



Office of Utility Regulation

# **Investigation into C&WG's Mast at Les Vardes Quarry**

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**Finding in Dispute D01/05 and Direction to  
Cable & Wireless GuernseyLtd**

**Document No: OUR 05/24**

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**Office of Utility Regulation**  
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# **1. Background**

## **1.1. Investigation Process**

On the 29<sup>th</sup> July 2005 Wave Telecom (“Wave”) notified the Office of Utility Regulation (“OUR”) of a formal dispute with Cable & Wireless Guernsey (“C&WG”) regarding the refusal by C&WG to allow Wave access to C&WG’s facilities.

Upon receipt and consideration of the issues the OUR launched a formal investigation and on 25 August 2005 OUR staff forwarded Wave’s complaint to C&WG in accordance with the OUR’s Dispute Resolution Guidelines (“DRGs”). C&WG responded to the OUR’s request for comments and provided what it called its “initial” response to the OUR. That response comprised three strands: application of licence conditions, procedural and practical. The OUR sought additional information from C&WG relating to the precise timing of the erection of the new mast and a report from the engineer confirming the mast was full.

The OUR exchanged correspondence and subsequently met with the Environment Department on 26<sup>th</sup> October 2005 to discuss the issues raised in the dispute. On 28<sup>th</sup> October the OUR forwarded C&WG’s response to the dispute to Wave in accordance with the DRGs for comment. Wave responded that same day stating that Wave was satisfied that the OUR had been supplied with full information regarding the dispute. Wave indicated that it was prepared to forego the two-week response period as set in the DRGs.

A proposed finding based on the Director General’s (“DG”) consideration of the information provided was distributed to both C&WG and Wave Telecom for comment by 11th November 2005.

Upon receiving comments from both parties on the proposed findings the OUR has considered all comments and taken those into account in the final finding. The final finding have been presented to both parties and is published for the information of all interested parties on the OUR’s website and is available to the public from the OUR.

## **1.2. Issues under Investigation**

Wave believed that:

- By constructing a mast at Les Vardes Quarry in such a manner as to preclude the installation of another operator’s equipment and
- Despite a request submitted prior to any construction work commencing C&WG

Wave were at a competitive disadvantage to C&WG.

Wave maintain that it is implicit from the planning permit that other masts will not be allowed in the same area. Wave believed C&WG to be in breach of conditions 20 and 32 of C&WG's Mobile Telecommunications Licence (Access to Facilities and Fair Competition, respectively).

In fact the relevant licence conditions are 20 and 28 of C&WG's **Mobile Telecommunications Licence** namely:

*20. ACCESS TO FACILITIES*

*20.1 If the Licensee and any Other Licensed Operator fail to reach agreement within sixty days in respect of a request by the Other Licensed Operator for Access, and the Director General considers that such Access is essential as being the only economically feasible means by which Telecommunications Networks can be installed or connected to the premises of a User or Subscriber, or over, under, in or across any public right of way or as being the only feasible means of avoiding material damage to the environment, the Director General may instruct the Licensee to allow, or to procure that the Licensee's Associated Company allows the Other Licensed Operator, Access on reasonable terms unless the Director General determines that the Licensee or the Licensee's Associated Company concerned, alone or with any other person willing or required to do so, is unable to grant the necessary Access, or that it would otherwise be unreasonable for it to do so.*

*20.2 In the absence of agreement between the parties, the terms of Access including time limits for completion of any agreement shall be determined by the Director General.*

and:

*28. FAIR COMPETITION*

*Subject only to the Licensee's exclusive rights during the Exclusivity Period as described in Condition 2.1, the Licensee shall:*

- (a) not engage in any practice or enter into any arrangement that has the object or the likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Mobile Telecommunications Networks or the provision of Mobile Telecommunications Services in the licensed area; and*
- (b) comply with any direction issued by the Director General for the purpose of preventing any practice or arrangement that has the object or effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Mobile Telecommunications Networks or the provision of Mobile Telecommunications Services.*

## 2. Summary of Events

Based on the information provided by all parties and Environment Department the OUR has compiled a chronology of the events leading up to the lodging of a formal dispute by Wave with the OUR.

Oct 1995/1996	Original Guernsey Telecom mast erected
June / July 2004	C&WG applied for planning permission for new mast to replace the existing Mast at Les Vardes Quarry.
30 Nov 2004	C&WG granted planning consent. The consent from Environment included the following condition: <i>“3. The mast hereby approved shall be made available for mast sharing in the event of other telecommunications operators requiring similar facilities in the future, so as to prevent a proliferation of masts in this area.”</i>
30 Dec 2004	Wave made an application to C&WG to share the mast.
5 Jan 2005	Wave emailed C&WG for response to initial request.
16 Mar 2005	Wave email an agenda for meeting between Wave & C&WG for 18 March. C&WG subsequently cancel this meeting.
7 April 2005	New date agreed for meeting and C&WG agreed to provide feedback to Wave Telecom during the week commencing 1 <sup>st</sup> May.
8 April 2005	C&WG’s old mast is removed and antennae transferred onto temporary scaffolding tower.
22 April 2005	New C&WG mast erected.
6 May 2005	Contrary to what was agreed CW&G fail to provide any feedback by the end of the week commencing 1 <sup>st</sup> May.
23 May 2005	New C&WG mast fully equipped.
7 June 2005	Wave asked C&WG for response by 10 <sup>th</sup> June.
10 June 2005	C&WG fail to provide response to Wave.
17 June 2005	Wave emailed CW&G asking for response by 22 <sup>nd</sup> June.
22 June 2005	C&WG fail to provide response to Wave.
28 June 2005	Wave MD wrote to C&WG CEO for assistance in resolving issue.

11 July 2005	C&WG informed Wave by email that Les Vardes site was not available for site sharing as the mast was full.
11 July 2005	C&WG responded to Wave MD informing him that C&WG had responded to request.
29 July 2005	Wave Telecom lodge official dispute with OUR.

In summary it took C&WG over six months to respond to Wave's initial request to share the Les Vardes Quarry mast. A response was eventually only forthcoming when Wave's Managing Director wrote to C&WG's Chief Executive.

In responding to this complaint C&WG stated that they had not been provided with any emails from Peter Le Chevalier and hence believed they were unable to substantiate or reject the timings of his emails or otherwise. In the absence of copies of these documents being provided C&WG were unable to comment on the timetable, but believed it unlikely that C&WG staff would simply ignore the correspondence as suggested by Wave. Wave Telecom have since provided the OUR with copies of the requests:

- for mast sharing of the 30<sup>th</sup> December 2004 and
- for a response from C&WG on 17<sup>th</sup> June 2005 which included reference to earlier correspondence and meetings.

The DG, having reviewed the available documentation and circumstances of the dispute believes it likely that C&WG did in fact receive the request from Wave Telecom on 30<sup>th</sup> December 2004 and accepts the chronology of events as an accurate representation of the communication that took place between the parties.

### **3. C&WG's Initial Response and Draft Finding**

#### **3.1. C&WG's Initial Response**

Following the commencement of the investigation into this dispute, the OUR requested C&WG's comments on the complaints raised by Wave Telecom. C&WG's response to this request on 12<sup>th</sup> September 2005 comprises three elements: the application of C&WG's licence conditions, procedural issues and practical.

##### **Application of Licence Conditions**

C&WG dispute the application of conditions 20 and 32 of its licence in this instance (for the avoidance of doubt the relevant licence conditions are 20 and 28 of C&WG's mobile telecommunications licence).

In the first instance C&WG states that condition 20 of its licence relates to Access to Facilities, with Access defined in the Telecommunications (Bailiwick of Guernsey) Law, 2001 and considered previously by the Utilities Appeal Tribunal ("UAT"). C&WG does not consider that mast sharing falls within the tri-fold test for access set out by the UAT. In C&WG's view mast sharing does not provide an OLO with access to telecommunications networks, telecommunications equipment, network

termination points and associated facilities for similar reasons to that for which a full leased line does not. Hence C&WG do not consider condition 20 to be relevant and state that Wave has not provided any reasoning as to why condition 20 applies.

C&WG reject the applicability of condition 32 (in reality condition 28 of its mobile licence) as the company erected a mast at the site in accordance with the specifications set out in the planning consent granted by the Environment Department. With the equipment that was placed on the mast it was not possible to install safely any additional equipment on the mast without further application to the Environment Department for consent for any alterations. In C&WG's view simply erecting a mast in accordance with the planning consent granted by the Environment Department and then installing its own equipment cannot constitute a breach of condition 32 (i.e. condition 28) of its licence.

### **Procedural Issues**

C&WG maintain that it agreed with Wave that Wave would always apply for Environment Department consent for their own masts and if such consents were not forthcoming, C&WG would always consider mast sharing with Wave. C&WG further state that acting upon the guidance of the DG and in accordance with document OUR 02/21<sup>1</sup>, C&WG's current procedure is only to consider mast sharing on those sites where Wave fails to get Environment Department approval for their own site. C&WG's second procedural point is that it is the Environment Department which should be making decisions about the location of and need for masts and not C&WG.

### **Practical Issues**

C&WG state that the mast which was erected at Les Vardes Quarry complied in full with the specifications approved by the Environment Department. C&WG maintain that *"it is a matter of unfortunate circumstance (but practical reality) that the equipment, for which planning permission was given, does not allow mast sharing to occur"*. C&WG received Wave's request for mast sharing on 30<sup>th</sup> December 2004, one month after receiving planning permission. C&WG's engineers were advised that the mast could not take the additional equipment in Wave's request. However C&WG has stated that it is "more than happy" to liaise with the Environment Department to see whether an additional mast or an alteration to the current mast may be permitted in order to facilitate Wave in placing their equipment at Les Vardes Quarry.

## **3.2. DG's Position**

In the draft decision provided to both C&WG and Wave Telecom the DG set out his preliminary view of the application of the various licence conditions and the Law to this dispute.

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<sup>1</sup> OUR 02/21 Competition for Mobile Telecommunications – Response to Consultation, Call for Expressions of Interest and Call for Comments on Preliminary Tender Document.

## **Application of Licence Conditions**

Access is defined in the Telecommunications (Bailiwick of Guernsey) Law, 2001 as meaning:

*“such facilities and services as may be necessary to obtain or facilitate the obtaining of access to telecommunications networks, telecommunications equipment, network termination points and associated facilities for the purposes of the provision of telecommunications services.”*

In the appeal of a previous decision by C&WG to the Utility Appeals Tribunal (“UAT”), the UAT considered in detail the definition of Access. This gave rise to the UAT’s trifold test<sup>2</sup> for Access in being:

- (i) within facilities and services;
- (ii) necessary to obtain or facilitate the obtaining of access to telecommunications networks, telecommunications equipment, network termination points and associated facilities; and
- (iii) for the purposes of the provision of telecommunications services.

The Telecommunications (Bailiwick of Guernsey) Law, 2001 includes the following definitions for terms included with the UAT’s trifold test:

Telecommunications Equipment means

*“equipment designed, constructed or adapted for use in connection with the establishment or operation of a telecommunications network or the provision of a telecommunications service, including telecommunications apparatus, poles, structure, man-holes and other tangible property.”*

Telecommunications Network means:

*“a network comprising telecommunications equipment for the emission, transmission, switching, conveyance or reception of messages through the agency of electric, magnetic, electro-magnetic, electro-chemical, electro-mechanical or electro-optical energy or by optic-electronic means.”*

Telecommunications Service means:

*“a service consisting of the emission, transmission, switching, conveyance or reception of messages within, to or from the Bailiwick by means of a telecommunications network.”*

And finally Associated Facilities means

*“those descriptions or classes of telecommunications equipment which are designated as associated facilities by the Director General from time to time.”*

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<sup>2</sup> Paragraph 198 of Document No 2003 1 14 Cable and Wireless Guernsey Limited and Director General of the Office of Utility Regulation. Certificate and Determination available at [www.utilityappeals.org.gg/casesPDFs/Document%20No%202003%201%2014.pdf](http://www.utilityappeals.org.gg/casesPDFs/Document%20No%202003%201%2014.pdf)



The DG stated that it is his belief that mast sharing satisfies all three of the UAT's criteria in that it is:

- i. within facilities and services (it is a facility);
- ii. necessary to obtain or facilitate the obtaining of access to telecommunications networks, telecommunications equipment, network termination points and associated facilities (necessary to obtain access to telecoms equipment); and
- iii. for the purpose of the provision of telecommunications services. (it is certainly for this purpose).

It was the DG's view in the draft decision that mast sharing does constitute Access and as such condition 20 of C&WG's Mobile Telecommunications Licence does apply in this instance.

With regards to Condition 28 of C&WG's Mobile Telecommunications Licence, the DG accepts that simply erecting and equipping a mast in accordance with the Environment Department's consent does not represent a breach of this condition. However the DG is concerned by C&WG's behaviour and its approach to dealing with Wave namely:

- from the initial request at the end of December 2004, it took C&WG over six months to respond to Wave's request for Access to Facilities;
- During this time C&WG continued with the construction of the mast at Les Vardes Quarry despite having received a request for mast sharing from Wave without keeping Wave fully informed of developments; and
- C&WG only eventually responded following a letter from Wave's Managing Director at the end of June 2005.

The DG considers that it could be construed from the chronology of events that C&WG's procrastination on this issue was a deliberate practice that had the object or likely effect of preventing, restricting or distorting competition in the establishment, operation and maintenance of Telecommunications Networks or the provision of Telecommunications Services.

On a separate matter the DG believes that C&WG's past actions are not in the spirit of condition 3 of the planning consent issued by the Environment Department which requires the mast to be made available for sharing in the event of another telecommunications operator requiring similar facilities in the future so as to avoid a proliferation of masts in the area. This is however a matter for the Environment Department. However the DG welcomes C&WG's acknowledgement of condition 3 of the planning consent from the Environment Department and that they are happy to alter the mast provided that the Environment Department would be prepared to give such consent as is necessary.

### **Procedural Issues**

The DG acknowledged that a refusal from the relevant planning authority on environmental grounds would represent a barrier to entry that mast sharing would alleviate. The DG referred to OUR 02/21 where the OUR's position on mast sharing

has been set out previously. It states that “...*the Director General remains minded to require mast sharing where it is deemed necessary for environmental reasons.*”

Condition 3 of C&WG’s planning consent from the Environment Department, clearly, in the DG’s view, implies that C&WG should make the site available for mast sharing with OLOs in the future in order to prevent the proliferation of masts in this area. Mast sharing is therefore necessary for environmental reasons. Environment considered C&WG’s application in the context of Strategic Policy 23 of the States Strategic and Corporate Plan namely:

*“The Detailed Development Plans may include provision for the development of telecommunications infrastructure and equipment taking into account the need to minimise any adverse impacts on the environment.”*

Environment have informed the OUR that in order to minimise the number of masts and lessen environmental impact it is unlikely to allow new masts at sites where masts already exist, hence the incorporation of the text of condition 3 in C&WG’s planning consent. Environment considers it a wasteful use of its limited resources for operators to submit applications for new masts at sites with existing masts without in the operators first considering the scope for sharing the existing masts.

#### **Practical Issues**

Whilst the DG welcomes C&WG’s willingness to liaise with the Environment Department to resolve this issue, the DG is concerned with the manner in which C&WG has behaved in dealing with Wave in terms of not progressing the request for mast sharing and in its previous implementation of condition 3 of the planning consent from the Environment Department. While the DG recognises that the enforcement of condition 3 of the planning consent is a matter for the Environment Department he is of the view that there would have been sufficient time for discussions to be held with Environment on whether its consent would have been forthcoming before any construction work commenced.

## **4. Summary of Responses to Draft Finding**

Wave Telecom accepted the draft finding in its entirety.

C&WG, whilst agreeing to address the practical issues associated with mast sharing, did not accept the argument set out in section 3.1 above as regards the interpretation of the UAT’s trifold test for access. However without prejudice to C&WG’s view that Licence Condition 20 and the tri-fold test do not apply, C&WG has indicated its acceptance the proposed directions set out in the draft finding provided that mast sharing is done on a commercial basis. The draft directions accepted by C&WG were:

- a) identify what structural alterations would be needed to the existing mast at Les Vardes Quarry in order for the mast to be capable of accommodating Wave’s telecommunications equipment. This information should be provided to Wave, Environment and the OUR within two weeks of the direction;

- b) obtain a quotation for the cost of the structural alterations and provide the supporting documentation to Wave Telecom and the OUR within two weeks of the direction;
- c) in the event that Wave Telecom wish to pursue the option of mast sharing at Les Vardes Quarry in the light of the information provided above, liaise with Environment Department to seek an amendment to the existing structure at Les Vardes Quarry. A compliant application should be submitted to the Environment Department within three weeks of Wave's decision.

## 5. DG's Powers and Findings

### 5.1. DG's Powers

The DG has a number of duties set out in section 2 of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 which include inter alia:

*2(d) to introduce, maintain and promote effective and sustainable competition in the provision of utility services in the Bailiwick, subject to any special or exclusive rights awarded to a licensee by the Director General pursuant to States' Directions;*

and

*2(f) to lessen, where practicable, any adverse impact of utility activities on the environment.*

In this regard section 5(1) of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 sets out the powers of the Director General which include, inter alia:

*5(1)(e) to give directions to a licensee concerning utility activities in cases where he is authorized to do so by or under this Law, any Sector Law or any condition of a licence.*

In addition as noted in section 1.2 conditions 20 and 28 of C&WG's Mobile Telecommunications Licence relates to Access to Facilities and Fair Competition and the DG has power to issue directions to C&WG under 5(1)(e) of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 to enforce those licence conditions.

Section 10(1) of the Telecommunications (Bailiwick of Guernsey) Law, 2001 enables the DG to give directions to any licensee in relation to interconnection and access as he considers necessary and desirable to, inter alia, enable him to uphold the duty imposed on him by section 2 of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 or to assist him in upholding that duty.

Section 10(2)(c) of the Telecommunications (Bailiwick of Guernsey) Law, 2001 allows the DG to direct any licensee whom he determines has a dominant position<sup>3</sup> in a relevant market to comply with a requirement to provide interconnection or access

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<sup>3</sup> C&WG has been found dominant in the retail mobile telecommunications market, see Document OUR 05/19.

on terms, conditions and charges that are transparent and cost-oriented having regard to the need to promote efficiency and sustainable competition and maximize consumer benefits.

## **5.2. Findings**

The DG continues to believe, for the reasons set out in Section 3.2 of this decision, that mast sharing does satisfy the UAT's trifold test for Access and as such condition 20 of C&WG's Mobile Telecommunications Licence does apply as well as Section 10 of the Telecoms Law. The DG however is also of the view that mast sharing is a facility and that one would not expect to see such facilities included in a Reference Offer. Instead rather than being addressed in a Reference Offer the DG believes that mast sharing should be dealt with through an agreed mechanism and procedures between parties.

Based on the evidence provided to this Office C&WG and Wave have failed to reach an agreement regarding a request by Wave for Access within sixty days of Wave's request. As the DG believes that such Access is essential so as to avoid material damage to the environment, and that this view is shared by the Environment Department, the DG is entitled to instruct C&WG to allow Wave Access on reasonable terms. The DG notes that this would also be in accordance with Strategic Policy No 23. In the absence of an agreement between C&WG and Wave Condition 20 allows the DG to determine the terms of Access including the time limits for the completion of any agreement.

The DG considers that 6½ months represents an unnecessarily long period for C&WG to respond to Wave's request for mast sharing at Les Vardes Quarry. The DG is disappointed that the request was only finally addressed once Wave's Managing Director wrote directly to C&WG's Chief Executive Officer. Further, C&WG does not appear to have acted in accordance with the spirit of condition 3 of its planning consent from the Environment Department.

The DG welcomes C&WG's desire to move this matter forward pragmatically and its offer to liaise with the Environment Department to see whether an additional mast or an alteration to the current mast may be permitted in order to facilitate Wave placing their equipment at Les Vardes Quarry. Whilst this commitment is welcomed the DG believes it appropriate to issue a Direction to C&WG in order to ensure this matter is resolved in a timely manner and without any further delay.

The DG further believes that this investigation has highlighted a number of issues relating to mast sharing in practice. In order to address the wider issue of ensuring that realistic efforts are made by all licensed operators the DG intends to write separately to both mobile operators requesting that they take immediate steps to put in place procedures to ensure that future requests are dealt with in a manner that recognises both the legal requirements under the Telecoms Law and Licence conditions and also the spirit of the Environmental laws insofar as they relate to this issue. This will involve liaising with the Environment Department to make sure that the agreed procedures address the Environment Department's needs.

In the event that the operators fail to agree appropriate procedures within four weeks from the date of this direction, the DG will impose procedures on the operators.

## **6. Direction and Timeframe**

Therefore, the Director General in light of the findings arising from the investigation directs Cable & Wireless Guernsey Limited in accordance with:

- Condition 20 of its Mobile Telecommunications Licence;
- section 5(1)(e) of the Regulation of Utilities (Bailiwick of Guernsey) Law, 2001;
- Section 10(1)(c) of the Telecommunications (Bailiwick of Guernsey) Law 2001, and
- Section 10(2)(c) of the Telecommunications Bailiwick of Guernsey) Law, 2001;

to:

- a) identify what structural alterations would be needed to the existing mast at Les Vardes Quarry in order for the mast to be capable of accommodating Wave's telecommunications equipment. This information should be provided to Wave, Environment and the OUR within two weeks of the direction;
- b) obtain a quotation for the cost of the structural alterations and provide the supporting documentation to Wave Telecom and the OUR within two weeks of the direction;
- c) in the event that Wave Telecom wish to pursue the option of mast sharing at Les Vardes Quarry in the light of the information provided above, liaise with Environment Department to seek an amendment to the existing structure at Les Vardes Quarry. A compliant application should be submitted to the Environment Department within three weeks of Wave's decision.

**This Direction shall come into immediate effect.**

**/END**