



CABLE & WIRELESS

Cable & Wireless
(Cayman Islands) Limited

P.O. Box 293
Grand Cayman KY1-1104
Cayman Islands.

www.cw.ky

Telephone +1 (345) 949-7800
Fax +1 (345) 949 7962

Our Ref: GRCR/GR/15.24
15 August 2007

Mr. David Archbold,
Managing Director,
Information and Communication Technology Authority,
P.O. Box 2502
3rd Floor Alissta Towers,
Grand Cayman, KY1 1104.

Dear Mr. Archbold:

Re: Cable & Wireless request for forbearance on NetSpeak

Cable and Wireless (Cayman Islands) Limited ("**C&W**" or "**C&W Cayman**") is pleased to submit the following request in accordance with clauses 18-19¹ of Schedule 1

¹ 18. At any time from two (2) years after the Effective Date, the Authority will entertain applications in relation to forbearance. If the Authority determines that rate regulation is not necessary:

- to prevent unreasonable or discriminatory practices; or
- for the protection of consumers,

and that forbearance is consistent with the interests of the public including promoting competition among Licensees, then the Authority will forbear from applying rate regulation to an ICT Service. One of the factors that the Authority shall have regard to, among others, in deciding whether to forbear shall be whether there is effective competition in relation to the relevant market.

19. Any Licensee making an application for forbearance is under the onus to prove to the Authority that the test for forbearance has been met. The Authority will make a finding in relation to an application within nine (9) months of receipt of said application. The Authority may exercise its power to forbear conditionally or unconditionally as it determines is appropriate in all the circumstances. Nothing in this section prevents the Authority from exercising its power to forbear or reduce the level of rate regulation of ICT services in the absence of a finding as contemplated above, or from making a subsequent finding that it is no longer appropriate to forbear, and therefore that rate regulation should be reinstated.



to the Agreement between C&W Cayman, the Governor in Cabinet of the Cayman Islands and the Information and Communications Technology Authority (“**ICTA**” or “**Authority**”) dated 10 July 2003. C&W is requesting that the Authority forbear from regulating C&W’s NetSpeak service on the basis that there is effective competition in the relevant market for the supply of VoIP services and that rate regulation is not necessary to protect customers.

C&W Cayman is filing portions of this submission in confidence with the Authority. A redacted version, with all confidential information replaced by “###”, will be provided for the public record.

In C&W’s 25 February 2005 comments, as part of our original application for classification of NetSpeak Service, we explained that we believed that, as NetSpeak competes with mobile, PSTN and VoIP providers, there is sufficient competition to justify light-touch regulation of NetSpeak. Moreover, we argued that NetSpeak is not the only or indeed primary choice for consumers who want voice services.

In its determination dated 29 March 2005, the Authority stated that *“Given the emerging nature of the competitive market place and the fact that the degree of competition to be faced by a service such as NetSpeak is unknown, particularly as the service has not yet been introduced in the market, the Authority believes it is far more prudent to rely on information reflecting the actual degree of competition faced by the service rather than on conjecture about the possible extent and likely effectiveness of competition. Indeed, given the nascent nature of voice over the Internet services, the information provided by C&W in support of its application is necessarily based on what may or could happen with no concrete information on the extent and effectiveness of competition among providers of NetSpeak and its alternatives.”*

Whilst we appreciate the Authority's argument regarding the nascent nature of VoIP, we trust that, now that we are over two years down the road since the launch of NetSpeak (and even longer since the emergence of VoIP in the Cayman Islands), the Authority will reconsider the level of competition that NetSpeak faces and forbear from further regulation of that service.

In Part I of this submission we provide evidence of the level of competition in the provision of VoIP in the Cayman Islands. In Part II of this request for forbearance, we illustrate how the regulation of NetSpeak in the Cayman Islands does not correspond to the regulatory treatment of VoIP elsewhere in the world, and in particular we highlight recent developments in the international arena for the regulation of VoIP services.

In Part III we briefly discuss the implications of the different licensing and regulatory treatments of C&W compared to the other providers of VoIP services in the Cayman Islands.

Part I – Competition in the supply of VoIP services

The driving forces behind the launch of NetSpeak included not only to provide a new domestic product but also to compete with the foreign VoIP operators who were, and still are, bypassing the traditional circuit-switched network. NetSpeak was, therefore, in large part a response to competition in the international voice calls market, with local calling included primarily for customer convenience, so that our customers did not have to use a different phone when making a local call. For that reason the local element of the service is charged at the same price as non-NetSpeak local calls.

If the Authority's original determination that the local call element should comprise a Category 1 service was a precautionary measure to ensure that C&W did not leverage any dominance it may have in the domestic fixed market through the use of NetSpeak, then the current NetSpeak customer figures show that such measures are no longer



necessary, if they ever were. Indeed as Table 1 below shows, after an initially promising start to NetSpeak take-up, with growth in subscribers of ### in the first quarter since launch; and a further ### in the second quarter since launch (that is, the quarter ending Dec 2005), this growth ###. In fact, for the whole of 2006, the subscriber base ###. As at July 2007, C&W had ### NetSpeak customers, representing a ### increase in the NetSpeak customer base since the start of 2007. If overall VoIP usage is increasing in the Cayman Islands – which C&W believes it is – then this ### increase in subscribers is likely to represent a declining share of the supply of VoIP services.

Table 1. NetSpeak subscriber numbers – by quarter since launch², plus latest month

Month	Number of subscribers	% change on previous quarter
June 2005	###	
Sept 2005	###	###
Dec 2005	###	###
March 2006	###	###
June 2006	###	###
Sept 2006	###	###
Dec 2006	###	###
March 2007	###	###
June 2007	###	###
July 2007	###	

This hardly constitutes a threat to fair competition in the domestic voice calls market and in any case C&W has committed to keeping local calling charges at existing circuit switched rates and, if changes were required by evolving market conditions, to apply for tariff approval as we do now for local calling services. Rather than C&W being able to

² NetSpeak was launched on 9th May 2005 but June 2005 was the first month of billing.

abuse a dominant position, we believe we are now actually at a competitive disadvantage.

In the Cayman Islands there are at least three other VoIP service providers readily available to Caymanian customers (MSN, Skype, and Vonage)³ none of whom face the same licensing and regulatory restrictions as C&W. These providers have already managed to establish very strong positions in other geographies without needing to incur significant sunk investment. For example, Vonage has enjoyed meteoric growth and was able to launch services in over 100 US markets with an investment of less than US\$30million.⁴ Likewise, Skype, which is based in Luxembourg, has 100 million users worldwide even though it has no network of its own. There is no reason to believe that such providers cannot build up similarly strong positions in the Cayman Islands and indeed, anecdotal and recent survey evidence that we have obtained supports the view that this is exactly what they have done. Furthermore, given that there are more than 400 VoIP operators in North America alone and over 1,100 worldwide, this means that the barriers to entry to the supply of VoIP services are all but non-existent. It is reasonable to expect, therefore, that there are, or will be, even more suppliers of VoIP services to the Cayman Islands.

Before discussing the evidence that C&W has obtained on other VoIP providers in the Cayman Islands, it is worth emphasizing that even without external confirmation, a look at C&W's own broadband and IDD usage would suggest that C&W's share of the VOIP market is small. Whilst C&W has ### broadband customers, we have estimated that our competitors collectively have about ### customers which makes a total broadband take-up in the Cayman Islands of nearly ##.⁵ It is unlikely that out of an estimated total of ### broadband customers, only about ##, or just under ##, use a VoIP product.

³ In addition to these three, Packet is another VoIP provider that has a number of connections in Cayman.

⁴ Vonage Press release, 24 November 2003 at http://www.vonage.com/media/pdf/pr_11_24_03.pdf

⁵ These estimate have been supported by information from the Tower study discussed below, which reported that ### of those surveyed used C&W as their high speed internet provider, which given C&W's known number of customers, translates into total broadband take-up of approximately ##.



Indeed, anecdotal evidence certainly suggests that a large proportion of broadband customers are using Vonage, Skype and MSN services. Given Cayman's large expatriate population, the Cayman Islands have a unique situation with the use of Vonage, in particular. Many expatriates came to this country with their own Vonage equipment and have continued to use it here. This is understandable, given that Vonage asks US \$24.99 for a package offering better plan rates and lower per minute rates for out of plan calls than the NetSpeak package for which we must charge CI\$ 39.95. Skype and MSN are, of course, free for PC to PC calling, while Skype also offers "SkypeOut" rates for international calls to non-Skype users starting from \$0.02 per minute, plus a connection fee of \$0.03 per call.

C&W believes it has only a fraction of the VoIP market and yet finds itself heavily regulated and unable to compete fairly with foreign operators who are not even licensed to provide telecommunications services in the Cayman Islands, let alone subject to any other regulatory requirements. Such operators contribute nothing to the local economy, community or infrastructure as no licence or regulatory fees are paid to Government, no Caymanians are hired, no network investment is placed here, and all revenues are collected overseas. Basically, Cable & Wireless is being discriminated against in favour of offshore competitors.

C&W has recently been able to confirm internal and anecdotal evidence with independent market research. In March 2007, C&W commissioned a Tower Omnibus Survey to provide us with a detailed insight into the ICT market in the Cayman Islands. The survey was conducted via telephone and 1,000 people were interviewed. This survey represents the largest telephone survey ever conducted in the Cayman Islands. The methodology used for the survey was pure random sampling achieved by including all fixed and mobile telephone number prefixes (Central Office Codes) issued in the Cayman Islands. Interview calls were made both during the day and in the evenings to ensure a random and representative sample was selected. The survey consisted of two



parts; one answered core demographic questions focusing on areas such as gender, age, income levels etc., whilst the other section concentrated on questions specific to the ICT sector. Included in this second section were questions relating to the use of VoIP in the Cayman Islands. We attach the survey results in a confidential annex to this submission.

The survey results confirm the anecdotal evidence that C&W does not have a huge customer base for its NetSpeak service. Of those surveyed who did use VoIP, ### used MSN's VoIP service and ### used Skype's product, with only ### using NetSpeak and ### using Vonage services. Even for users gaining access to VOIP via C&W broadband services, the percentage using NetSpeak was only ###.

Moreover, those that used alternative VOIP services used those services more heavily than NetSpeak customers used theirs. In Table 2 below we use the usage data from the Tower survey to estimate the average usage per month by users of the top three VOIP services. NetSpeak, on average, is clearly used less. For example, ### of NetSpeak users have a monthly usage of less than one hour, with only ### of NetSpeak users having a monthly usage of an hour or more. By contrast, ### of Skype users and ### of MSN users have a monthly usage of over an hour. Therefore, on a usage basis, NetSpeak's market share is even lower than on a subscriber basis.



Table 2. Estimated Monthly VOIP usages by service provider

Survey Usage (mins)	Proxy Usage (mins)	% of Skype Users	% of MSN Users	% of NetSpeak Users
0-15	7.5	###	###	###
16-30	23	###	###	###
31-60	45.5	###	###	###
61-120	90.5	###	###	###
121-200	160.5	###	###	###
200-300	250	###	###	###
More than 300	400	###	###	###
Total		100.00%	100.00%	100.00%
Weighted Average Monthly Mins of Usage		Skype	MSN	NetSpeak
		###	###	###

The above evidence clearly places both MSN and Skype's positions as providers of VoIP services above that of C&W's NetSpeak service, whether measured by number of subscribers or minutes of use, and yet they do not hold a licence in the Cayman Islands, and are far from being subject to price regulation by the Authority. This cannot possibly be considered to be fair competition and, in fact, C&W is being discriminated against in favour of offshore carriers who contribute nothing to the local network, economy or community.

In fact, C&W is being prevented from competing on a level playing field by regulatory restraints which curtail our ability to price our NetSpeak service competitively. As the Authority is aware, section 9(4) of the *Information and Communications Technology Authority Law* (2006 Revision) (the "**Law**") states that the Authority may regulate rates of a service that is required to be licensed where it is in the public interest to do so. However, the Authority does not appear to be exercising this power in a consistent or

principled manner. Either it must be in the public interest to regulate VOIP prices and services because all VOIP service providers ought to be regulated, or because a recognized market failure means that a dominant VOIP service provider ought to be regulated. It does not make sense to regulate only one, minor VOIP service provider when larger VOIP service providers remain both unlicensed and unregulated. C&W believes that the Authority is remiss in its duties under the Law, either by failing to require licensing of other VoIP providers who are operating in the Cayman Islands, or by regulating C&W, an operator with a minority market share in VoIP in the Cayman Islands, or both. This situation is clearly not in the public interest.

We understand that originally the Authority was concerned that the emerging nature of the competitive market place meant that competition for NetSpeak was unknown and therefore the Authority felt that *"it is far more prudent to rely on information reflecting the actual degree of competition faced by the service rather than on conjecture about the possible extent and likely effectiveness of competition."*⁶ However, market information is now available. C&W trusts that, given the results of the Tower Omnibus Survey, the Authority will now reconsider its position and forbear from further regulation of C&W's NetSpeak service, particularly in light of the results of the survey which indicate "the actual degree of competition" and show that C&W does not have market power in VoIP services in the Cayman Islands and in fact is attempting to compete under heavy regulation whilst the market leaders face no regulatory requirements whatsoever.

In its 2005 determination, the Authority said *"The ability to place and receive domestic and international voice calls using Netspeak is no different, in the Authority's view, from the local and international call service functionalities provided by C&W using its circuit switched network"*⁷. C&W believes that the Authority has failed to give sufficient weight to the fact that C&W does not have market power in the service at issue – VoIP – to distort competitive markets. Instead, the Authority has placed undue emphasis on the fact that the VoIP service connects with the PSTN, concluding that NetSpeak is in the same

⁶ ICTA Determination, "C&W NetSpeak" (ref.: ICTA/160/161-09), dated 29 March 2005, at page 4.

⁷ Idem, at page 5.

relevant market as traditional local services and hence C&W's dominance in traditional local services translates into potential dominance in a local telephony services provided using VoIP.

But as the anecdotal and survey evidence demonstrates, C&W does not currently have market power in VoIP, and neither is C&W likely to gain substantial market power in VoIP in the future given the nature of VoIP technology. This is for a number of reasons:

- i) VoIP service providers do not need to acquire network infrastructure, but instead can rely on customers' broadband access which need not be provided by C&W;
- ii) The costs to provide a VoIP service are much lower than those of providing circuit-switched telephony, allowing for easy entry in and out of the VoIP market;
- iii) C&W has no first-mover advantages in providing the NetSpeak service as C&W is as much a new entrant in VoIP telephony as other operators (in fact, operators such as Vonage launched their services well before C&W first provided NetSpeak services);

In addition, while C&W has experience providing local telephone service, this does not translate into an ability to "manage" circuit-switched customers to the NetSpeak service. Customers will only move to NetSpeak if C&W offers a better quality-adjusted price compared to other VoIP providers. Contrary to the Authority's concerns that C&W may leverage supposed dominance in the PSTN market into the VoIP market, C&W has neither the incentive nor the ability to price VoIP below cost in an effort to drive rivals from the VoIP market and thereby preserve market power in traditional local telephony. Pricing VoIP below cost would simply result in losses that could not be recovered. Even in the most unlikely event that competitors such as Skype and MSN were to exit the supply of VoIP services to the Cayman Islands, the barriers to entry to

the VoIP market are so low that any attempt by C&W to then raise prices would simply be met with new competitor entry.

Importantly, we note that the Authority did not conclude that C&W has market power in VoIP services in the Cayman Islands. Instead, the Authority found that because (in its view) VoIP is a functional substitute for local circuit switched exchange services because C&W possesses a very high market share in traditional local services, C&W must be presumed to possess market power in a combined local circuit-switched and local VoIP services "market". This conclusion does not seem to have been based on an extensive analysis of demand and supply substitution, or one of pricing.

By regulating only C&W's NetSpeak service, however, while leaving all other VoIP providers free of licensing and regulation, the Authority's decision unnecessarily constrains C&W's ability to respond to other VoIP providers' efforts to capture circuit-switched customers. As a result, regulation is stifling competition. If the Authority were to forbear from regulating NetSpeak, customers would have a wider selection of VoIP offerings faster and at lower cost. For example, C&W has been stymied by an imputation process that prevents it from offering more customised packages at lower prices. Skype and Vonage have no such restrictions on their products. Therefore, the Authority's determination has led to higher prices and less attractive service offerings for NetSpeak customers than would otherwise exist in a forborne market.⁸ By curtailing C&W's ability to respond to other VoIP providers' competitive manoeuvres, the Authority has handed C&W's offshore - and unlicensed - competitors an advantage which makes it impossible for C&W to compete on price. C&W believes that the Authority's current regulatory practices are at odds with its functions set out in the Law at sections 9(3)(a) and (h) which state respectively that the principal functions of the Authority are:

⁸ Of course, Skype, Vonage and other VOIP providers are also free from any obligation to pay licence or regulatory fees in the Cayman Islands, which further enhance their ability to compete against C&W.

(a) to promote competition in the provision of ICT services and ICT networks where it is reasonable or necessary to do so;

(h) to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure

C&W believes that the Authority's current regulatory treatment of VoIP simply has the effect of promoting competition amongst foreign operators in the Cayman Islands whilst limiting the ability of C&W to compete on the same terms.

Beyond the impacts on prices, extending retail price regulation to a new and evolving product such as VoIP can also have detrimental effects on investment and therefore dynamic efficiency which goes against section 9(3) (h) of the Law. It is generally thought that consumer demand for the innovative services available with VoIP will have a positive impact on the demand for broadband access. However, whether or not operators will invest as much or as quickly under regulation as they would in an unregulated environment is uncertain. For example, it does not seem rational to expect C&W to invest heavily in extending our ADSL broadband reach simply to hand over a former circuit-switched voice telephony customer to an alternative VoIP provider given C&W's constrained ability to compete for that customer's VoIP service.⁹

The Authority's decision to regulate C&W's NetSpeak service limits our ability to stem the customer losses as circuit-switched customers move to VoIP technology. Not only are we losing circuit-switched customers but we are unable to win them back in the VoIP market and we believe that customers would be best served if all VoIP providers, including C&W, were allowed to compete vigorously for their business. C&W considers that regulation would be justified if there were a market failure, but that is simply not the case in the Cayman Islands.

⁹ This same issue would not exist if C&W were allowed to compete fairly with unlicensed foreign VoIP service providers for that voice telephony customer.

In this respect, it is pertinent to consider the stance that the United States Federal Communications Commission (“**FCC**”) has adopted towards the regulation of VoIP services. It has reached a very different conclusion to the Authority on the regulation of VoIP services, namely that VoIP services, including those of incumbents should not be regulated. In reaching this conclusion it commented:

“Our starting point – and our most important finding – is the recognition that all IP-enabled services exist in a dynamic, fast changing environment that is peculiarly ill-suited to the century old telephone model of regulation. Competitive market forces, rather than prescriptive rules, will respond to public need much more quickly and more effectively than even the best intentioned responses of government regulators. Indeed, our best hope for continuing the investment, innovation, choice and competition that characterizes Internet services today lies in limiting to a minimum the labyrinth of regulations and fees that apply to the Internet. All too often, these edicts can thwart competition even among traditional telecommunications providers.”¹⁰

The FCC’s aim is to ensure a competitive market for the United States. In contrast, in the Cayman Islands, rather than supporting local businesses, the Authority appears to be actively favouring foreign operators, by leaving them free to act as they wish whilst restricting the local operator with heavy-handed regulation. C&W urges the Authority to reconsider its determination that NetSpeak be subject to price regulation before C&W is driven out of the VoIP market in the Cayman Islands. As the figures in Table 1 show, at best C&W’s subscriber base could only be described as growing at a marginal rate, but given that it is highly likely that the overall take-up of VoIP services in the Cayman Islands is increasing, the figures probably represent a declining share of the overall supply here of VoIP services.

¹⁰ Separate Statement of Chairman Michael K. Powell, Re: IP-Enabled Services, Notice of Proposed Rulemaking (adopted Feb. 12, 2004) at page 1.

Part II - International Trends in VoIP regulation

In addition to the approach to VoIP noted above adopted by the US regulators, a recent report by Gilbert & Tobin on international comparisons of VoIP regulation¹¹ found that *“while regulators around the world have approached the issue of VOIP regulation using different decision making structures, the predominant trend worldwide is to arrive at a similar outcome of little or no ex ante regulation of incumbents’ VOIP. The absence of a requirement to obtain ex ante approval of VOIP prices with the single exception of Singapore, reflects the desire of regulators around the world to drive VOIP penetration by reducing unnecessary regulation and their recognition that regulation should only be applied when it is the least burdensome remedy for a particular competitive problem.”*

Even in countries – such as France and Germany - where regulators have shared the Authority’s views on VOIP and PSTN as being in the same economic market, the regulatory remedies in these countries are very different from the Authority’s treatment of NetSpeak because these regulators have already decided not to apply economic PSTN regulation to VOIP. Even where economic PSTN regulation is applied to VOIP, such economic regulation is substantially less extensive than in the Cayman Islands and almost universally does not extend to prior tariff approval.

The table below shows that even in markets where VoIP and PSTN have been held to be in the same market, and/or where ex ante approval for PSTN services is required, VoIP is still not subject to tariff approval:

¹¹ Gilbert & Tobin International Comparison Of Approaches To Economic Regulation of VoIP, 12 April 2006

Table 3.

Country in which PSTN ex ante approval required	Is tariff approval required for VoIP?
Belgium – no prior tariff approval required	No
Canada –prior tariff approval required	No
France – prior tariff approval required	No
Ireland - no prior tariff approval required	No
Italy - prior tariff approval required	No
Japan - no prior tariff approval required	No
Netherlands - no prior tariff approval required provided price is between floor and cap	No (a price floor applies to VoIP services provided by the incumbent)
Singapore - prior tariff approval required	Yes
South Korea –prior tariff approval required	No (publication of tariffs is required)
Spain – no prior tariff approval required	No
Switzerland - no prior tariff approval required	No (A price ceiling applies where the VoIP provider is defined as a universal service)
UK	No

The Gilbert & Tobin report has found that VOIP is not the subject of extensive economic regulation, in particular prior tariff approval, in other countries regardless of whether:

- (a) VOIP take-up is just beginning to accelerate, as in the Cayman Islands, or is already at high levels with significant substitution of PSTN services;
- (b) broadband penetration rates are low or high;
- (c) broadband services are primarily provided on the incumbent's network or there are significant alternative broadband networks, as in the Cayman Islands;
- (d) the incumbent is currently owned by the Government;
- (e) the regulators have decided that the incumbent is still dominant in the supply of PSTN services, as the Authority has decided, albeit without much analysis;

- (f) the regulator has adopted technology neutral regulation policies, as in the Cayman Islands; or
- (g) the regulator has decided to extend non-economic regulation of PSTN services to VOIP, such as emergency calls and other consumer protections, as the Authority has decided to do.

C&W believes that the Authority is applying an archaic *ex ante* retail regulatory model which most other regulators now consider to be inappropriate even for mature technology services such as PSTN voice, let alone for a nascent technology like VOIP. The adoption of such an outdated model is likely to hinder rather than promote the expansion of VOIP services within the Cayman Islands.

Gilbert & Tobin's review of international VoIP regulation revealed a consistent policy towards the treatment of VoIP. Since the review was published the Canadian Government has also elected to forbear from VoIP regulation for the ILECs. The Industry Minister has stated: *"The VoIP changes reflect a new approach to economic deregulation in the telecom sector. New technologies can be cutting-edge one day and virtually obsolete the next. In government just as in business, we cannot afford to be slow in adapting. We cannot afford to lag behind while other countries leap forward. There is no reason why Canada should not be the model for other countries in the field of regulation."*¹²

In Europe, in the UK, Ofcom has indicated that it believes that VOIP and PSTN are currently in different markets, although it has yet to do a detailed analysis. It states that it expects that "...in time VoIP services will increasingly act as a competitive constraint on traditional voice services to the degree to which they may be considered to be in the same market." Ofcom has made some determinations on non-economic regulation of VOIP in relation to codes of practice and number portability services, and intends to

¹² Speech of Minister Maxime Bernier to the Economic Club of Toronto, 15 November 2006 <http://www.ic.gc.ca/cmb/welcomeic.nsf/503cec39324f7372852564820068b211/85256a5d006b972085257227004f6aed!OpenDocument>

consult further on the issue of access to emergency services¹³, but has forborne from applying economic regulation to VoIP services. Elsewhere in Europe, Denmark's decision that VoIP and local/national calls are currently in different markets has been notified to the European Commission. Spain has also notified its decision that PSTN and VoIP are in different markets.

Even where some European regulators have determined that PSTN and VoIP are in the same market, they have adopted a relatively light regulatory touch to VoIP. For example, OPTA, the regulator in the Netherlands, recently found voice telephony access provided over a broadband connection by a broadband access provider (managed VOB) to be included in the retail access and calls markets. Although it subjects retail voice and access services in the high capacity market to a price floor and price cap for all single and bundled retail services (no prior approval is required if prices fall within the defined range), it has adopted lighter regulation for VOB services which are not subject to the price cap and which have a separate price floor which reflects their more efficient cost structure. Therefore, KPN must merely ensure that the price for VOB services does not breach the price floor as well as complying with the general obligations of non discrimination and transparency.

This treatment of VOB has been described by Oxera in a report for OPTA as *"on the scale of all possible ex ante remedies, relatively light touch"* and *"the proposed remedy can therefore be seen as a form of regulatory 'safety valve'."*¹⁴ This approach has also met with the approval of the European Commission which stated *"the regulation of VOB should not prevent the SMP operator from switching to a new more cost efficient technology. In this context the Commission notes the flexible regulatory approach proposed by OPTA which is*

¹³ Ofcom, *Regulation of VOIP Services: Statement and publication of statutory notifications under section 48(1) of the Communications Act 2003* modifying General Conditions 14 and 18, 29 March 2007.

¹⁴ Oxera "Potential competition problems in voice-over-broadband services-Report prepared for OPTA" 2 November 2005

introduced via the price floor taking into account the different cost structure of the products based on VOB.”¹⁵

OPTA’s approach reflects the requirement of the European directives that the choice of *ex ante* regulation should be the least burdensome requirement to address the competitive problem. Most recently, in its telecommunications annual report for 2005, the European Commission unambiguously stated its preference for a light regulatory touch for VoIP, irrespective of the market definition issue:

The Commission supports a light regulatory touch and welcomes the fact that a number of NRAs have taken a forward-looking stance, which reflects the Commission approach, on regulatory treatment of VoIP. The Commission has agreed with a number of NRAs that VoIP is part of the calls market, and has expressed a preference for light-touch regulation. Regulation of VoIP in the Member States has accordingly been very measured so far. In practice there appear to be low barriers to market entry.¹⁶

Looking further afield, although Singapore, like the Cayman Islands, applies its extensive *ex ante* PSTN regulation to VoIP, that is not the result of a direct determination by the regulator that VoIP should be regulated in the same way as PSTN. Rather, Singapore has an “opt-out” approach to dominant carrier regulation: i.e. the ILEC is treated as being dominant for all services until the regulator has determined otherwise. The regulator has not yet had a proceeding to address whether or not VoIP services generally should be forborne from the dominant carrier rules.

Other regulators have decided, like the Authority, that VoIP and PSTN services are in the same market. However, the mere finding that VoIP and PSTN are in the same

¹⁵ Letter from the Commission to OPTA “dated 2.12.2005”

¹⁶ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee of the Regions: European Electronic Regulation Markets 2005 (11 th Report)*, Page 9

market does not mean that ex ante PSTN economic regulation should be applied to VoIP. The issue is not whether VoIP and PSTN are in the same market, but rather whether there is some form of market failure in respect of VoIP and, if so, what, if any of the economic regulatory remedies applying to PSTN should be applied to VoIP to rectify that failure. In this respect, in Canada, the Minister of Industry Maxime Bernier stated:

"Barriers to entry in this market are very low. There is no reason to regulate it. In a competitive sector, there is no reason to regulate some companies while others can offer the services they want at the prices they want. It is time to have a level playing field from which consumers and small businesses will benefit.

*We firmly believe that eliminating unnecessary economic regulation will stimulate competition in this new and fast-growing market. It will mean lower costs, fewer regulatory proceedings, and more competitive markets."*¹⁷

In Japan, while not explicitly applying a market analysis, the regulator also decided not to apply PSTN regulation to VOIP. The regulator in South Korea has decided that VOIP should be subject to some PSTN regulation in order to protect consumers.¹⁸ The particular PSTN regulation that is applied to VOIP, however, is a tariffing requirement in the form of tariff publication. VOIP penetration in those countries, and therefore presumably the level of substitution for PSTN services, is amongst the highest in the world.

C&W believes, therefore, that given the international trend for forbearing from the regulation of VoIP and the detrimental effects of the Authority's current policy on

¹⁷ Speech of Minister Maxime Bernier to the Economic Club of Toronto, 15 November 2006 <http://www.ic.gc.ca/cmb/welcomeic.nsf/503cec39324f7372852564820068b211/85256a5d006b972085257227004f6aed!OpenDocument>

¹⁸ If an operator is declared to be dominant in respect of VOIP, then a tariff approval requirement will be imposed on that operator in respect of its VOIP services. However, at present, no operator has been declared to be dominant in respect of VOIP.

C&W's ability to compete against unregulated foreign operators, that the Authority must revisit its categorisation of NetSpeak and forbear from further regulation.

Part III – Licensing VoIP

The challenge in regulating VoIP providers is that, in the main, they are based offshore and do not consider that they should have to apply for licences to operate in the jurisdictions where they provide service. However, this does not mean that they should not be subject to appropriate regulatory rules. Not regulating a company which provides services which compete with those of licensed operators raises questions of fundamental fairness. There is no reason why, when VoIP providers rely on the traditional domestic fixed access network to originate or terminate their calls, that they should not be considered part of the telecommunications community. Part of being a member of that community involves ensuring that a fair contribution is made towards the upkeep of the network which they use, including being a part of any universal service schemes, and paying their dues to the Government of the country where they are operating rather than returning all their revenues back to North America and elsewhere, with no contribution whatsoever to the local economy. As customers make more use of such operators, especially for international traffic, the revenues of locally-based and licensed operators will decline. Not only will this have direct consequences for the financial viability of these local licensed operators, there will also be direct consequences for Government in that the revenue-based licence fees collected will decline. There will also be a strain on foreign exchange since local consumers are likely to pay offshore providers by credit card for services provided. Regulating VoIP providers does not necessarily mean that the regulation should be overly intrusive, for example, it could still encompass the dis-application of price controls. But it would mean that operators were competing on a level playing field and that consumer protection measures could be mandated as part of the licensing regime. Currently, C&W is the only VoIP provider licensed in the Cayman Islands and yet we are competing against a host of unlicensed offshore VoIP operators who have a significantly



larger share of the Caymanian VoIP market as they are not constrained by any of the regulatory obstacles which the Authority has put in C&W's path.

Conclusion

C&W requests that the Authority consider this application and forbear from regulating C&W's NetSpeak service so that we are able to compete fairly in the provision of VoIP services. To do otherwise is damaging not only to local business and investment but also to Government revenues. The Authority has itself stated in its original determination that "As many regulatory authorities have come to recognise, in such a dynamic environment, it is important that regulation encourage, rather than impede, the provision of efficient, innovative and affordable service"¹⁹. C&W is simply asking that the Authority act on its statement and in compliance with the Law. C&W looks forward to a prompt decision by the Authority to forbear as we have requested. If it would assist the Authority to that end we would be pleased to meet to discuss this further at the Authority's convenience.

Please contact me regarding any questions you may have.

Yours faithfully,
Cable & Wireless (Cayman Islands) Limited.

"Signed"

Rudy B. Ebanks
Chief Regulatory and Carrier Relations Officer

c.c. Timothy Adam, Chief Executive C&W
Ian Tibbetts, Chief Operating Officer C&W
Frans Vandendries, Vice President Regulatory Affairs C&W

Encl.

¹⁹ ICTA Determination dated 29 March 2005 ICTA/160/161-09



Appendix 1

Tower Omnibus Survey

(Redacted)