



## ICT Decision 2004-2

Grand Cayman, 7<sup>th</sup> April 2004

### **Cable & Wireless (Cayman Islands) Limited – Anti Competitive Conduct in the Mobile Market**

#### **Cable & Wireless Mobile Rate Changes**

*The Authority finds that C&W's failure to satisfy the appropriate imputation test is anti-competitive conduct contrary to its Licence and the ICTA Law. The Authority finds that C&W has engaged in other practices which, taken in combination, amount to anti-competitive conduct contrary to its Licence and the ICTA law. C&W is directed to bring such infringements to an end by immediately:*

- *Withdrawing its mobile rates which have not satisfied the imputation test,*
- *Ceasing the introduction of rates which do not clearly pass the relevant imputation test,*
- *Ceasing to charge substantially different mobile rates for on-net and off-net calls,*
- *Ceasing to waive termination charges only for C&W TDMA customers who migrate to C&W GSM plans and*
- *ceasing all its advertisements, publicity and marketing which do not clearly describe the services and the rates for such services.*

*In addition, C&W is invited to show cause why the Authority should not impose a financial penalty .*

(Note: This overview is provided for the convenience of the reader and does not constitute part of the Decision. For details and reasons for the conclusions, the reader is referred to the various parts of the Decision.)

#### **Background**

1. In the evening of 3 March 2004, Cable & Wireless (“C&W”) notified the Authority that, with effect from 9 March 2004, it planned to introduce new post-paid, prepaid and international direct dial (IDD) rates for its mobile services.
2. On 4 March 2004, the Authority forwarded C&W’s notification of the company’s planned new mobile services rates to the other companies currently licensed to provide mobile services in the Cayman Islands, namely Digicel Cayman Limited (Digicel) and Wireless Ventures (Cayman Islands) Limited (Wireless Ventures).

3. On 5 March 2004, Digicel and Wireless Ventures issued requests for the Authority to prohibit C&W's planned new mobile services rates from taking effect on 9 March 2004. The Authority issued a letter to C&W that same day, requiring the company to respond to the concerns of Digicel and Wireless Ventures by no later than noon, 8 March 2004.
4. C&W replied to the Authority's letter, as requested, on 8 March 2004. In its reply, C&W stated that there was no basis in the company's Licence for the Authority to prevent the planned new mobile service rates from taking effect and, furthermore, that the concerns expressed by Digicel and Wireless Ventures were unfounded.
5. On 6 March 2004, Digicel submitted in confidence an analysis purporting to demonstrate that certain of C&W's proposed new mobile services rates were priced below cost. Two days later, on 8 March 2004, Digicel filed in confidence a second submission purporting to offer further evidence that C&W's proposed new mobile service rates were priced below cost.
6. Following its review of the changes proposed by C&W, the Authority, on its own initiative, issued a letter to C&W on 8 March 2004, requiring the company to submit an analysis by no later than 10 March 2004 demonstrating that its planned new mobile service rates were priced at or above the company's cost. In this correspondence the Authority further noted its concern that certain aspects of the new rates, if introduced, might well place C&W in breach of the anti-competitive conditions in its Licence. The Authority placed C&W on notice that if the Authority determined that certain of the mobile rates did not satisfy the imputation test or that the company was, in any other way, in breach of Condition 15 of its Licence, C&W would be required to rectify the situation immediately. Accordingly, the Authority strongly recommended that C&W defer the implementation of its planned new mobile rates until the Authority had made the relevant determinations.
7. On the same day, 8 March 2004, C&W confirmed to the Authority that the company was very confident that its planned new mobile rates would pass the imputation test and that it therefore would implement the new rates as planned.
8. On 10 March 2004, the company filed the imputation analysis in support of its new mobile service rates. A redacted version of the imputation analysis was provided by C&W to Digicel and Wireless Ventures. The latter two parties submitted comments on the redacted version of C&W's imputation analysis on 12 March 2004 and 29 March 2004 respectively.
9. Following its review of the company's imputation analysis, the Authority concluded that the information was insufficient to complete its assessment. As a result, on 15 March 2004, the Authority issued to C&W two sets of interrogatories, with replies due to the Authority by 30 March 2004 and 6 April 2004, respectively.
10. On 17 March 2004, the Authority issued to Digicel and Wireless Ventures a single set of interrogatories essentially requesting that they identify usage volume and patterns

associated with post-paid mobile plans in the other Caribbean jurisdictions where they or an affiliate provide mobile services in calling party pays regimes, with replies due to the Authority on 26 March 2004.

11. On 19 March 2004, Wireless Ventures declined to provide the data requested by the Authority, contending that the information was highly confidential and that as it concerned markets other than the Cayman Islands was not relevant to the Authority's determination. On 29 March 2004, Digicel submitted its reply to the Authority's interrogatories.
12. C&W filed its responses to all of the interrogatories on 31 March 2004.
13. The Authority has carefully reviewed all of the above-mentioned submissions and issues its decisions herein.

### **Claims of Confidentiality**

#### ***C&W***

14. On filing its mobile service imputation test on 10 March 2004, C&W made a claim for confidentiality pursuant to Regulation 3 of the Information and Communication Technology Authority (Confidentiality) Regulations, 2003 (the Regulations) and provided a redacted copy for the public record. Although no other party disputed the claim for confidentiality submitted by C&W, the Authority, on its own initiative, on 18 March 2004 expressed the view that the company claimed confidentiality for more information than was supported in its submission and requested that a new redacted version be filed taking into account the Authority's comments. C&W complied with this request by filing a new redacted version of the mobile imputation test for the public record on 29 March 2004. Given that the Authority has not received any challenges to the latest filing of the new redacted version by C&W, it is satisfied to let the public record stand as it currently exists.
15. In its response to interrogatories filed 30 March 2004, C&W submitted a claim for confidentiality in accordance with the Regulations and provided a redacted copy for the public record. The Authority notes that it is issuing its decision prior to any party having had the opportunity to challenge the C&W claim for confidentiality. The Authority recognizes that some of the material filed by C&W is the proper subject for a claim of confidentiality. Additionally, in arriving at its determination, the Authority is called upon to assess and comment upon various information covered by the claim for confidentiality. Accordingly, in issuing its decision the Authority is providing both a confidential version and a redacted copy. Should any party successfully challenge the C&W claim for confidentiality on the interrogatory responses, the Authority will modify the redacted version accordingly.

### *Digicel*

16. On 6 March and 8 March 2004, Digicel submitted various comments in confidence and provided a redacted copy of these comments for the public record. There has been no challenge to the Digicel claim for confidentiality and the Authority is satisfied to let the public record stand as it currently exists.

### *Wireless Ventures*

17. Wireless Venture did not make any confidentiality claims.

## **Comments by Interested Parties**

### *Wireless Ventures*

18. In its comments of March 5 2004, Wireless Ventures requested that the Authority stay the effectiveness of Cable & Wireless' rates and assess whether these rates were predatory or anti-competitive using an appropriate imputation test to make such a determination.
19. Wireless Ventures stated that Cable & Wireless was in violation of paragraphs 8(1)(b) and 12(1)(f) of the Interconnection and Infrastructure Sharing Regulations if, using appropriate imputation methodologies, it was providing interconnection services to its wireless arm at rates that were lower than those made available to Wireless Ventures under its interconnection agreement. Wireless Ventures went on to state that C&W's rates were 66% below its 23 February rates and that it was using its monopoly power to offer below-cost pricing to stifle competition. They further contended that C&W would fail an appropriate imputation test.
20. Wireless Ventures stated that it would suffer irreparable harm if C&W's rates were permitted to go into effect and that allowing C&W to establish rates that did not reflect the actual cost of providing services would likely cause a new entrant to withdraw from the market.
21. In concluding, Wireless Ventures stated that C&W's mobile pricing fell squarely within the prohibited anti-competitive practices set forth in Condition 15 of its Licence.

### *Digicel*

22. Digicel submitted comments through its legal counsel on 5 March 2004 and submitted further comments on 6 and 8 March 2004.
23. In the 5 March 2004 submission, legal counsel made a number of comments with respect to Condition 15 of the C&W Licence to the effect that C&W was under an obligation not to engage in anti-competitive conduct which includes predatory pricing and price squeezing.

24. Counsel for Digicel further stated that pricing could not be approved pursuant to paragraph 17 of Annex A of the C&W Licence if it failed the imputation test. Counsel maintained that until a Category 3 allocation had been agreed, mobile services must continue to be treated as a Category 2 service.
25. In its 6 March 2004 submission, Digicel states that C&W had the burden of proof to refute claims of anti-competitive pricing and that the Authority could require C&W to prove that they would pass the imputation test in accordance with paragraph 17 of Annex of the C&W Licence.
26. Digicel also submitted a confidential analysis with respect to C&W's post paid packages and IDD calls in support of its position that C&W was engaging in anti-competitive practices by selling below cost.
27. In its 8 March submission, Digicel queried why C&W had not submitted analysis to support its assertion that prior to adopting its new rates C&W had carried out a complete financial analysis on profitability by service and by plan. Digicel also filed an analysis on the margins available to C&W based on C&W's fixed termination costs, the range of disputed mobile termination costs and wholesale international prices.

#### *C&W Response to Other Licensees' Comments*

28. In the first of two letters sent on 8 March 2004, C&W responded to the comments of the other Licensees by stating that their objections were without merit and represented an attempt to use the regulatory process to frustrate the normal workings of a competitive market.
29. In the second letter, which was a response to a request from the Authority dated 5 March 2004, C&W addressed directly, and in more detail, the various comments made by Digicel and Wireless Ventures.
30. The company stated that neither Digicel and AT&T had justified their anti-competitive allegations and that there was no reasonable grounds upon which to base a cease and desist order. Under the procedures set out in Annex 5 of the Cable & Wireless Licence, the transfer of C&W "Mobile Services" to the service Category 3 was an automatic process, which occurred as soon as a mobile competitor began "commercial operations". C&W pointed out that the rates filed on March 3, 2004, were filed pursuant to paragraph 22 of Annex 5 and that they could be implemented upon three-business days notice, without any requirement for prior approval by the Authority, but subject to an ex post review within 180 days. C&W maintained that Digicel was incorrect in maintaining that the Authority should require ex ante approval of C&W mobile price decreases.
31. C&W took issue with Digicel's view that because there was no agreement as to which of the sub categories in Category 3 mobile services should fall within that it should remain as a Category 2 service.

32. C&W submitted that there was no evidence which could justify a review of C&W's prices. The fact that C&W's rates were now lower, following the introduction of mobile competition, and the fact that competition appeared to have reduced rates faster than either Digicel or AT&T expected, was not evidence that prices were below cost, and could not be the basis of a concern that would lead to intervention by the Authority.
33. The company was being accused of cross-subsidizing its retail mobile services out of its mobile termination revenue stream, when C&W had in fact fought consistently against the high mobile termination charges that the two new mobile entrants had been arguing for in the Cayman Islands. C&W stated that revenues from those high charges formed a central component of the typical mobile new entrant business model, to cross-subsidize their own retail rates.
34. With respect to the need for the imputation test, prior to adopting the rates that were filed on March 3, 2004, C&W carried out a complete financial analysis on the impact of these proposed rates on its profitability by service and by plan. C&W asserted that there was no rate among the new rates filed on March 3, 2004, that were loss-making. The average unit revenue forecasted under reasonable assumptions for mobile-to-fixed, mobile-to-own-mobile, and mobile-to-third party-mobile calls showed that all rates were cost recovering, including an allowance for a reasonable return on capital, for all plans. C&W submitted that it was only under a naïve or disingenuous comparison of improbable consumption patterns that one could assert that these rates "clearly" fail an imputation test. Its rates were based on an informed view of the revenue generated by each plan and of actual consumption patterns.
35. C&W concluded that the Authority should dismiss the Digicel and AT&T requests for a review of the new mobile rates filed on March 3, 2004.

### **Authority's Assessment of Interested Party Comments**

36. The Authority takes seriously the comments concerning below cost pricing, the obligation not to engage in anti-competitive conduct, the necessity for rates to pass the imputation test and the potential for irreparable harm such as might cause a new entrant to withdraw from the market. However, the Authority notes that simple allegations to this effect are not sufficiently probative unless substantiated by empirical data and assessed within proper regulatory and legal constraints and parameters. It is for this reason that the Authority has undertaken the extensive assessment, discussion and disposition reflected in this decision and that of Decision 2004-1.
37. The Authority notes that Decision 2004-1 and the assessment undertaken herein address many of the comments made by the interested parties to these proceedings. However, additional comments are warranted to address specific submissions which may not otherwise be dealt with.
38. C&W is correct in stating that, as mobile services are a Category 3 service, its obligation is to pass an ex post imputation test if so required by the Authority. The operative

paragraphs are 22 and 38 in Annex 5 of the C&W Licence. The Authority is appreciative of the various analysis submitted by Digicel. It is not necessary to provide any comment on these as the Authority itself has undertaken a comprehensive analysis of the costs and prices involved and this forms the basis of Decision 2004-1.

39. The Authority has addressed critically many of C&W's comments later in this Decision and in Decision 2004-1. However, the Authority wishes to note here the very serious reservation it has as to the veracity of C&W's assertion that it carried out a complete financial analysis as to profitability by service and by plan prior to implementing its new rates.

### **Natural Justice**

40. The Authority has not taken lightly its examination of facts and circumstances leading to this decision, nor the potential impact of its decision on all the stakeholders in the marketplace.
41. The Authority has endeavoured to respect the natural justice rights of the parties to be heard and to present their position. C&W was put on notice, at the earliest stage possible, that the Authority was concerned that its new rates, on an initial examination, might be in breach of the anti-competitive provisions of its Licence. It was for this reason, together with concern about the possible impact of its eventual decision upon all stakeholders, that the Authority strongly recommended that C&W delay the implementation of its new rates pending the appropriate investigation. Had the amendments to the Law been in effect at the time, it is likely that the Authority would have issued an interim direction in accordance with the new section 34P.
42. The Authority requested the imputation test from C&W in a relatively short time frame. In doing so, the Authority was mindful that officers of the company had repeatedly stated, both publicly and in writing to the Authority, that C&W was confident that all its rates would pass the imputation test. Given these public statements and the Licence obligation that mobile rates must pass the imputation test, it was reasonable for the Authority to assume that C&W had already undertaken a comprehensive study to satisfy itself that it met the necessary regulatory requirements, and that all relevant information therefore was readily available.
43. Upon receiving the imputation test from C&W, it was found to be significantly deficient in many areas, such that the Authority felt bound to send some nine pages of additional questions to C&W. The Authority provided C&W with a full 15 days to produce this additional information. The eventual C&W response runs to some 70 pages, with a similar number of appendices and spreadsheets. This gives an indication of size of the original deficiencies, and the additional work that had to be done. Other Licensees, and perhaps the general public, may have felt that this was an unduly lengthy period of time to give to C&W. However the Authority had to balance the requirement to obtain a rapid decision in emerging competitive marketplace especially when anti-competitive

allegations are at issue with the requirements of natural justice and the need to obtain meaningful information about the imputation test.

## **Anti Competitive Practices: Conduct**

### *Introduction*

44. Quite distinct from the imputation test procedure, the Authority has examined whether C&W has breached the provisions of its Licence as it pertains to the prohibition against anti-competitive practices.<sup>1</sup> Further, on 1 April 2004, the Information and Communications Technology Authority (Amendment) Law, 2003 was brought into effect and therefore the Information and Communications Technology Law 2002 (the Law) now includes, amongst other new provisions, a legislative prohibition against anti competitive conduct.<sup>2</sup> Accordingly, if C&W has engaged, or continues to engage in anti-competitive practices on or after 1 April 2004, it may be in breach of the Law in addition to having been in breach of its Licence.
45. The Authority recognizes that for Category 3 services C&W does not require the Authority's approval for rate decreases. However, in introducing such rate decreases C&W must be mindful that not only may it be required to demonstrate that its proposed rates pass an imputation test<sup>3</sup>, but also that its overall mobile service practices and pricing conduct do not amount to an abuse of its dominant position which affects trade in the Cayman Islands. Were they to do so, it would constitute an anti-competitive practice contrary to either Condition 15 of its Licence and section 34F of the Law. In other words, when introducing new rates, C&W could potentially be in breach of its obligation to pass an imputation test and, in pursuing various business practices including pricing for services, it can also be in breach of the Law or the Condition of its Licence against engaging in anti-competitive practices. In the Authority's view, the imputation test obligation and the prohibitions against abuse of a dominant position are separate and distinct requirements upon C&W.

### *Licence Condition and the Law*

46. The determination of whether C&W may be in breach of Condition 15 involves an overall examination of its conduct since the issuance of its Licence. A determination under the new section 34F of the Law involves an examination of C&W's conduct from 1 April 2004 onwards. The Authority is of the view that, given the recent amendments to the Law, if it makes a determination that C&W is in breach of its Licence Conditions, the natural justice provisions contained in the amended Law (but absent from Condition 15 of the Licence) should still apply<sup>4</sup>.

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<sup>1</sup> Condition 15 of the C&W Licence dated 10 July 2003 contains a prohibition against anti-competitive conduct.

<sup>2</sup> The Information and Communications Technology Authority (Amendment) Law, 2003. See in particular section 34F.

<sup>3</sup> See paragraphs 22 and 38 of Annex A of the C&W Licence.

<sup>4</sup> See for instance 34L and 34Q.



47. Condition 15 of the C&W Licence provides as follows:

“15 ANTI-COMPETITIVE PRACTICES: Conduct<sup>5</sup>

15.1 Any conduct on the part of one or more licensees which amounts to the abuse of a dominant position in a market for ICT networks or ICT services is prohibited if it may affect trade within the Cayman Islands.

15.2 Conduct may, in particular, constitute such an abuse if it consists in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts;
- (e) using revenues attributed to a particular ICT service to cross subsidize unfairly or affect competition for another ICT service, unless otherwise approved or directed by the Authority.”

48. Section 34F of the Law contains language similar to that in Condition 15 of the Licence. Both are modelled upon Article 82 of the EEC Treaty.<sup>6</sup> The Authority notes that the list of abusive practices outlined in Condition 15.2 and section 34F are not an exhaustive enumerations of the possible abuses of a dominant position.<sup>7</sup> Assessing whether the prohibition contained in Condition 15.1 and section 34F have been infringed involves an assessment of whether C&W is an undertaking in a dominant position, and whether there has been an abuse of that dominant position that affects trade in mobile services in the Cayman Islands. The latter involves an assessment of the relevant market, costs, the economic impact and circumstances in which the mobile prices were introduced, as well as the overall conduct of C&W when introducing its new mobile prices into the mobile marketplace.

***The Product and the Market/Dominant Position***

49. Until 10 July 2003, C&W had a monopoly in the telecommunications marketplace in the Cayman Islands. Competition has been introduced in phases, with liberalization in the mobile sector being effective from 1 February 2004 and in the international sector from 1 April 2004. Actual competition in the mobile marketplace was introduced on 3 March 2004 when Digicel and Wireless Ventures officially launched their respective mobile services. C&W notified the Authority on 3 March 2004 that it was launching

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<sup>5</sup> Cable & Wireless Licence dated 10 July 2003

<sup>6</sup> The Authority notes there is a significant body of case law on section 82 of the EEC Treaty and it has referenced such case law where appropriate.

<sup>7</sup> Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 26.

restructured competitive mobile services, which included, amongst other things, new mobile rates and plans.

50. C&W currently retains significantly in excess of 50% of both the mobile and international (IDD) markets. The Authority therefore finds that C&W is in a dominant position with respect to the mobile and international markets in the Cayman Islands.<sup>8</sup> For purposes of its anti competitive assessment, the Authority finds the appropriate product market to be the mobile market, and the relevant geographic market to be the Cayman Islands.
51. A finding that an incumbent is in a dominant position does not deprive it of the right to protect its own commercial interests if competition is introduced, but it does impose upon the incumbent a special responsibility to ensure that its conduct does not unfairly distort competition in the mobile marketplace.<sup>9</sup> Such conduct cannot be countenanced if the its purpose is to strengthen the company's dominant position and abuse it so as to affect trade in mobile services.<sup>10</sup> Further, a dominant entity such as C&W may be precluded from engaging in conduct which may not be objectionable if engaged in by a non-dominant firm.<sup>11</sup> The consideration of whether C&W's conduct constitutes an abuse of its dominant position needs to include an assessment of its prices in relation to its costs together with all the circumstances surrounding its approach to competition in the mobile marketplace.

### **Imputation Test Analysis**

52. In its Decision 2004-1, the Authority has found that C&W's revised mobile rates have failed to satisfy the imputation test in a number of areas. The Authority also found improper costs were used in some instances and various elements of cost were omitted entirely from the imputation test analysis. Additionally, even the imputation test filed by C&W 10 March 2004 demonstrated that not every element passed. Decision 2004-1 is incorporated by reference and the analysis and conclusions noted therein constitute a part of this decision.
53. The Authority finds that in those instances where C&W's mobile prices have failed to pass the imputation test, C&W is deemed to have engaged in anti-competitive conduct which prior to 1 April 2004 constitutes a breach of Condition 15 and thereafter a breach of section 34F of the Law.
54. In those instances where it has failed to include all appropriate costs, the effect of which is to compromise the imputation test assessment, C&W has unnecessarily tainted the validity of various mobile prices to the prejudice of the marketplace. The Authority is of the view that it is unreasonable for C&W to be the beneficiary of its failure to include

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<sup>8</sup> Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461, paragraph 41. See also AKZO Chemie v Commission [1991] ECR I-3359.

<sup>9</sup> Case 322/81 Michelin v Commission [1983] ECR 3451, paragraph 57.

<sup>10</sup> Case 27/76 United Brands v Commission [1978] ECR 207, paragraph 189.

<sup>11</sup> Hoffman-La Roche, paragraph 120.

proper costs to the detriment of the imputation test analysis and competitors in the marketplace. There is no doubt that C&W had the onus to demonstrate that it had satisfied the imputation test and it matters not whether the omissions and errors were intentional, accidental, or the result of insufficient resources being allocated to the task. C&W's refusal to delay the implementation of its new rates, together with its public statements that its rates met the imputation test requirements, demonstrates a disregard for its regulatory obligations. The Authority necessarily concludes that the legitimacy of C&W's prices cannot be supported as a whole and, as such, cannot be said to pass the imputation test, thereby contravening Condition 15 prior to 1 April 2004 and section 34F of the Law thereafter.

55. The Authority finds that C&W's failures with respect to the imputation test, in and of themselves, constitute anti-competitive conduct resulting in a breach of both its Licence and the Law. Nonetheless, the Authority proposes to examine C&W's complete approach to competition in the mobile marketplace to determine whether, in addition to the imputation test failures, further practices may be anti-competitive in nature.

## **Analysis of C&W's Approach to Competition in the Mobile Marketplace**

### *Introduction*

56. As noted above, neither Condition 15(2) of the Licence nor section 34F(2) of the Law represent an exhaustive list of that conduct which may constitute an abuse of a dominant position affecting trade. Recent case law on whether only pricing below cost can constitute abuse indicates that it does not; rather all of the circumstances need to be examined. Price cutting by an incumbent could be abusive conduct affecting trade in mobile services whether or not it sets its prices below or above its own costs.<sup>12</sup> The totality of the incumbent's approach to competition in the mobile market needs to be examined to determine if a finding of abuse should be reached.

57. The Authority is cognizant that major barriers to competitors entering the market are:
- the large capital investment required for establishing and running mobile networks,
  - the economies of scale, available to the incumbent, but from which new entrants to the market cannot derive any immediate benefit and
  - the actual cost of entry, made up of all of the general expenses incurred in penetrating the market such as the installation and testing of an adequate mobile network, and the mounting of large scale marketing campaigns.

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<sup>12</sup> *Compagnie Maritime Belge Transports v Commission* [2000] ECR I 1365, paragraph 125. See also *Napp Pharmaceutical Holding Limited v Director General of Fair Trading*, Case no. 1001/1/0, Competition Commission Appeal Tribunal, 2001, paragraphs 207-216 generally.

58. These investments represent significant financial risks for new licensees, as the costs would not be recoverable if the attempt at market entry fails. It is against this backdrop that the Authority assesses C&W's approach to competition in the mobile marketplace.

### *Circumstances Surrounding the Imputation Test*

59. Given C&W's dominant position in the marketplace, the Authority views with grave concern:

- its failure to pass certain aspects of the imputation test,
- its failure to provide a sufficient imputation test analysis on its initial filing,
- the ensuing delay in obtaining appropriate imputation test information,
- its failure to include all appropriate cost elements in the imputation test analysis,
- its decision to disregard the Authority's recommendation to delay implementation given serious concerns of a possible breach of anti-competitive conditions in its Licence.

60. The Authority concludes that C&W has not given due regard to, nor met, the appropriate regulatory and pricing constraints. This failure on C&W's part has compromised the nature of the competitive marketplace and, if permitted to continue, sustainable long term competition. Further, the fact that C&W, at this late stage following the introduction of its mobile rates, is required yet again to provide additional information for its mobile imputation test compounds the injury to mobile competition. Such conduct is particularly regrettable and detrimental given the nascent, and hence fragile, nature of competition in the mobile marketplace.

61. All of these factors, taken in combination, must be viewed as an abuse of the regulatory process for anti-competitive reasons. The Authority finds that, taken as a whole, C&W's conduct with respect to the imputation test is conduct which constitutes an abuse of the dominant position held by C&W in the mobile market as it affects trade in such market in the Cayman Islands. C&W has engaged, and continues to engage, in conduct which is a breach of both its Licence and the Law.

### *Plan Migration*

62. On 8 March 2004, five days after the introduction of the new rates for its mobile services, the Authority reminded C&W of the Licence Conditions prohibiting anti-competitive conduct and stated that, based on information available at that time, it believed that certain aspects of the new rates might place C&W in breach of those conditions.<sup>13</sup> The Authority strongly recommended that C&W defer the implementation of its planned new mobile rates until the Authority could make a determination on whether or not there would be a breach. C&W declined to follow the Authority's recommendation, but they clearly have been under notice of the Authority's examination and that an adverse determination by the Authority would require the company to rectify the situation.

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<sup>13</sup> Letter from the Authority to C&W dated 8 March 2004 .

63. C&W has not sought simply to reduce the price of its mobile services. In introducing its new mobile services and rates, C&W is migrating its current customers to new mobile plans which, as noted above have serious imputation test issues, and which are superior in terms of effective per minute pricing, and involve other added benefits such as an increase for nominated number discounts.
64. Until relatively recently, all mobile customers in the Cayman Islands have been C&W TDMA mobile subscribers. All mobile providers, including C&W, have now introduced new GSM technology. A significant and substantial portion of potential users of these new GSM plans are therefore currently C&W TDMA customers. The C&W plan for the migration of their existing TDMA customers to GSM mobile services is structured such that they can migrate to a C&W GSM plan without having to incur any charge for the early termination of their TDMA contract.<sup>14</sup> However, such customers are required to enter into a new GSM mobile service contract that has a minimum term of 12 months.<sup>15</sup>
65. Three concerns arise about these practices. Firstly, termination charges are only waived if the C&W customer wishes to move to the C&W GSM plan and not that of another supplier. It is reasonable to assume that customers wishing to avail themselves of the new GSM technology will take the waiving of termination charges into account when making their purchase decisions and are therefore more likely to choose C&W as their GSM mobile service provider. Secondly, as C&W did not include in its imputation test calculations the cost to it of waiving such termination charges, it was able to obtain this benefit without limiting its ability to reduce its rates to more competitive levels. Whether C&W simply failed to exercise proper care or whether it was a designed competitive strategy is secondary to the Authority's assessment of the unfair advantage obtained by C&W.
66. The above factors are all the more detrimental when we consider that the requirement to sign a new 12-month contract effectively prevents competitors from accessing a large number of potential customers at a time when the market has just opened up to competition, and during which competitors need to establish both market share and revenue.
67. Thirdly, the Authority is concerned that C&W customers are not being clearly advised by C&W marketing materials or service staff that they may remain on their existing TDMA plans whilst receiving equivalent "bundled" minutes as the corresponding GSM plan. The impression created in the market is that customers must migrate to the GSM plan in order to obtain this benefit. As previously stated, such a migration necessitates both the purchase of a new GSM phone and the signing of a new 12 month contract, neither of which are required if the customer stays with TDMA technology.
68. The Authority is of the view that C&W's practices, as noted above, are anti-competitive in nature and intent and are not based on proper cost factors.

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<sup>14</sup> See C&W Interrogatory Response 2(f), 29 March 2004.

<sup>15</sup> See C&W Interrogatory Response 2(g), 29 March 2004.

### *On Net and Off Net Charges*

69. C&W customers are charged less for calls to other C&W customers (on net) than for calls to other mobile provider customers (off net).
70. Although interconnection agreement have been reached between C&W and Digicel, and between C&W and Wireless Ventures, the current Fixed to Mobile termination rates are interim while the Authority considers a determination request on the matter filed by the three companies in accordance with the Interconnection and Infrastructure Sharing Regulations and the Dispute Resolution Regulations.
71. On 11 February 2004, during the period that mobile services were classified as Category 2 services and therefore required the Authority's approval for new or increased rates, C&W applied to introduce new rates for off net calls. They proposed charging their post-paid mobile customers 27c per minute when calling a third-party mobile phone (i.e. the same rate as for a call to a phone on their own mobile network), and their prepaid mobile customers 45c per minute for a similar call (i.e. the highest of several rates applicable to a similar call to a phone on their own mobile network). In its subsequent ruling on 29 February 2004, the Authority advised C&W that it approved the post-paid rate of 27c per minute but that with respect to its proposed prepaid rate of 45c per minute "that more appropriate rates, in the interim period until the mobile termination rate is finalised ("interim period"), are C&W's prepaid rates for calling mobile customers on its own network"<sup>16</sup>.
72. On 3 March 2004 both Digicel and Wireless Ventures commenced commercial operation of their mobile networks, and this triggered a move of mobile services from Category 2 to Category 3. For a Category 3 service, C&W is not required to obtain prior approval for rate changes but must notify the Authority of such changes at least 3 business days before their implementation.
73. Also on 3 March 2004, C&W notified the Authority of wide-ranging changes to their mobile plans and rates for implementation on 9 March 2004. In general, these revised rates charged a 10c per minute premium over on-net calls for mobile calls to 3rd party networks by their prepaid customers, and a 12c per minute premium over on-net calls for mobile calls to 3rd party networks by their post-paid customers. Clearly C&W had chosen not to follow the Authority's prior ruling which, though no longer mandatory due to the move of mobile services to Category 3, still gave an unambiguous indication of what the Authority considered to be the appropriate policy to adopt. Furthermore, from the information available to the Authority, it appears that C&W failed to implement the Authority's ruling as it should have done for the period from 3 March 2004 to 9 March 2004.
74. For C&W post-paid mobile subscribers, calls to another C&W subscriber (on-net calls) benefit from a much lower effective rate per minute whilst they fall within the "free

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<sup>16</sup> Letter of the Information and Communications Technology Authority dated 29 February 2004.

minutes” bundled with each of the company’s monthly post-paid calling plans. The highest rate is paid only when the number of bundled minutes has been used up. Calls to 3<sup>rd</sup> party networks (off-net calls) are excluded from the bundled minutes, and are therefore charged at a fixed rate per minute. These off-net fixed rates are at least 50% more than the highest (non-bundled) rate for an on-net call. This substantial premium is even greater when the effective cost of bundled minutes is taken into account. The Authority is of the view that the substantial difference in price between on-net and off-net calls is of such a magnitude that it has little justification on the basis of costs.

75. The Authority is of the view that C&W is charging dissimilar prices for what are substantially similar transactions contrary to Condition 15. Further, the additional cost of making off-net calls is likely to influence individual consumers and businesses to select the same mobile network as the majority of their regular contacts. As almost all existing mobile phone users are currently C&W subscribers, this will mitigate against migration to competitors’ networks. Even if other Licensees maintain a differential between on-net and off-net rates, the potential impact upon migration will be minimal because of their insignificant market share. It follows that C&W, as a dominant entity, may be precluded, at this early stage of competition, from engaging in activity, which may not be offensive if undertaken by another non-dominant entity.

76. The Authority is of the view that C&W’ practice with respect to off net rates, especially given the magnitude of the premium being charged, is anti-competitive in nature and intent and is not based on cost factors.

### ***Marketing Practices***

77. C&W has married its new mobile plans and rates with an aggressive marketing campaign which includes paid advertising and interviews with senior officers that have appeared in local newspapers and on local radio. A significant number of these advertisements contain the assertion that “mobile rates are up to 67% lower than the competition” without any detailed qualification or explanation of the true discounts for all of the various rates in the different rate plans<sup>17</sup>. The Authority is of the view that such marketing is misleading and is designed to create an impression in the minds of consumers as to the totality of the mobile pricing which is neither accurate nor proportionate. There is no consumer protection legislation in place in the Cayman Islands with respect to advertising of prices for services, nor any other prohibition against advertisements which are misleading or which create overall inaccurate impressions as to pricing. Nonetheless, the Authority would expect C&W, as a dominant carrier, to clearly describe its services and the rates for such services in its marketing materials. By means of conditions in their licence, the Authority requires this type of conduct from all other Licensees. The Authority is of the view that misleading advertising by C&W, as a dominant entity, is conduct which it views as anti-competitive.

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<sup>17</sup> Advertising materials state the following: Rates up to 67% lower than the competition; International Mobile Rates up to 45% lower; Prepaid Mobile Rates up to 45% lower; Postpaid Mobile Rates up to 53% lower; Corporate Mobile Plan Rates up to 67% lower.

## Overall Conduct as Anti Competitive

78. The Authority is concerned that C&W may not appreciate the full ambit of Condition 15 of its Licence or, going forward, section 34F of the Law. As further indication of the company's mind-set, the Authority notes that until it intervened, C&W was charging another Licensee a rate for its "ISP Connect" service that was twice the rate for its "Dedicated Internet Access" service. Senior officers of the company stated publicly on several occasions that the services were different. Moreover, C&W refused to supply that Licensee with its less expensive "Dedicated Internet Access" service. The Authority subsequently determined, and the company admitted, that the services were technically and contractually identical. As a result of this approach, C&W could easily undercut the other Licensee's retail internet prices, as it was charging twice as much as it should have done for its monopoly upstream service. This is classic price squeezing activity and is specifically prohibited by Condition 15 of the Licence and section 34F of the Law.
79. In the foregoing paragraphs, the Authority's assessments have not focussed upon whether C&W's conduct is the outcome of an overall strategy, a series of individual and unrelated decisions, or is merely negligence. Rather, the fundamental issue has been whether or not the conduct is an abuse of C&W's dominant position which affects trade in mobile services. However, in the case of the circumstances surrounding the imputation test, the Authority notes that C&W has an obligation to ensure that it does not introduce anti competitive rates into the marketplace. By declining the Authority's strong recommendation to defer implementation of their rates, and by making public statements such as they did, the company had a duty to ensure that the relevant information was readily to hand or that it had available the resources to provide it in a expeditious manner. C&W was well aware that any delay in satisfying the Authority that its rates satisfied the imputation test would potentially cause direct harm to their competitors. The Authority considers that the company's conduct was a breach of its duties and obligations under its Licence and the Law. It further considers that negligence or lack of resource would be an unacceptable defence.
80. With respect to all other issues raised in the previous sections, the Authority finds that, when viewed in combination, the various approaches used were pursued intentionally and that the overall conduct of C&W must be viewed as being designed to impact competition unfairly.
81. The Authority is of the view that all C&W's conduct with respect to the mobile market (i.e. excluding the contextual example in paragraph 78) constitutes conduct which amounts to abuse by a dominant entity which affects trade in mobile services. In arriving at this conclusion the Authority cites its comments found at the paragraphs addressing Imputation Test Analysis, Circumstances Surrounding the Imputation Test, Plan Migration, On Net and Off Net Charges and Marketing Practices. Save for the failure to satisfy the imputation test requirements, any one action taken in isolation might not amount to abuse by a dominant entity which affects trade in mobile services, but taken in combination these activities, including the failure to satisfy the imputation test, amount to an infringement of Condition 15 of the Licence and, where the activity has continued



beyond 1 April 2004, section 34F of the Law. Their effect is to unfairly distort mobile competition and potentially jeopardise the establishment of long-term, sustainable competition in the mobile market in the Cayman Islands.

## **Disposition**

82. Cable & Wireless cannot be permitted to keep its new mobile rates in place and must be required to review and amend its mobile service practices. The Authority is extremely concerned with the impact upon the mobile marketplace at this early stage of its development and it cannot countenance anti competitive conduct by Cable & Wireless.
83. The Authority considers that it is necessary for it to act immediately, as a matter of urgency, to prevent serious, irreparable damage to competitors and to protect the public interest by ensuring the establishment of long term, sustainable competition in the mobile market and by preventing anti-competitive practices which are disruptive to consumers and competitors alike. Accordingly, the Authority issues the following direction, in accordance with section 34N with respect to the breach of Condition 15 of the Licence and section 34F of the Law:

Cable and Wireless is directed to bring the referenced infringement to an end by:

- a. withdrawing immediately its new mobile rates which have not satisfied the imputation test;
  - b. immediately ceasing the introduction of rates which do not clearly pass the relevant imputation test for such rates,
  - c. immediately ceasing to charge substantially different mobile rates for on-net and off-net calls,
  - d. immediately ceasing to waive termination charges only for TDMA customers who only migrate to C&W GSM plans, and
  - e. immediately ceasing advertisements, publicity and marketing which do not clearly describe its services and the rates for such services.
84. In addition, the Authority is minded to issue a further decision, on the basis of the above, which imposes an appropriate financial penalty upon C&W. C&W is invited to show cause, within 14 days of this decision, why the Authority should not impose a financial penalty.