



Office of Utility Regulation

Refusal to develop infrastructure at Les Caches - Dispute between Wave Telecom and Cable and Wireless Guernsey

Finding in Dispute

Document No: OUR 07/15

October 2007

Office of Utility Regulation

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1. Introduction

1.1. Background

The functions of the Director General of Utility Regulation (“DG”) are set out in The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 (as amended) (the “**Utilities Law**”) which includes, amongst others, the function to:

“Receive and to conduct inquiries and investigations (which may include inspections of any part of a utility network) and to hear complaints by any person regarding utility activities.”¹

Under Section 5 of the Utilities Law, the DG has the power to do anything that appears to him to be necessary or expedient for the purpose of exercising his functions and powers, including without limitation, the power to impose any direction, requirement or sanction under the Utilities Law or any Sector Law.

Under The Telecommunications (Bailiwick of Guernsey) Law, 2001 (the “**Telecoms Law**”) under Section 27 the DG also has the power to give directions to licensees in the event that the DG is satisfied that a licensee is or has been in contravention of any condition of a licence or any provision under the Utilities Law or the Telecoms Law².

An important aspect of hearing complaints and determining disputes involves ascertaining whether there is or has been a contravention of any licence condition or a contravention of the applicable law. The DG has issued guidelines on the procedures which his office (“**OUR**”) will apply to the handling of complaints and disputes (including disputes between licensees that have not been resolved bilaterally between the parties)³ (“**DRG**”).

1.2. The Complaint

Wave Telecom Limited (“**Wave Telecom**”) submitted a complaint to the OUR regarding an alleged refusal by C&W Guernsey (“**C&WG**”) to develop infrastructure required to provide Wave Telecom with 8 x 2Mbit and 45Mbit/s wholesale private circuits at Les Caches Technical Park. Wave Telecom alleges that as a result its competitive position and more generally the competitive market for telecoms services in Guernsey is damaged.

Wave Telecom alleges that C&WG’s refusal to supply or indeed to engage in a meaningful way as to the terms on which such circuits are supplied by C&WG contravenes three of C&WG’s fixed licence conditions; namely, Licence Conditions

¹ The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001 Section 4 (1)(e)

² The Telecommunications (Bailiwick of Guernsey) Law 2001 Section 27 (1)

³ Dispute Resolution Guidelines Document number OUR 02/32

26, 29 and 32. Wave Telecom argues that the existence of this dispute is merely one example of what it terms “deny, delay, and degrade” behaviour by C&WG that has the effect of limiting competition for communications services to business customers in Guernsey.

Wave Telecom has therefore requested that the DG instructs C&WG to quote a price for and then to provide the infrastructure to meet Wave Telecom’s requirement for 8x2Mbits and 45 Mbit/s circuits connecting Les Caches to Wave Telecom’s Point of Presence at St. Georges Complex and to respond to future capacity requests where infrastructure is not available by quoting a price to develop the infrastructure as required.

1.3. Investigation Process

On the 28th June 2007 Wave Telecom notified the OUR of its complaint against C&WG regarding the alleged refusal by C&WG to negotiate the development of infrastructure at Les Caches intended to provide leased line private circuits to Wave Telecom (“**the Dispute**”).

Upon receipt of the complaint and having considered the matters complained of, the OUR launched a formal investigation and on 3rd July 2007, forwarded Wave Telecom’s complaint to C&WG in accordance with the DRGs. C&WG responded to the OUR’s request for comments with a letter dated 18th July 2007. That response which also dealt with the 45 Mbit/s on-island wholesale leased line Dispute comprised some general comments and a rebuttal of Wave Telecom’s allegations of non-compliance by C&WG with its licence conditions.

In accordance with the DRGs, C&WG’s response of 18th July 2007 was forwarded to Wave Telecom for comment. A commentary on the response was received from Wave Telecom on 20th July 2007.

A proposed finding in the dispute was provided to both Wave Telecom and C&WG for comment who responded on 10th and 11th September respectively.

The DG has considered all of the information provided by Wave Telecom and C&WG in the correspondence referred to above. This document sets out the DG’s finding based on his consideration of the information provided.

2. Structure of the Paper

The rest of this paper is structured as follows:

- Section 3:** contains a chronology of the negotiation process between the two parties;
- Section 4:** presents the issues under consideration raised by Wave Telecom's Dispute;
- Section 5:** summarises both C&WG's and Wave Telecom's comments on the issues;
- Section 6:** summarises the DG's proposed finding and responses from C&WG and Wave Telecom to the proposed findings; and
- Section 7:** sets out the DG's final decision.

Responses to the DG's proposed finding from C&WG and Wave Telecom are published on the OUR's website.

3. Summary of Events

Based on the information provided by both parties the OUR has compiled a chronology of the events leading up to the lodging of a formal dispute by Wave Telecom with the OUR.

28 March 2007	Wave Telecom submit an infrastructure request to C&WG for wholesale circuits (8x2Mbit and 45Mbit circuits) between Les Caches, St Martins (former Burbridges site) and Wave Telecom's PoP (St George's Complex, St. Georges Espl).
29 March 2007	C&WG inform Wave Telecom that it is unable to offer prices on the capacity requested as there is limited line plant available. C&WG says it can only offer 2x2Mbit lines.
3 April 2007	Wave Telecom indicates they have a real requirement and ask for a quote for price and timescale for C&WG to provide 8x2Mbits between the two locations.
3 April 2007	C&WG send text of original response of 29 March, namely that it is unable to offer prices on the capacity requested as there is limited line plant available.
15 May 2007	Environment Department grant permission for change of use at the Burbridge's site.
28 June 2007	Wave Telecom lodge official dispute with OUR.

4. Issues under Investigation

4.1. Refusal to Provide Infrastructure

The circumstances of the Dispute are cited by Wave Telecom as a particular instance in which Wave Telecom's business suffered as a direct result of C&WG's refusal to provide infrastructure. Specifically in relation to the Dispute, Wave Telecom has stated that it requested a quote for the supply of 8x2Mbit leased line circuit and a 45 Mbit leased line circuit at Les Caches.

The chronology presented in section 3 sets out a list of correspondence between the two parties based on the information provided to the DG by Wave Telecom and C&WG, including the first request and subsequent amended request when C&WG informed Wave Telecom of the unavailability of infrastructure. Wave Telecom asserts that C&WG's response is evidence of C&WG's refusal to meet a reasonable request to discuss the timescales and costs of developing C&WG's private circuit capacity at Les Caches. Consequently, Wave Telecom argues that this behaviour constitutes a breach of conditions 26, 29 and 32 in C&WG's fixed telecommunications licence (the "C&WG Licence").

4.2. Licence Condition 26

Wave Telecom maintains that C&WG's refusal to develop infrastructure at Les Caches amounts to a refusal to supply leased lines, contravening condition 26 of the C&WG Licence. Wave Telecom asserts that C&WG has used and is using its effective control over access to telecommunications infrastructure at Les Caches as a means to prevent and/or delay its competitors (including Wave Telecom) offering services that compete with its own. Wave Telecom refer to three conditions within Licence Condition 26, namely 26.1, 26.2 and 26.3.

Licence condition 26.1 states, inter alia, that:

"The Licensee shall offer to lease out circuits for any lawful purpose:

- (a) on publicly advertised conditions and on non-discriminatory terms...*
- (b) within a reasonable and published period of time from any request;"*

Wave Telecom alleges that C&WG's refusal to discuss development plans, timescales and costs, for increasing capacity at Les Caches amounts to a breach of condition 26.1 (b). Wave Telecom argues that by refusing to engage in or even to start negotiations / discussions C&WG is ensuring that it cannot offer leased lines 'within a reasonable and published period of time from any requests'.

Condition 26.2 states that *"the licensee shall offer to lease out circuits to other licensed operators on terms that are no less favourable than those on which the Licensee makes equivalent leased circuits available to its Associated Companies or its own business divisions"*.

Wave Telecom therefore also alleges that C&WG already `notionally' offers the relevant infrastructure supplying wholesale capacity generally to its own downstream division and that by not offering the reasonable infrastructure for Wave Telecom to purchase an equivalent service, C&WG is discriminating between Wave Telecom and its C&WG downstream operations, in breach of condition 26.2.

Licence condition 26.3 provides that the following grounds may be reasonable grounds for a Licensee to refuse a request for leased circuits:

- *if use of the leased circuits in the manner proposed would harm the integrity, security or interoperability of the Licensed Telecommunications Network or Licensed Telecommunications Services in a material way; or*
- *if the leased circuits will be connected to Customer Premises Equipment (“CPE”) that is not approved for connection to the Licensed Telecommunications Network.*

Wave Telecom argue there is no reason to believe that the integrity, security or interoperability of C&WG's network would be compromised by the provision of the service. Nor had C&WG suggested the circuits might be connected to unapproved CPE.

Wave Telecom acknowledge a request for developing access may reasonably be refused if the cost of product development and in-life product management of the wholesale product are disproportionate to the benefits. However, it did not believe this argument applied in this case since Wave Telecom would be meeting the infrastructure development costs, and in any event C&WG has not raised any discussion about the costs.

4.3. Licence Condition 29

Condition 29 of the C&WG Licence states that:

“The Licensee shall not show undue preference to, or exercise unfair discrimination against any User or Other Licensed Operator regarding the provision of any Licensed Telecommunications Services or Access. The Licensee will be deemed to be in breach of this Condition if it favours any business carried on by the Licensee or an Associated Company or Other Licensed Operator so as to place Other Licensed Operators competing with that business at an unfair disadvantage in relation to any licensed activity.”

Wave Telecom asserted that C&WG already `notionally' offers the infrastructure supplying wholesale capacity of 8x2 Mbit/s and 45 Mbit/s on-island to its own downstream division. By not offering the infrastructure for Wave Telecom to purchase an equivalent service, Wave Telecom argue C&WG is discriminating between Wave Telecom and the C&WG downstream division.

4.4. Licence Condition 32

Condition 32 of the C&WG Licence states that, under Part V: Fair Competition,

“... 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 Telecommunications Networks or the provision of 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 Telecommunications Networks or the provision of Telecommunications Services.”*

Wave Telecom has expressed the view that, by refusing to supply timescales and costs in response to a request to develop C&WG's network at Les Caches, C&WG is preventing and restricting Wave Telecom from offering a competitive service to its business customers. Wave Telecom asserts that this delaying tactic results in an unfair competitive advantage to C&WG.

5. Summary of Responses

Following commencement of the OUR's investigation into the Dispute, the OUR requested C&WG's comments on the arguments made by Wave Telecom. C&WG's response to this request on 18th July 2007 comprised some general comments and a rebuttal of Wave Telecom's allegations.

5.1. C&WG Response to Dispute

5.1.1. General Comments

C&WG claimed Wave Telecom had lodged the Disputes under a section of the Telecoms Law (Section 10, parts 2 (a), (b) and (d)) which it believes does not apply to services in the Wholesale Leased Circuit Services Agreement ("WLCSA"). Notwithstanding this, C&WG responded to the Dispute in the interests of moving the matter forward in a constructive and co-operative manner.

C&WG stated that the term 'Les Caches Technical Park' was not used in the initial Wave Telecom request although it is used by Wave Telecom in the Dispute document. C&WG assert that the reason for this is that planning permission had not been given in March 2007 for the change of use of the former Burbridges site to a technical park, which C&WG allege is a significant fact in the Dispute. C&WG argue there was considerable doubt at the time of Wave Telecom's initial request for circuits as to whether a change of use would be allowed in respect of the Burbridges site and maintain that this informed its responses to Wave Telecom.

C&WG maintain that it was not economically viable to provide high capacity circuits at the specified location, either to its own retail arm or to its wholesale customers prior to the planning issue having been determined. Given the uncertainty about planning permission it was not willing to invest in the provision of fibre to the site, because of the risk that businesses could not locate at the site because the change of use was refused. C&WG commented that developing infrastructure is expensive and for C&WG to do so with no certainty of total customer capacity requirements would be highly inefficient.

C&WG also argue that there was no mention of Wave Telecom paying for the development of the infrastructure. C&WG's Access Engineering Department confirmed that no such discussions have taken place at any stage with Wave Telecom.

Environment Department gave permission for the change of use at the Burbridges site on 15 May 2007. C&WG have confirmed that since 15 May 2007 it has become clear to C&WG that the Les Caches / Burbridges site is indeed being developed into a Technical Park and C&WG has received requests for further capacity to the site, as a result of which C&WG consider that the investment in fibre to the site has since become viable. Its external planning department had reorganised its work programme and was about to commence laying fibre to units at Les Caches for those customers who have requested and made a firm order and infrastructure will be available to other customers on demand.

C&WG comment that Wave Telecom alleges it missed out on a competitive bid for high capacity connectivity to a business at Les Caches to another party, but C&WG had not taken part in any such bid for a 45 Mbit leased line, and that up to now it would not have been in a position to provide such capacity due to the technical constraints now being overcome.

5.1.2. Condition 26:

C&WG maintain that until the change of use for the Burbridges site had been approved, which was not the case at the time of the initial application by Wave Telecom, there was no justification for C&WG investing in the installation of fibre to the site. In C&WG's view this does not amount to a refusal to supply leased lines. C&WG assert that until such time as the change of use had been approved there was no commercial case for supplying anything other than the existing copper cable to that site, as fibre cable would not have been utilised. In relation to Condition 26.2, C&WG stated that at no time has C&WG made available any circuits at the Burbridges site to its Associated Companies or business divisions which have not been available to Wave Telecom. Consequently C&WG denied and refuted any allegation that it was in breach of condition 26 of its licence.

5.1.3. Condition 29:

C&WG maintain at no time has C&WG made available any circuits at the Burbridges site to its Associated Companies or business divisions or any Other Licenced Operators ("OLO") that have not been, or are not now, available to Wave Telecom.

5.1.4. Condition 32:

C&WG reject the argument that it has been adopting delaying tactics as alleged by Wave Telecom. It claims that unless and until there was an approved change of use for the site there was no case for development of capacity to the Burbridges site. C&WG maintain that there was no offer from Wave Telecom to pay all costs, and in this regard referred to the email correspondence between the parties.

5.1.5. Financial Penalties

C&WG note that in the Dispute, Wave Telecom proposed that a punitive approach be taken by OUR and that it impose a substantial fine by reference to section 28 of the Telecoms Law.

C&WG assert that Section 28 only permits a financial penalty to be imposed in the event of a breach of a direction made by the DG under Section 27 of the Telecoms Law. In the first instance C&WG denied that it is in contravention of any condition of its licence. Moreover it contends that in any event unless and until there has been a section 27 direction with respect to the relevant licence conditions there can have been no contravention of such direction and therefore Section 28 does not apply at this stage.

5.2. Wave Telecom Comments

Wave Telecom had a limited response to C&WG's response to the Dispute and alleged licence breaches.

Wave Telecom believe it was not the responsibility of C&WG to decide whether to provide services dependant on their opinion with regard to the likelihood of a change of use being granted by the Environment Department. Wave Telecom also rejected C&WG's assertion that Wave Telecom did not offer to pay for the required development and pointed to the email to C&WG of 3rd April 2007 in which Wave Telecom asked specifically "*what price and in what timescales are you able to provide 8 EI's between the above locations.*" C&WG took no account of this and repeated its first response, which in Wave Telecom's view made it clear that C&WG had no intention of providing any infrastructure until compelled.

6. Proposed Finding and Responses

6.1. Summary of Proposed Finding

The DG's proposed finding was that C&WG's behaviour had the effect of restricting Wave Telecom's ability to compete in the provision of Telecommunications Services in the licensed area. The DG proposed to find C&WG in breach of condition 32 of its fixed licence. The DG did not consider it necessary to consider whether or not C&WG had contravened licence conditions 26 and 29 as requested by Wave Telecom.

6.2. Responses to Proposed Finding

Wave Telecom restated arguments it had previously made which are already set out above.

C&WG refuted the finding that it was in breach of licence condition 32. However, in light of concerns expressed by the OUR in its draft findings C&WG undertook to start a new process of raising staff awareness of legal and regulatory obligations. C&WG argue that the DG should take account of wider issues than the specific complaint and any consideration of allegations of misconduct in Guernsey should take into account relevant and connected circumstances and behaviours in Jersey.

On the specific finding, C&WG acknowledge it did not explain to Wave Telecom it had concerns that planning permission might not be granted and that its investment could be wasted.

C&WG is however of the view that since Wave Telecom did not expressly request that C&WG provide a price for providing the entire infrastructure required to enable the installation of a high capacity circuit, it was reasonable to assume the request from Wave Telecom was for nothing over and above a standard product.

C&WG's response described its usual procedures in responding to requests and states that any OLO that had made a similar request for high capacity circuits to Les Caches would have been given the same response as Wave Telecom received, and if C&WG Guernsey's retail arm had made the enquiry similar action would have been taken.

7. DG's Decision

The DG is satisfied, having regard

- (a) to his duties and functions under Sections 2 and 4 respectively of the Utilities Law, including in particular the duty to secure, so far as reasonably practicable, the provision of utility services that satisfy all reasonable demands for services within the Bailiwick and to maintain and promote effective and sustainable competition in the provision of utility services in the Bailiwick and the function to receive and conduct inquiries and investigations and to hear complaints; and
- (b) to his powers under Section 5 of the Utilities Law to do anything which appears to him necessary or expedient for the purpose of exercising his functions or powers, including without limitation the power to impose directions under Section 5(1)(e) and powers under Section 27 of the Telecoms Law,

that it was appropriate that the DG consider the Dispute and that he has the power to make the findings and issue directions.

The DG's consideration of the Dispute involved the DG forming a view as to whether or not C&WG's actions in the matter under review constituted a breach of any of the terms of the C&WG Licence as referred to by Wave Telecom in its initial complaint. In assessing this the DG considered, amongst other things, the terms of the relevant conditions of the C&WG Licence and C&WG's obligations thereunder, the factual circumstances in which C&WG's behaviour occurred and whether subsequent changes in those circumstances resulted in any alteration in C&WG's actions or behaviour and whether the communications cited offer sufficient evidence of failure to enter into discussions for the provision of a service sought by a customer.

The DG did not consider it necessary to consider whether or not C&WG contravened all three licence conditions cited by Wave Telecom. It appeared to the DG that the licence condition most relevant to the behaviour by C&WG is Condition 32. The applicability of Licence Condition 32 is therefore considered below.

7.1. Condition 32

This Licence Condition imposes a special responsibility on C&WG that prohibits it from unfairly affecting competition in the establishment, operation and maintenance of Telecommunications Networks or the provision of Telecommunications Services in the licensed area.

In response to a request to C&WG made on 28th March 2007, the trail of correspondence indicates to the DG that C&WG's approach in responding to Wave Telecom's request effectively equated to a refusal to negotiate. The reason given to Wave Telecom for not meeting its request was that there was limited line capacity. C&WG's subsequent explanation as part of this dispute investigation for not

providing the service requested was that it did not wish to do so until planning permission for change of site use had been given. This reason was not provided in the correspondence to Wave Telecom when it made the requests. Despite a communication to C&WG that Wave Telecom had a 'real requirement'⁴, C&WG limited its reasons to the repeated statement that it had 'limited plant available'. No mention is made of change of use issues which C&WG since argued in its response, was a material issue at the time.

The basis for this more recently communicated reason by C&WG is that it was "not willing to invest in the provision of fibre to the site, only to find that businesses could not locate there". Based on the correspondence before the OUR, it is also apparent this reason was not provided to Wave Telecom when it requested the service. Since Wave Telecom was not provided with either of these reasons, it was not in a position to address C&WG's concerns or misunderstanding.

It is also material to the DG's consideration, that when circumstances changed C&WG made no attempt to overcome the factors that in its view prevented it from meeting the request by Wave Telecom. Of particular relevance is that despite Environment Department granting permission for change of use at the Burbridges site on 15 May, by the 28th of June 2007 C&WG did not alter its position or reopen the issue with Wave Telecom. Wave Telecom was not in a position to appreciate the potential for this development to address C&WG's concerns, at least in part, since the issue of planning permission was never conveyed by C&WG as a reason.

It would not appear plausible that C&WG's wholesale business would engage in such a way with its own retail business if a similar request had been made. While the DG notes that C&WG does not accept the OUR's assessment, he believes such a conclusion is within the reasonable range of positions that might be adopted in the circumstances. The DG interprets C&WG's behaviour as equating to a refusal to provide a service to Wave Telecom. The issues of risk to investment and who would bear the infrastructure costs to meet the request may or may not be valid and the DG takes no view on these issues. The key issue in the DG's view is that the evidence demonstrates that C&WG's behaviour equated to a refusal to negotiate.

The effect of an operator refusing (implicitly or explicitly) to negotiate the provision of a wholesale service in the wholesale market in which it is dominant raises concerns about fair competition. The failure by C&WG in this instance amounts to a practice which denied Wave Telecom timely provision of a service. Such behaviour can have the effect of an OLO losing out on the value of the proposed contract and its competitive position suffer. The delay in resolving this issue is also a factor given Wave Telecom's request was made on 28th March 2007 and C&WG continued to provide only a partial and brief explanation of its reasons for not meeting the request until Wave Telecom launched a formal dispute on 28th June 2007, whereupon C&WG appears to have indicated for the first time in its response dated 18th July the full extent of its reasons. This delay of almost four months before Wave Telecom was in a position to understand and respond to C&WG's reasons is material for a commercial business such as Wave Telecom. It is also the case that C&WG only provided these reasons once a formal dispute had been made, resulting in Wave Telecom having to

⁴ Email of 3rd April from Wave Telecom

pursue more formal dispute procedures and diverting scarce resources from competing for business.

The DG notes C&WG's view that the OUR should take account of pan-Channel Island issues when considering any disputes that may arise as in its view the relationship between C&WG and Jersey Telecom is relevant. The DG does not accept this as having any merit. C&WG has obligations under its licence issued under Guernsey Law. The DG is aware that Jersey Telecom has its own licence and specific obligations which are imposed by the JCRA, the regulator in Jersey. C&WG is required under its licence to treat all OLOs fairly and impartially. This is regardless of what other dealings it may have with any associated companies in other jurisdictions. If C&WG, as it appears to allude to, has concerns about its treatment in Jersey then this is a matter to be addressed with the regulator in Jersey. The DG would be extremely concerned if C&WG were to allow factors outside of those it should reasonably take account of to determine how it interacts with OLOs in the Guernsey market where it is dominant.

C&WG's behaviour had the effect of restricting Wave Telecom's ability to compete in the provision of Telecommunications Services in the licensed area. The DG therefore finds C&WG in breach of condition 32 of its fixed licence. The DG does not consider it necessary to consider whether or not C&WG has contravened licence conditions 26 and 29 as requested by Wave Telecom.

7.2. Conclusions

The DG finds C&WG in breach of Condition 32 in regard to the complaint lodged by Wave Telecom with respect to the refusal to develop infrastructure and provide requested leased circuits at Les Caches. This licence condition breach and repeated instances of obstructive behaviour by C&WG over recent years has resulted in the need by a competitor to issue formal disputes. These have led to formal or informal remedies by the DG without altering an underlying pattern of behaviour in dealing with OLOs.

The DG has commented in earlier findings against C&WG that its behaviour in respect to its dealings with OLOs has not matched its licence obligations. The DG has in previous disputes imposed specific measures that he has required of C&WG to rectify previous licence breaches. Regrettably in the present dispute (and the on-island 45Mbit wholesale dispute addressed separately) similar issues continue to arise. This raises broader concerns and the DG is considering what future measures are appropriate to address what appears to be a wider issue regarding C&WG's approach to dealing with OLOs. While the DG notes (and welcomes) that C&WG is intending to reaffirm its legal and regulatory obligations to all staff, the DG believes a more structured review, in particular insofar as OLOs relationship with C&WG is concerned may be warranted.

In terms of the issue at hand, C&WG has since decided that provision of infrastructure to the site is now viable and infrastructure will be available to customers on demand.

/END