

Cable & Wireless
Response to the ICTA's public consultation
on Wholesale and Carrier Services
(Ref: CD (2003)09)

23 January 2004

Introduction and Executive Summary

1. Cable and Wireless (Cayman Islands) Limited ("C&W") is pleased to submit the following response to the Consultative Document¹ on wholesale and carrier services published by Information and Communications Technology Authority (the "Authority"). C&W is of the view that the Authority's proposals as set out in the Consultative Document cannot be justified in law, are not consistent with international practice, and would be bad policy. In particular, the Authority's proposals require unnecessary manipulation of the meanings of terms in C&W's Licence, and requires the re-definition of terms in a manner inconsistent with the definitions used internationally. The Authority's proposals would also lead to unnecessary regulatory intervention in a manner that would interfere with the establishment of commercial relationships between licensees in the Cayman Islands. The remaining sections of this response will detail C&W's arguments.

2. As a preliminary matter, C&W notes that it will use the term "wholesale" in this document to refer to both so-called "resale" and "carrier services", unless the context requires otherwise. This is consistent with C&W's view that the "wholesale" category of services includes both so-called "resale" and "carrier services". However, C&W notes that this is not consistent with the Authority's use of the term "wholesale".

The Proper Interpretation of the Word "Wholesale"

3. C&W is of the view that Part 6 of Annex 5 to C&W's Licence², dealing with "wholesale services", already includes what the Authority now refers to in its Consultative Document as "carrier services". As a result, C&W respectfully submits that the Authority lacks the jurisdiction to mandate C&W to provide any such services except in accordance with Part 6.

4. The Authority states at page 3 of its Consultative Document that the term "wholesale" is not explicitly defined in the Licence. The Authority's interpretation of "wholesale", though, appears to be reliant on its definition of "resale." In the Consultative Document, the Authority makes an assumption that resellers are those who "resell the same or substantially the same service to its own customers" and that, therefore, any services purchased by carriers which are not resold in substantially the same form do not qualify as "wholesale" services.

¹ ICTA, *Public Consultation on Wholesale and Carrier Services*, 19 December 2003, Ref: CD (2003) 08 [hereinafter *Consultative Document*].

² C&W's Licence is identical to Schedule 2 to the Agreement signed on July 10, 2003, between C&W, the Governor in Cabinet of the Cayman Islands, and the Information and Communications Technology Authority (the "Authority") (the "Agreement").

5. The Authority also creates the term "carrier services", which it defines as "services, other than retail services and interconnection and wholesale (for resale) services provided by one licensee to another".³

6. In its Consultative Document, the Authority therefore appears to take a somewhat backdoor approach to the definition of "wholesale":

- First, the Authority creates an unnecessarily restrictive interpretation of the word "resale" as meaning only the provision of services that are retailed in the same or substantially the same way by the purchaser.
- Second, by narrowly interpreting "resale", the Authority can then claim that there are other services which are not wholesale (for resale) services under the Agreement, and over which it has jurisdiction.
- Third, the Authority creates the term "carrier services" to cover these other services.

7. Thus, the Authority claims that "wholesale", as that term is used in the Licence, only applies to those services which it has now narrowly defined as "resale".

8. C&W does not accept the Authority's analysis, which leads to incorrect conclusions. These distinctions and definitions are found nowhere in the Licence. There is nothing in the Licence that indicates, expressly or impliedly, that "carrier services" were intended to be a separate category, apart from wholesale services. Nor is there any support in the text of the Licence for the view that wholesale services should be categorized as "resale" or "carrier services" according to the function that a provider assigns to those services once purchased from C&W.

9. As C&W details below, the definition of "resale" has a universally accepted and well-established meaning in the telecommunications industry, i.e., "resale" is the sale of services purchased on a wholesale basis from another provider, regardless of how the purchaser uses these services to provide service to its customers. Defining "wholesale" with regard to basic principles of contractual interpretation, which state that words must be read in context of an agreement as a whole, further make it clear that wholesale services were intended to cover "carrier services" under the Licence. Finally, the Authority's interpretation is a strained construction of the text which requires the implication of terms not found in, and not contemplated by, the Licence.

³ *Ibid.* at p. 4. The Authority concedes at page 5 of the Consultative Document that "carrier services" is not a term used in the Agreement. C&W notes that, although the term "carrier services", as defined and used by the Authority, is not a recognized concept in the telecommunications industry and is not used in the Agreement, we will use the term in this document as defined by the Authority for ease of reference.

a) The Meaning of "Resale" in the Telecommunications Industry

10. C&W is of the view that the terms "resale" and "reseller" should be interpreted in accordance with their use in the telecommunications industry generally, which use includes both services that are bought and resold in the same form, and services that are bought and used in combination with other services and facilities to offer different services to the end user. Where contracts contain particular expressions which have a known meaning attached to them within the trade, they should be construed according to that usage, unless it is inconsistent with the agreement.⁴ Moreover, interpretation of a contract must ascertain the meaning that would be conveyed to a reasonable person, with all the background knowledge which would reasonably have been available to the parties at the time when they were making the contract. This has also been called the "matrix of fact."⁵ Thus, the House of Lords has explained that "the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean [by the reasonable person]."⁶

11. C&W, the Governor in Cabinet of the Cayman Islands, and the Authority are sophisticated parties with broad knowledge of the global telecommunications industry. Yet, the Authority's interpretation of resale is at odds with the well-recognized usage of that term in the field. In its Consultative Document, the Authority states that those operators who act as resellers resell "the same or substantially the same service to its own customers."⁷ The term resale is defined more broadly in the telecommunications industry generally, where it is understood to encompass not only services that carriers buy and resell in the same form, but services that may be used in different ways, e.g. as part of the "backbone" of a carrier's operations to be used in combination with other services and facilities, in order to allow a carrier to offer different, new and/or innovative services to customers.

12. As long ago as 1976, in the United States, the Federal Communications Commission ("FCC") issued a decision titled "Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities."⁸ In that decision, it envisioned a two-tiered industry – one tier which dealt with retail services, and one which dealt with wholesale services, including all forms of resale:

We foresee expanded resale and sharing as resulting in the future development of a two-tiered interstate telecommunications industry and market structure. The first tier will be comprised of carriers offering basic communications channels and switching services in two

⁴ *Chitty on Contracts: General Principles*, ed. A.G. Guest (London: Sweet & Maxwell, 1994) at 582-583

⁵ Lord Hoffmann, *Investors Compensation Scheme Ltd v. West Bromwich Building Society*, [1998] 1 ER 98 at 114-115.

⁶ *Ibid.*

⁷ *Consultative Document*, supra note 1 at p. 3

⁸ 60 F.C.C. 2d 261.

markets – to the public at the "retail" level, and to other common carriers and resale carriers at the "wholesale" level. The second tier will be comprised of carriers and other entities leasing the preponderance of their communications plant from the first tier carriers for the ultimate purpose of reselling these to the public sector – either directly in the form of point-to-point communications channels, or implicitly, when these channels and switching facilities are combined to form a switched private line data or voice communications service, or a communications based data processing service.⁹ (emphasis added)

13. Similarly, in Canada, the Canadian Radio-television and Telecommunications Commission ("CRTC") has defined the function of a reseller more broadly than simply reselling a service directly from an underlying carrier:

[R]esellers may determine which services or facilities to lease in order to provide their services and may aggregate and switch the traffic to be sent over their systems. Furthermore, in certain circumstances, resellers do control the routing of messages over their leased services or facilities. Resellers typically lease services and facilities from carriers and program their switches to determine how to route their traffic over these services and facilities. In such cases, it is the reseller, not the carrier, who determines the routing, thereby operating the system carrying the traffic.¹⁰

14. The CRTC reiterated its view in a 1998 decision with respect to regulating the provision of international telecommunications services:

Some parties argued that the licensing regime should distinguish via conditions of licence between resellers and facilities-based carriers. Stentor replied that distinguishing between resellers and facilities-based carriers would only contribute to maintaining an artificial distinction between similar activities that are only differentiated by the economic choice of the entity carrying on the activities. Further, most conditions that would apply to carriers would be equally appropriately applied to resellers.

⁹ *Ibid.* at para. 81.

¹⁰ Telecom Public Notice CRTC 93-62, *Exemption of Resellers from Regulation*, 4 October 1993.

... The Commission considers that a distinction between resellers and facilities-based carriers, per se, is not warranted. The Commission notes that many resellers, through the use of switches and private lines, are as capable of determining the routing of international traffic as are facilities-based carriers.¹¹

15. An analogous concept to resale in this context is found in the provision of International Simple Voice Resale (ISVR) services, where providers use leased circuits in combination with their own facilities as part of a larger service which is then sold to end consumers, rather than simply marking up and reselling the leased circuits. Oftel, the former telecommunications regulator in the United Kingdom,¹² defines ISVR as follows:

International Simple Voice Resale - (ISVR) - an international service provided by an operator to customers using the international facilities owned by other operators. In the case of an outgoing call, the operator collects traffic from the public telecommunications network, transfers it to a line leased from a facilities operator, and then hands it over to a *Public Telecommunications Operator* in an overseas country who will deliver the call to its destination. It therefore involves breakout onto the public telecommunications network at both ends, but with the international leg of the call being carried on leased circuits. ISVR traffic bypasses the accounting rate system.¹³

16. The World Bank *Telecommunications Regulation Handbook*¹⁴ defines "reseller" as:

A public telecommunications service provider that does not own network transmission facilities but obtains transmission facilities or services from others (usually a public telecommunications operator) for resale to its customers. These facilities or services may be resold with other services (e.g. value-added services) or without ("simple resale"). Some resellers operate their own

¹¹ Telecom Decision CRTC 98-17, *Regulatory Regime for the Provision of International Telecommunications Services*, 1 October 1998 at paras. 289-290.

¹² Statutory powers and duties for regulation of UK communications industries formally vested with Ofcom on 29 December 2003.

¹³ Oftel Glossary, online at <http://www.ofcom.org.uk/static/archive/oftel/publications/glossary/index.htm>

¹⁴ ed. H. Intven (The World Bank: Washington, 2000).

switches, routers and processing equipment. Others do not.¹⁵

17. Therefore, C&W is of the view that, in line with industry custom, the term "resale" in Part 6 of Annex 5 of the Licence should encompass any wholesale services sold by C&W to other licensed carriers without regard to how those other carriers choose to use them. Such an interpretation would be consistent with the Licence, which does not make a distinction in Part 6 between resale of services that are the same as those sold by C&W to retail customers, and resale of other services that may result from a carrier using the service purchased from C&W as a component of their own services. In fact, by incorporating Attachment 1 by reference in paragraph 64, which Attachment includes both so-called "carrier services" and simple resale, the Licence itself indicates an interpretation that is congruent with industry practice.

b) Part 6 Must Be Read In Context of the Licence as a Whole

18. A proper reading of Part 6 of Annex 5 in the context of the whole Licence makes it clear that the term wholesale was intended to include all resale services, including those services that the Authority has called "carrier services," subject to the exceptions in paragraph 66.1 of Annex 5.

19. It is a well-recognized principle of contract law that every contract must be construed in context, with respect to the whole of its terms. The words must be interpreted so as to bring them into harmony with the other provisions of the contract.¹⁶ In ascertaining the intention of the parties to an agreement, it has also been noted that "the cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand."¹⁷

20. As detailed below, it is clear that, among the services included in Attachment 1 to Annex 5 of the Licence to be offered on a wholesale basis, at least some of them are what the Authority would now refer to as "carrier services." Therefore, a coherent interpretation of the Licence must define wholesale as meaning the sale of services by C&W, priced on a wholesale basis, to any other provider of telecommunications services. The term is not restricted by virtue of how a provider chooses to use the services purchased.

21. The relevant paragraphs of *Part 6 – Wholesale Services* are cited below for ease of reference:

64. Authority may mandate resale. From the Effective Date, C&W shall offer any service to other licensed

¹⁵ *Ibid.* at C-13.

¹⁶ *Chitty*, *supra* note 4 at 586.

¹⁷ *Ibid.* at 580.

operators on a wholesale basis if the Authority has issued a written direction requiring C&W to do so. The wholesale price of any service that is required to be offered for resale shall, subject to any specific exemptions in section 66 below, be:

(a) (in the case of a service covered by the commitments given in Attachment 1) as calculated in this Agreement; and

(b) (in all other cases) C&W's retail price less a discount to reflect the avoided retail costs to C&W of providing that service.

...

66.1 C&W shall not be required:

(a) to offer wholesale access for traffic that neither originates, nor terminates, in the Cayman Islands;

(b) to make available on a wholesale basis any service which it does not itself offer to retail customers.

(c) to make available wholesale services for which there is insufficient demand to justify the cost of development.

...

70. C&W Commitments. Without being specifically required to do so by the Authority, C&W shall, from the dates specified in Attachment 1, make the wholesale services available to ICT licensees on request as set out in the Attachment 1 to this Schedule 4.

22. Paragraph 64 of Annex 5 to the Licence states that the Authority may direct C&W, in writing, to offer any service to other licensed operators for resale on a wholesale basis. It also states how the prices of those services are to be calculated, subject to paragraph 66.1 (which states those circumstances in which C&W will not be required to offer a service).

23. Paragraph 64(a) states that where a service is covered by the commitments given in Attachment 1, the wholesale price shall be as calculated in the Licence.

24. Attachment 1 outlines six services and sets out the wholesale rate that is applicable to each of them: Outgoing IDD Carrier Wholesale, IDD Resale, Domestic Leased Circuit, International Private Leased Circuit, and Retail ADSL Internet Service

Resale. Of these services, Outgoing IDD Carrier Wholesale and Internet ISP Connect and Dial Up Access Service services would be "carrier services" under the Authority's definition.

25. Therefore, since at least some "carrier services" are included among the services listed in Attachment 1, and Attachment 1 relates directly to Part 6, it is clear that "carrier services" are considered, for the purposes of the Licence, to be wholesale services.

26. The Authority correctly observes that some of the services listed in Attachment 1 are not offered on a retail basis.¹⁸ Notwithstanding this fact, when paragraphs 64 and 66.1 are read together with paragraph 70, it demonstrates that C&W agreed to offer these services on a wholesale basis. The purpose of paragraph 70 is merely to clarify that the services listed in Attachment 1 are to be offered regardless of any requirement, but does not remove these services from the rubric of Part 6. Therefore, the fact that any service listed there is not offered on a retail basis does not make it any less a "wholesale" service.

27. Although the word "wholesale" is not defined in Part 6, it is defined in Part 3 of Annex 5 to the Licence, which deals with the creation of an imputation test. Table 2 of Part 3 defines "wholesale" as "the price charged by C&W to Licensees who are purchasing wholesale service as contemplated in this Schedule 4."¹⁹ Moreover, Table 2 of Part 3 of Annex 5 lists Domestic Leased Circuit and International Private Leased Circuit services – which are "carrier services" – as being offered on a wholesale basis. We note that Table 2 of Part 3 does not attempt to subdivide categories of licensees who may purchase these wholesale services as between licensees engaged in resale and licensees providing "carrier services." Accordingly, the Authority's attempt to make this interpretation on page 3 of its Consultative Document, where it states that "some but not all of the services listed in Attachment 1 to Schedule 4 would be considered to be wholesale services" [emphasis added], is inconsistent both with Part 6, which deals exclusively with wholesale services, and with Part 3, which lists specific carrier services as wholesale and defines "wholesale" in light of Annex 5 of the Licence as a whole.

28. In sum, defining "wholesale services" as including "carrier services" allows the words of Part 6 to be construed in a manner consistent with the universally accepted meaning of "resale" within the telecommunications industry, and allows Part 6 of Annex 5 to be read in harmony with the context of the document as a whole.

c) The Authority's Interpretation Requires the Unnecessary Implication of Terms into the Licence.

29. The Authority states that the definition of wholesale under Part 6 of Annex 5 only includes resale where the services are resold in the same or substantially the same

¹⁸ *Consultative Document*, p. 5

¹⁹ Schedule 4 of the Agreement is identical to Annex 5 of C&W's Licence, and the reference in Table 2 of Part 3 of Annex 5 of the Licence should read "...as contemplated in this Annex 5."

fashion. The Authority's argument, in essence, is that paragraph 64 should be read as follows:

64. **Authority may mandate resale.** From the Effective Date, C&W shall offer any service to other licensed operators on a wholesale basis *where those operators intend to resell the same or substantially the same service to end users* if the Authority has issued a written direction requiring C&W to do so. The wholesale price of any service that is required to be offered for resale shall, subject to any specific exemptions in section 66 below, be:

(a) (in the case of a service covered by the commitments given in Attachment 1) as calculated in this Agreement; and

(b) (in all other cases *where the service to be sold by the licensed operator to its customers is the same or substantially the same as that purchased from C&W*) C&W's retail price less a discount to reflect the avoided retail costs to C&W of providing that service. (italicized portions added)

30. There is a general presumption against implying terms into written contracts; the more detailed and apparently complete the contract, the stronger the presumption.²⁰ Indeed, the maxim *expressum facit cessare tacitum* stands for the proposition that what is expressed prevails over what is implied.²¹ The House of Lords has held that, in order for a term to be implied, it must be required to give business efficacy to the contract, and must be so obvious that if its absence were pointed out at the time the contract was made, both parties would have agreed without hesitation to its insertion.²²

31. In this case, the implication of the terms that would be required in order for the Authority's interpretation of the Licence to be correct are not necessary to give business efficacy to the contract. On a plain reading of Part 6, at least some "carrier services" are already included as resale services under paragraph 64 by virtue of Attachment 1. If Part 6 of Annex 5 is read in context of the Licence as a whole, and with an understanding of the terms as informed by the custom of the industry, then it is even clearer that the term resale must include any services deemed by the Authority to be "carrier services". No more is needed for the Licence to be effective in this respect.

²⁰ K. Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 1997) at 125; see also *Phillips Electronique Grand Public S.A. v. British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472 (C.A.)

²¹ Chitty, *supra* p. 599

²² *Liverpool City Council v. Irwin*, [1977] AC 239 per Lord Cross.

32. Moreover, paragraph 64(b) sets out an alternative pricing mechanism for all other services which the Authority may mandate C&W to offer to other licensed operators. It does not state "all other resale services *except* carrier services." It makes it clear that, where the price of a service is not already calculated in Attachment 1, "in all other cases" the price of the service shall be C&W's retail price less a discount to reflect the avoided retail costs to C&W of providing that service. However appealing an interpolation of language may be to the Authority, the legal test for the implication of terms has, again, not been met: it is not necessary to imply language in order to give business efficacy to the contract.

33. Finally, had the definition of resale come up at the time that the parties were negotiating the Agreement, including the Licence, it is not obvious that both parties would have agreed to the interpretation advanced by the implied terms inserted above. C&W therefore respectfully submits that the Authority's interpretation requires a strained and unnecessary construction of the Licence.

No Jurisdiction to Regulate "Carrier Services" Except Under Part 6

34. As noted in the preceding paragraphs, the Authority contends that paragraph 64 of Part 6 has no application to what it defines as "carrier services". The Authority, in making this statement, makes a distinction between "carrier services" and "wholesale (for resale)" services. The Authority states that it believes it has jurisdiction to require Cable & Wireless to provide "carrier services" to other licensees and for such services to be subject to regulation.

35. However, if in fact there is a separate category of services known as "carrier services", a contention which Cable & Wireless disputes, and if, as the Authority contends, paragraph 64 of Part 6 does not apply to "carrier services", then the Authority has no jurisdiction to mandate Cable & Wireless to provide "carrier services" to other licensees, or to regulate such services in a manner inconsistent with the provisions of Part 6.

36. The Authority, being a creature of the *Information and Communications Technology Authority Law* ("ICTA Law" or "Law"), only has such powers as are granted by or pursuant to the provisions of the Law. Perhaps recognising this principle, the Authority seeks to invoke section 9 (3) paragraphs (a) and (h) of the Law which define as being among the principal functions of the Authority, the functions of promoting competition in the provision of ICT services and the promotion and maintenance of an efficient, economic and harmonized ICT infrastructure. Reference is also made to clause 2.5 of the Agreement, which provides that all ICT networks subject to licensure under the ICTA Law and operated by Cable & Wireless are subject to regulation by the Authority.

37. The general statutory power to regulate ICT services conveys no power on the Authority to create a jurisdiction it does not already have in enacted regulations or

pursuant to the terms of the Licence. The only source of the Authority's jurisdiction to require Cable & Wireless to provide any service to other licensees on a wholesale basis lies in Part 6 and the rules governing the provision of such services are the rules set out in Part 6. The Authority may not regulate by exception. If these "carrier services" are not included in the "wholesale services" to which Part 6 applies, then the Authority has no power to require Cable & Wireless to offer "carrier services" to other licensees nor to fix terms and conditions for the provision of these services which are inconsistent with those set out in Part 6.

C&W Responses to ICTA Questions

38. This section responds to each of the questions in the Consultative Document. We address each of the questions on its merits. The section therefore includes economics and policy analysis as well as some legal points, and is without prejudice to the legal and jurisdictional argumentation in the preceding section.

39. Because the first three questions appear to address issues relating to "resale" services, while the last three address issues relating to "carrier services", C&W's answers to each of the questions focus on the relevant set of services. C&W does not concede that "wholesale" is in fact limited to "retail for resale", and C&W's answers in this section are without prejudice to its arguments raised in the preceding sections.

Question 1

Among Cable & Wireless' retail services, are there services other than those listed in Attachment 1 to Schedule 4 that are required to be made available to licensees in order to facilitate resale competition?

40. In answer to this question, C&W would address the implication of the assumptions underlying the question. C&W believes that, by asking this question, the Authority is creating an expectation that further retail services could be made available for non-negotiated mandatory resale provision under the terms of Part 6. In so doing, the Authority runs the risk of eroding incentives for carriers to (1) seek commercial arrangements for provision of such services, and/or (2) invest in their own facilities in the Cayman Islands to provide services. The negative implications of the latter risk are evident. The consequences of the former are more complex but equally harmful to the public interest in the Cayman Islands.

41. C&W would expect any licensee that wants to purchase a "retail for resale" service from C&W to make a request and enter into commercial negotiations, negotiations which would take place within the framework established by Part 6 of Annex 5. The need for intervention by the ICTA would therefore occur infrequently. It is evident that the imposition of regulation is only appropriate and effective where it will yield net benefits. This is only likely to be the case where markets do not operate

efficiently without regulation, and where any defects cannot be corrected within a reasonable timescale by normal operation of the market.

42. We are concerned that the Authority's consultation on this question will obstruct or delay such normal, commercial requests by creating an inappropriate expectation of regulatory intervention. In fact, C&W is already aware of instances where it became aware of so-called demand for certain new "retail for resale" services, not from a licensee, but from the Authority. In one instance, the licensee in question has never communicated with C&W's Carrier Services department to request wholesale or any other services. In these cases, there is no evidence at all that regulatory intervention is necessary, simply because no dialog whatsoever has been attempted by the other licensees in question. C&W considers it to be inappropriate and highly irregular for those licensees to attempt to "negotiate" with C&W through the ICTA and, by asking Question 1 above, C&W believes the ICTA is not discouraging such irregular actions.

43. Cable & Wireless understands that some special conditions apply in the early stages of liberalisation. Specifically, there are some interconnection and wholesale services which only it can provide and which are critical service inputs to other licensees. Provision of these services is covered by the arrangements for interconnection and wholesale service provision in the July 10, 2003, Agreement. A new mandate for provision of any retail service for resale would create an artificial constraint on normal commercial arrangements for service provision. The Authority should therefore only consider this if there is evidence that commercial arrangements are not working and that regulation can provide an efficient remedy.

Question 2

The principles for setting wholesale rates are set out in Schedule 4. The Authority contemplates applying the following pricing principles for wholesale services:

- **wholesale prices should not discriminate in a way which reduces efficient competition; and**
- **wholesale prices should not be inflated to reduce competition in dependant markets.**

44. Cable & Wireless considers these two additional principles to be unnecessary. Detailed principles and the methodology to calculate prices for 'retail for resale' services were established in Part 6 of Annex 5. In summary, Part 6 requires that retail services provided for resale to be provided at rates set at the level of the relevant retail rate minus the costs avoided by Cable & Wireless as a result of providing the service for resale. This pricing methodology is often referred to as 'retail minus'. Additional principles regarding non-discrimination and dependant markets are not necessary since the 'retail minus' formula guarantees that rates for 'retail for resale' services will always be set at level which (a) is equal to the resale rate imputed by Cable & Wireless to its own retail service and (b) enables sufficient margin between the resale and retail rates to accommodate the retail costs of the other licensee purchasing the resale service. In other

words, the Authority's concerns, that it would seek to address through the two new pricing principles, are already addressed by the existing pricing principles in Part 6.

Question 3

The Authority seeks comments on the whether terms and conditions of wholesale services need to be reviewed and if so, the principles that ought to be used.

Comment on the following principles for determining the appropriateness of proposed terms and conditions for wholesale services:

- **wholesale services are to be made available on terms and conditions that are reasonable and non-discriminatory;**
- **when an ICT service is made available only to a limited group of customers, such a service is to be made available on a wholesale basis such that the wholesale service could be resold to the same limited group of customers that have purchased such a service in the past;**
- **wholesale services are to be provided with the same quality and in the same provisioning time intervals that C&W provides to itself; and**
- **absent prohibitions to the contrary, a competitor could lease residential telephone services and subsequently resell it to a business customer. Resale of services between categories of customers should be prohibited.**

Indicate whether there are additional principles other than those listed above that should be contemplated.

45. Since the Authority addressed pricing principles in Question 2, Cable & Wireless assumes that Question 3 is about non-price terms and conditions, and will answer accordingly.

46. Cable & Wireless agrees that the principles expressed in the *first*, *third* and *fourth bullets* of the question would be appropriate in an environment where non-price terms and conditions were regulated. In fact, the *first* and *third bullets* are virtually unavoidable where "retail for resale" services are concerned, because the terms, quality and provisioning practices will necessarily be the same. It is therefore probably not necessary to restate them as separate principles. The *fourth bullet* is necessary only because the Authority artificially constrains prices for certain services provided to residential customers. As long as such constraints are retained, rules prohibiting arbitrage are necessary.

47. The meaning and intention of the *second bullet* is not clear. Cable & Wireless therefore reserves comment on it and would welcome discussion with the Authority to clarify its purpose.

Question 4

Is the definition of carrier services set out in Section 4 “Carrier Services” above an appropriate one?

48. In responding to this question, it is worth repeating that the comments in this section are without prejudice to the legal argumentation which precedes it. In particular, the Authority should be in no doubt that Cable & Wireless believes that it is outside the legal jurisdiction of the Authority to create a new category of ‘Carrier Services’ separate and apart from the category of “wholesale services” that are subject to Part 6 of Annex 5.

49. In addition to the legal and jurisdictional points raised earlier, we believe the creation of a new category to be unnecessary. The “carrier services”, as they are described by the Authority in the Consultative Document, include services which currently fall within either the interconnection and infrastructure sharing or the wholesale pricing systems. As such, they are all taken care of within the existing framework established by the Licence, and there is no “gap” or other type of service that needs to be addressed through the creation of a new category of services.

50. Cable & Wireless rejects the concept of ‘Carrier Services’ and therefore does not agree its definition.

Question 5

Are carrier services such as leased services and unbundled network elements required to be made available on a mandatory basis to licensees in order to facilitate the provision of their own services in a timely fashion and in an economic manner? If so, provide a detailed description of such services, why they are required to be made available, and the implications if such availability is not mandated.

51. Cable & Wireless refers the ICTA to the response to Question 1 in this submission. Our response to that question focuses on “retail for resale” services, but some of the principles we explain there apply generally across all services.

52. In particular, Cable & Wireless wishes to draw the attention of the Authority to the potential danger in prescribing provision of services where there is no evidence of market failure. As explained in the response to Question 1, Cable & Wireless accepts that, in the early stages of liberalisation, there will be some interconnection and wholesale services which only it can provide and which are critical service inputs to other licensees. The provision of these services was incorporated in the Licence. Also, principles for the provision of interconnection and infrastructure sharing under the ICTA Law are now published in the *Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations 2003*. These would cover any unbundled network elements which the Authority appears now to wish to include in its category of “carrier services”. However, the creation of a new mandate for “carrier services” would create a sub-set of infrastructure services outside and possibly in conflict

with the framework established by the existing Interconnection and Infrastructure Sharing Regulations. This would suggest that the Authority’s category of “carrier services” is in fact redundant and unnecessary under the ICT regulatory framework for ICT services in the Cayman Islands, and should not be adopted.

53. The existing framework contains very comprehensive safeguards to prevent any anti-competitive or abusive behaviour in the provision of interconnection and wholesale services. This framework allows for commercial negotiation with adequate powers for the Authority to intervene if necessary. Establishing a new category of mandatory services would create (1) an artificial constraint on normal commercial arrangements for service provision, and (2) confusion and possibly conflict with the existing Interconnection and Infrastructure Sharing Regulations.

Question 6

The Authority seeks comments on how carrier services should be regulated.

Provide comments the following regime for regulating carrier services:

- **Carrier service prices and terms and conditions would be subject to prior written approval by the Authority**
- **Carrier service rates would be priced at long-run incremental cost plus mark-up. In absence of an incremental costing model, C&W’s proposed rates would be based on its adjusted fully-allocated cost model.**
- **Carrier services would be provided in a manner that:**
 - **Maximizes the use of public ICT networks and infrastructure**
 - **Minimizes the potential for negative environmental impacts**
 - **Enables the development of competition in the provision of public ICT networks and public ICT services in a timely and economic manner**
- **Carrier services would be provided:**
 - **At reasonable rates. Charges are to be cost-oriented and sufficiently unbundled so that parties are obliged to pay only for the services they require**
 - **On terms and conditions that are non-discriminatory**
 - **For reasons of liability, with limitations to sub-lease such services to another licensee.**

54. As stated above, Cable & Wireless does not believe it to be necessary or appropriate to create a new category of wholesale services called ‘carrier services’. C&W recognizes that it is likely that licensees will purchase various services from one another – either at the infrastructure or services level – of the type which the Authority has suggested be included in the ‘carrier services’ category. However, generally, as explained above, the regulatory framework in the Cayman Islands already adequately and completely incorporates such services, and we believe that no regulation in addition to the existing framework is necessary or desirable. On the specific points contained in the bullets to question 6, we have the following comments.

55. On the *first bullet*, we believe it would be inappropriate to introduce an approval system other than that which is already contemplated by Part 6 of Annex 5. This unduly burdensome regulatory approach could delay market developments. Also, it is inconsistent with the framework established by the Law and by regulation for interconnection and infrastructure sharing agreements, which clearly contemplates commercial negotiation and agreement of terms and conditions, including prices. If the Law considers it appropriate to provide for commercial negotiations in the first instance for services as fundamental as interconnection and infrastructure sharing services, it is certainly not appropriate for the Authority to create a more burdensome and inflexible regulatory framework for so-called “carrier services”.

56. On the *second bullet*, we do not believe that any single cost standard could be applied across the wide range of services which could potentially be included in the Authority’s proposed “carrier services” category. In the Authority’s proposed framework, this would be a very mixed bag of services. Establishing a rigid costs standard for pricing at the outset would set expectations for investors of price points which may not lead to the most efficient investment decisions. For example, some “carrier services” priced at FLLRIC cost levels might create artificial incentives to provide services using existing networks when, in fact, the most efficient outcome would be new infrastructure investment in the Cayman Islands. In addition, to the extent that the “carrier services” contemplated by the Authority already fall within the interconnection and infrastructure sharing or the wholesale pricing systems, the Authority runs the risk of establishing conflicting pricing standards for the same service. C&W strongly recommends that the Authority refrain from setting a rigid cost standard for pricing across all services which could potentially be included in the ‘carrier services’ category.

57. We question the intent of some of the points in the *third bullet*. Use of the term ‘maximises’ in the first tiret, could be interpreted as meaning that that networks should be utilised at their peak capacity. In fact, this would be inefficient. The regulatory framework should seek to facilitate use of networks at their optimum level of efficiency. As a general point, and particularly with reference to the first and third tirets, Cable & Wireless submits that initiatives to achieve these objectives should be proportionate and should not result an undue burden on any licensee(s) or customer(s).

58. We believe that the first two tirets under the *fourth bullet* are general principles which would apply to any regulated service under the existing framework, with the exception that, as noted above, pricing principles should be flexible so as not to constrain the ability of the Authority to establish efficient investment signals. C&W, therefore, submits that the reference to cost oriented charges in the fourth bullet of Question 6 is not appropriate, and that no amendment or addition to the current framework is needed.

All of which is respectfully submitted this 23rd day of January 2003.