNICATIONS (CONSUMER PROTECTION) REGULATIONS (SPECIFIC RULES ON CONSUMER PROTECTION IN THE ELECTRONIC COMMUNICATIONS SECTOR)"

ISSUED BY THE EASTERN CARIBBEAN TELECOMMUNICATIONS AUTHORITY ON 28 AUGUST 2020

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I. Introduction

1. Cable & Wireless Ltd, trading as FLOW ("FLOW"), welcomes the opportunity to respond to comments on the Consultation Documents "Market Assessment of Regulated and Unregulated Retail Services and Proposed Recommended Regulatory Measures for Retail Services in the ECTEL Member States" and "Proposed changes to Regulation 17(c) of the draft Electronic Communications (Consumer Protection) Regulations (Specific Rules on Consumer Protection in the Electronic Communications Sector)" (the "**Consultation Documents**"), issued by the Eastern Caribbean Telecommunications Authority ("ECTEL") on 28 August 2020.

2. We understand that, besides FLOW, the NRTCs of St. Vincent & the Grenadines, Dominica and Grenada submitted comments to the Consultation Documents. FLOW is not responding to each statement by these commenters; however, our choice not to address any particular statement should not be construed as FLOW's agreement with such statement. For example, the NTRC of Dominica makes comments regarding wholesale markets in its paragraphs 8, 9, 16 and 20. These comments are not germane to this proceeding on retail services, so FLOW has not addressed these comments. The NRTC of Grenada has made no substantive comments and limited itself to comments on draft language, so, similarly, FLOW has not addressed these comments.

3. In this document, we wish to make three main points:

    - The NTRCs of St. Vincent & the Grenadines and Dominica have misinterpreted the underlying economics driving mobile price dynamics as a failure of competition. The prices for mobile service reflect the loss of revenue from traditional services and requirements to invest continually to upgrade broadband services and capacity, not, as the NTRCs assert, the absence of competition. Regulating prices to lower levels in these conditions will lead to the deterioration of service for consumers.

- The NTRCs are generally supportive of ECTEL's seriously flawed proposals to change Regulation 17(c) of the draft Electronic Communications (Consumer Protection) Regulations. The proposals put forth by ECTEL have no basis in international best practice and will lead directly to consumers facing less choice and higher prices.
- Based on the unequivocal findings of this benchmark analysis of international best practice, FLOW urges ECTEL to reconsider its proposed changes to Regulation 17(c) of the draft Electronic Communications (Consumer Protection) Regulations and consult again directly with stakeholders before making any recommendations to the NTRCs .

4. Please direct any questions you may have on these comments to:

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II. Comments on Comments on the Market Assessment

5. The NTRC of St. Vincent & the Grenadines begins its submission with a long list of questions that relate to the process and methodology employed by ECTEL. We believe that, at least in part, these questions arise because of the pre-determined nature of the ECTEL analysis that FLOW criticised in its first submission[1]. In sum, ECTEL asserts at the outset of its analysis that it is NOT reviewing the designations of dominance, but in fact goes through the motions of just that. Bound to a set of designations that is totally outdated, it arrives at conclusions that make no sense. Thus, for example, the NTRC of St. Vincent & Grenadines rightly make the point at paragraph 7, after supplying much evidence in support that "[t]his is a clear view that the mobile Service is a substitute for fixed PSTN lines."

6. Similarly, the NTRC of Dominica highlights the disingenuous nature of ECTEL's market assessment. It states, in its second paragraph, "[t]he fact ECTEL needs to implement market safeguards is an indication that some sort of [market power] failure exists".

7. Of course, FLOW does not agree with many points that the NTRCs make in respect to their characterisation of mobile markets. However, ECTEL must recognize that its two-decade-old approach of interpreting current data to reverse engineering previous dominance designations is untenable.

[1] See Section II of Cable & Wireless Limited, dba FLOW, Comments on The Consultation Document "Market Assessment of Regulated and Unregulated Retail Services and Proposed Recommended Regulatory Measures", 30 October 2020.

8. The biggest issue that FLOW has with the market assessments of the NTRCs of St. Vincent & Grenadines and Dominica is their characterisation of the mobile market as collusive or exhibiting joint dominance. FLOW and Digicel have a very long history of aggressive competition--competition that has provided substantial benefits to consumers in the ECTEL Member states. Ignoring this history, the NTRCs make observations on market outcomes solely through a flawed prism of market dynamics without reference to the underlying drivers of supply and demand. To them, stability in headline prices or nominal price rises must be the product of the market becoming less competitive or more collusive. This is simply not the case.

9. Over the last several years we have witnessed radical change in mobile and fixed markets that have simultaneously led to access providers losing key segments of service revenue, yet requiring them to increase investment in network capacity to cope with the exponential rise in data demand. More specifically, mobile and fixed access providers have had to increase capacity dramatically to accommodate the content that over-the-top providers have generated and monetized. Having lost the battle for content revenue, they have little choice of where to fund cost recovery for network expansion: access. Unless a new dispensation is found—one that has alluded the industry for several years now—to share revenue captured by the OTTs, one cannot expect access prices to decrease.

10. To be sure, there are certain aspects of mobile service provision (and the same can be said for fixed service provision) whose costs are falling. The NTRC of St. Vincent and the Grenadines cites mobile termination, for example. However, these costs are dwarfed by

the requirement to expand capacity. The associated increases in gross margin for off-net voice telephony afforded by decreases in mobile termination are dwarfed by the overall reductions in voice telephony income. We therefore categorically reject the NTRC's statement made in paragraph 9 that "[t]here can be no other reason for an increase in mobile retail tariffs, while MTRs are dropping, than a lack of regulation and/or competition in the sector."

11. The NTRC of Dominica goes further in its criticism. It suggests that the cost of the mobile broadband service should be less than that of the fixed broadband. At paragraph 4 it rhetorically asks "why is the cost of a bit so much more expensive over the cheaper mobile network" and, at paragraph 31, states "[i]n Member states the operational cost to manage networks is a fraction of the cost needed to manage fixed networks". While FLOW is very sympathetic to the NTRCs call for ECTEL to spend more time on determining the cost of traffic on the mobile network—a revised LRIC model is very *long* overdue—we believe that the NTRC in this context will be disappointed with the results. It need only review the previous ECTEL LRIC modelling (or *any* mobile and fixed network LRIC modelling for that matter) to see the answer to why costs are relatively higher on a mobile network.

12. The NTRC of Dominica also cites the in-plan and out-of-plan price differential as evidence of mobile data pricing being "arbitrary" at paragraphs 5, 18, 24 and 25. It makes this statement as if the ECTEL markets are somehow unique. In fact, in every mobile market, such a price differential exists. By way of a non-exhaustive list of examples, consider in the UK, Australia and New Zealand, where O2, Optus and 2Degrees, respectively, charge

an order of magnitude more for out-of-bundle voice minutes.[2] In the US, AT&T throttles out-of-plan data usage to speeds that make service unusable for contemporary applications. In Canada, out-of-plan data per MB is charged at an order of magnitude above in-plan data.[3] The differential is part and parcel of the commercial approach to mobile product pricing and exists in every market irrespective of the number of competitors.

13. Similarly, the NTRC of Dominica, at paragraph 19, takes a broad swipe at the practice of in-plan allowances suggesting that they are "grossly unfair to the consumer" and result in the consumer being "robbed of value" every plan period. The practice of in-plan allowances is universal and gives consumers the opportunity to benefit from cheaper per unit rates. A consumer always has the possibility of choosing a pay-as-you go basis, if predicting actual consumption is difficult and makes purchasing an in-plan allowance a less favorable option.

14. Should the NTRCs attempt to regulate theses standard commercial practices, by limiting in-plan vs. out-of-plan price differentials or eliminating the option of plan allowances, they will distinguish themselves as unique regulatory actors internationally and cause prices to rise to the detriment of consumers.

15. Before shifting its attention to ECTEL's specific proposals, the NTRC of St. Vincent & the Grenadines concludes its comments on ECTEL market assessments, at paragraph 14, by

[2] See https://www.o2.co.uk/shop/sim-cards/pay-as-you-go#simtype=bigbundles; https://www.optus.com.au/17c0db28-aa15-4334-b0f0-12c1c573c4c5; https://www.2degrees.nz/mobile-plans/prepay?cleanInputSearchContent=false&focusInputSearch=false

[3] https://www.bell.ca/Mobility/Cell_phone_plans/Prepaid_plans/Prepaid_plans.tab#selectedtab

stating "In short, we have two dominant players in the two markets…We must regulate both markets going forward if we are to protect the rights of our consumers and provide equitable and affordable access to our citizens." In light of the actual economics of access service provision this is a very dangerous proposal. By misinterpreting adverse revenue and cost trends facing access providers—both fixed and mobile—as lack of competition and requiring further constraints on profitability, regulators may end up depriving the market of the means to keep up with the ever increasing requirements for investment in digital infrastructure.

16. Finally, it should be highlighted that, in contrast to the NTRC perceived reality, the relative value of mobile services to the consumer in ECTEL markets continues to increase in spite of the adverse economics affecting competitive access providers. Access providers are providing more and more data and bandwidth for generally the same data prices.

III. Comments on Comments on the Proposed Price Cap Regime

17. The NTRC of St. Vincent & the Grenadines states, at paragraph 14, that Cable & Wireless and Digicel are both dominant in fixed broadband provision. While we strongly disagree with this assessment, we do agree that the Basic Broadband Offer obligation is unfairly asymmetrically imposed. Where Digicel enter the market in a significant degree as measure by the Automatic Adjustment Mechanism, then either the obligation should be lifted from FLOW or imposed symmetrically on Digicel.

18. The NTRC proposes, at paragraph 15, that the basic broadband offer should be 50 Mbps/20

Mbps, in line with the draft of its national broadband plan. We believe that it is unrealistic to assume that, given the current costs of service provision, the market can deliver a 50 Mbps service at a price point that will be adopted by the majority of fixed broadband users in St. Vincent & the Grenadines. If the NTRC wishes to target that speed in the near term, it will need either to subsidise access or jointly develop some other innovative approach with the private sector. FLOW is ready to discuss these options with the government. However, we believe that it would be counterproductive to regulate prices of the 50 Mbps service down to the level in order to make 50 Mbps a mass commodity.

19. The NTRC of Dominica urges, at paragraph 13, that the Basic Broadband Offer be extended to all ECTEL Member States, not just those with fewer competitive offerings. This proposal flies in the face of the approach embedded in the regulatory frameworks in the Eastern Caribbean, i.e., that introduction of ex-ante regulatory measures should be introduced only where market forces cannot be relied on to deliver competitive outcomes.

20. The NTRC of Dominance also argues that, at paragraph 15, simply because there is only one fixed broadband provider in certain areas of the island, broadband prices should be regulated. ECTEL has argued and pricing practices have demonstrated that there is a single national market for fixed broadband. The fixed broadband prices are national, i.e., prices are the same in all areas are priced the same, which means that the pricing outcomes for the most competitive areas drive pricing for all areas in the country.

21. The NTRC of Dominica, at paragraph 11, proposes that the Automatic Adjustment Mechanism (AAM) be also applied "in the opposite" direction, i.e., should Digicel's market share trigger the AAM relaxation of price cap regime, then subsequent reversal in

market share should reinstate the constraints. The idea that such shifts in market should take place over the short duration of the price cap (three or four years) is not realistic. ECTEL will have ample opportunity to address any reversal of market power in the next price cap review.

IV. Comments on Comments on the Mobile Safeguards

22. With respect to the mobile safeguards proposed in ECTEL's "Market Assessment of Regulated and Unregulated Retail Services and Proposed Recommended Regulatory Measures for Retail Services in the ECTEL Member States", the NTRC of St. Vincent & the Grenadines had a number of comments. In paragraph 16, the NTRC urges that, once registered on a new network abroad, the roaming customer should be notified whether or not they face roaming rates. This notification is already available with FLOW services.

23. In paragraph 17, the NTRC proposes that the customer should have to opt-in to roaming upon arrival abroad before the roaming service commences. This is not something FLOW can technically accomplish with its current system, which is why we have proposed a default of no service provision until the customer takes action to order a service. In particular, FLOW has proposed that in order to prevent subscribers from roaming rate shock, C&W will no longer default consumer usage to an out-of-bundle plan, but rather discontinue offering the service until and unless the user purchases a bolt-on product for additional roaming. Thus, the user will be notified *at the time of taking the service, and as part of the user agreement*, that he or she will have the responsibility to make a choice

between 1) no roaming service or 2) purchasing an add-on after the bundle is exhausted.

24. In paragraph 18, the NTRC proposes that for out-of-bundle national usage, in addition to having to "opt-in," the customer should also have the right to select the credit bound (within available credit or lesser amount). Technically, FLOW cannot select to limit credit after roaming has already begun. FLOW's proposed alternative in order to prevent subscribers from rate shock is that FLOW will no longer default consumer usage to an out-of-bundle plan, but rather discontinue offering the service until and unless the user purchases a bolt-on product for additional national usage. Thus, the user will be notified *at the time of taking the service, and as part of the user agreement*, that he or she will have the responsibility to make a choice between 1) no national usage service or 2) purchasing an add-on after the bundle is exhausted.

25. In paragraph 19, the NTRC proposes that under national plans, for usage of minutes, any rollover of unused allotment is used first, before the new allotment. FLOW already implements this practice.

26. With respect to In-Bundle National usage, the NTRC of Dominica at paragraphs 21 and 27 makes the correct observation that the ECTEL proposal on notification requires real-time billing and an immediacy of notification that is not technically feasible. It also identifies, at paragraph 29, a key limitation on roaming notification safeguards proposed by ECTEL. FLOW has made similar points in its submission and offered an alternative solution to prevent bill shock.

27. Unfortunately, many of the comments the NTRC of Dominica makes on the safeguards is that they are not adequate and that more aggressive retail price regulation is required.

Elsewhere in our comments on comments we have observed that the NTRC proposals are inconsistent with international regulatory practice in mobile markets and will lead to higher prices and lower investment in the network capacity.

V. Comments on Comments on the Proposed Changes to Regulation 17(c) of the draft Electronic Communications Regulations

28. In terms of the proposed changes to Regulation 17(c) of the draft Electronic Communications Regulations, the NTRCs of St. Vincent & the Grenadines and Dominica are unfortunately generally supportive of ECTEL's wholly misguided approach. The NTRCs do not seem concerned that ECTEL's proposals:

- were made without any reference to international practice;
- did not consider alternative means to achieve its policy objectives; and
- did not consider negative consequences of changing essential features of prepaid services.

29. At paragraph 21(b), the NTRC of St. Vincent & the Grenadines accepts the proposed appropriation of unused prepaid balances by the state and suggests the subscribers be notified and given the option to collect their balances. As indicated in the table below, in which we summarize the results of the markets that ECTEL itself uses for benchmarks for

its other consultation document[4], the appropriation of these balances is outside of international policy precedent. Moreover, implementing this requirement will ensure that mobile prices will rise.

30. The NTRC of St. Vincent & the Grenadines also supports the notion of extending the minimum prepaid subscription beyond the 3 months proposed by ECTEL to at least "6-12 months". Similarly, the NTRC of Dominica suggests this service period should be 1 year. Indeed, it proposes that the account be allowed to be maintained indefinitely (with short-code reactivation).

31. These extended minimum or indefinite terms will have the effect of killing off a range of existing low-cost prepaid mobile products. The specification of a minimum validity period will limit the customer choices that are currently available in the market and the benefit of buying data bundles with different sized allowances at different price points. The action will therefore lead to the unintended consequence of the termination of lower priced offers resulting in customers paying more for services. The ECTEL proposed constraint, which the NTRC urges to make even more burdensome, will particularly disadvantage users who buy small data bundles as they are likely to pay more as a result of the ECTEL proposals than what they currently pay.

32. In conclusion, the ECTEL proposals, and NTRC support of them, show a lack of appreciation of the business model on which the prepaid service is built. Prepaid services are not defined solely by the purchase of minutes, text or data. Prepaid service models

[4] Market Assessment of Regulated and Unregulated Retail Services and Proposed Recommended Regulatory Measures, issued by ECTEL on 28 August 2020.

provide time-limited access to the network as well as predetermined usage volumes. The proposals attack this business model and will likely lead to profound changes in how services are offered.

33. The proposals are also unequivocally inconsistent with international regulatory practice as the findings of the benchmark analysis in the table below illustrate.

34. FLOW urges ECTEL to reconsider its proposed changes to Regulation 17(c) of the draft Electronic Communications (Consumer Protection) Regulations in light of a benchmarking of international practices and consult again directly with stakeholder before making any recommendations to the NTRCs.

#	ECTEL Proposed Change in Regulation 17(c)	Dominican Republic	South Africa	Canada	UK	USA	Hong Kong
1	SP cannot provide a prepaid service that expires in less than 3 months after the service is first used	Inconsistent with DR Consumer Regulation and DR Mobile Norm. Inconsistent with commercial practice among service providers	Inconsistent with RSA EUSCC Regulations. Inconsistent with commercial practice among service providers	Inconsistent with CA Wireless Code. Inconsistent with commercial practice among service providers	Inconsistent with UK Billing Code. Inconsistent with commercial practice among service providers	Inconsistent with USA Wireless Code. Inconsistent with commercial practice among service providers	Inconsistent with HK Bill Shock Measures. Inconsistent with commercial practice among service providers
2	SP shall notify a customer at least 5 days before prepaid subscription expires	As above	As above	As above	As above	As above	As above
3	In the notification of expiration, a SP must notify a customer of the option and implication of inaction	As above	As above	As above	As above	As above	As above
4	A customer may, within 15 days of the termination of the prepaid subscription, request that it be reactivated	As above, but allow a grace period following expiry to “top up” account	As above	As above, but allow seven-day grace period following expiry to “top up” account	As above	As above	As above
5	A SP shall not terminate a prepaid subscription if customer has at least $10 on account	As above	As above	As above	As above	As above	As above

#	ECTEL Proposed Change in Regulation 17(c)	Dominican Republic	South Africa	Canada	UK	USA	Hong Kong
6	A SP shall not terminate a prepaid subscription if customer has at least 10% of the voice minute, text message or data allowance on account	As above	As above	As above	As above	As above	As above
7	An SP shall not terminate a prepaid subscription if customer in the preceding 3 months made or received a call, sent or received a text or used data	As above	As above	As above	As above	As above	As above
8	If customer requests, SP must within 30 days of the termination of a prepaid subscription refund or transfer to another account any outstanding credit or unused minutes/text/data allowances	As above	As above	As above	As above	As above	As above
9	If a prepaid subscription has been terminated by an SP and the SP has not received a customer request for refund or transfer, the SP after a period of 3 months transfer any outstanding balance to the Accountant General (national treasury)	As above	As above	As above	As above	As above	As above

Note: SP = Service Provider; "provide" = provide, promote or sell

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