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REGULATORY CONSISTENCY AND PREDICTABILITY

and

**EXPERIENCES OF INDEPENDENT AND TRANSPARENT TELECOMMUNICATIONS
REGULATION – THE CASE OF THE OECS**

by

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INTRODUCTION AND DEFINITION

The notion of Regulatory Consistency and Predictability can and only be sustained from the concept of Independence. While it can be argued that Independence is a matter of degree, the Independence of the regulator is the most critical factor in achieving consistency and predictability in the rulings of the Telecommunications Regulator.

Independence, therefore, encompasses three key elements. These are:-

- 1) the separation of regulatory and operational functions;
- 2) freedom from direct political pressure; and
- 3) fair and transparent procedures.

The International Telecommunications Union defines a separate regulator as one that is independent – in terms of finance, structure and decision-making – from the operator and the relevant government ministry. The extent to which the regulator is perceived to be independent of political control – and separate from other telecommunication bodies – is a key factor in the confidence that industry and the public have in its decision-making and its capacity to attract foreign investment.

Statutory provisions governing the appointment and removal of officials, reporting requirements and financial autonomy provide some guarantees of Independence. But the regulator needs to be vigilant to achieve functional independence, particularly if the government maintains a significant stake in the telecommunications operator, as obtains in at least one country in our Region.

VISION AND PURPOSE

The early establishment of the OECS/ECTEL regulatory framework was predicated on the conceptual position that independent regulation increases investor confidence, by preventing the incumbent operator from creating barriers to entry of new competitors and or by delaying interconnection. This transformation from monopoly to competition occurred within an environment fueled by international debate and characterized by the conviction that competition would more effectively serve the interest of all stakeholders.

The member governments, conscious that the monopolistic approach no longer served the public interest, decided that new structural arrangements had to be created. The decision was also informed by the knowledge that monopolistic prices for telecommunications services served as a deterrent to economic growth.

Yet, the governments were conscious that those who invest capital must earn fair returns. It is against this background that ECTEL was created by Treaty in May 2000 in St. Georges. The Authority was formally launched in St. Lucia in October 2000 to guide the process to market liberalization so that the people of the sub-region could enjoy the freedom to communicate over an efficient telecommunications network at reasonable prices.

LEGISLATIVE PROVISIONS AND PROTECTION

In the OECS/ECTEL model we have made legislative provision for a National Telecommunications Regulatory Commission to deal with the regulatory functions, while the Ministry of Telecommunications deals with operational issues. Some of the key regulatory functions that are generally well-known are to:-

- 1) ensure compliance with government's international obligations on telecommunications;
- 2) institute and approve technical regulation and setting of standards;
- 3) supervise, regulate and arrange use of radio frequency spectrum;
- 4) approve interconnection agreements;
- 5) approve fees for regulated services;
- 6) investigate and resolve disputes.

Another important provision designed to foster consistency in the Rulings/Orders of the Regulator is the legislative provision that Commissioners must be appointed for a fixed three-year term. They must normally be persons of recognized standing and experience in relevant disciplines. But perhaps even more importantly, the Act stipulates how a Commissioner can be removed and the specific causes. While this may not be an absolute safeguard, it provides some considerable protection from influence of the Minister in the regulatory decision-making process.

Also, the early experiences of the OECS/ECTEL States reveal that Regulatory Certainty must be viewed from two perspectives. The first perspective must be by those who are regulated, that is, licensees and operators; and secondly, by those who constitute the regulatory machinery, and are given the power to apply the rules.

The effective regulator must be independent from those it regulates. Therefore, our Act stipulates that Commissioners cannot hold direct or indirect interest in telecommunications companies or equipment manufacturers or dealers. The same applies to staff, while in the case of ECTEL Directors any interest in a matter must be disclosed and the Member is required by the Treaty to excuse himself from the discussion and decision-making.

In fact, the Treaty establishing that Regional Regulatory body prevents the Managing Director from holding any financial interest other than his employment. Article 9(6) states that “the Managing Director shall devote the whole of his professional time to the affairs of ECTEL, and shall not, while holding office, have any interest, directly or indirectly in any telecommunications business...and also shall not engage in any other business without the prior approval of Council.”

The other perspective on Certainty speaks to the critical need for the regulator to be independent and adequately funded. The funding source must therefore be reliable and predictable. This independence has been achieved through the spectrum fees. These fees are collected from licensees who utilize electromagnetic spectrum and must be remitted to ECTEL according to the Act.

Another critical component of regulatory independence relates to fair and transparent procedures. This component is particularly important to operators and investors who make investment decisions. Transparency in decision-making for the OECS/ECTEL States means that the process of arriving at regulatory policies and specific rulings is open, consistent and predictable.

Transparency required the establishment of two fundamental pillars. The first pillar was the publication of evaluation criteria for individual licenses, and secondly, all major matters for regulatory decision must first be published with sufficient time available for informed comment. Here, the complexity of the issue determines the period for public consultation.

THE INTERCONNECTION STRUGGLE

In early 2002, the OECS Regulatory System faced its first major challenge over Independent Regulation. It is the case of an operator duly licensed before the opening of the market, using network convergence technology to provide cable TV and fixed line telephony and ISP Services requested interconnection under Section 46(2) of the Act.

The incumbent responded by inviting that other party to negotiations over price and other terms and conditions. As a first step however, the incumbent required the signing of a non-disclosure agreement. When the Interconnect Offer was submitted for Regulatory Approval, the Regulator on advice from ECTEL,

determined that the price was too high and contrary to the Public's Interest. The operator, requesting interconnection, on advice of one of its attorneys/directors/marketers, presumably motivated by economic difficulties took to the streets demanding that Interconnection be approved at the price proposed by the incumbent.

Thus in the face of public and other pressures the Regulator maintained that the parties had to return to the table to negotiate a price that would reflect equity, and better serve the consumers. In the end, the agreed price was lowered and the Regulator approved for a three-year period, with the proviso that any operator who later received a better interconnection rate, that lower rate would apply to the earlier agreement.

These principles and procedures were based on the notion that rules, once made, would be consistently applied. Fundamentally, also, every matter before the Commission would be on the public record, except where in the judgement of the Commission a matter would be placed in the confidential file pursuant to a request that has been fully and properly justified.

Effectiveness also demands that the regulatory body must have full ability to regulate the market through policy and enforcement decisions. The difficulties over interconnection demonstrated quite forcefully the serious shortcomings in the area of enforcement mechanisms and penalties.

OTHER RELATED ISSUES AND EXPERIENCES

Consistency and predictability also raise the issue of adaptability and flexibility in application and interpretation. It is generally agreed that formal legislation cannot anticipate all the changing conditions that may occur. Accordingly, as obtains elsewhere, the regulator has been given the power to propose rules to deal with specific policy issues. In our case, the sovereignty concerns prevented the countries from vesting the Commissioners with the power to make regulations, but requires the ministers, wherever practicable "to adopt the form, document, process and subsidiary legislation as recommended by ECTEL, and implement policy and recommendations proposed by ECTEL (Section 7(5) Telecommunications Act of Dominica).

Conceptually, however, this power to make rules must itself be pursued openly as changes to suit prevailing conditions could impact negatively investor and provider confidence. The Consistency and Predictability principle - so necessary for independent regulation is once more highlighted.

Enforcement and adjudication is an important process by which the independent regulator ensures compliance by telecommunications providers. This process is also a function of Consistency. The provider must know that violations will be resisted and attract penalties and sanctions. These sanctions must of

themselves be appropriate to give the required deterrent effect. However, to enforce compliance, and to successfully do so, the regulator must be given the power to investigate the actions and records of providers. The Commissions are so empowered.

In one case, a request for information was denied since the specific provision was not detailed in law. However, once the appropriate Regulations were passed, the information was forthcoming. This experience taught the Regulator and the Advisory Body one significant lesson, that is, that governance of the licensees operations must be based in law. Indeed, even where specific sanctions were not provided in the form of fines, the threat of revocation of licenses served to produce the necessary data and information for decision-making.

The OECS/ECTEL experience shows that since the introduction of competition, voice telephony has impacted the populations of member countries very significantly. You may ask what informed our two-tier structure of a regional body and national commissions. This was due largely to the realization that through functional cooperation the counties had achieved more as a group of small island states than could have been achieved individually. Secondly, the spectrum resource is scarce, so too, is the available human resource and technical expertise, but also the countries were responding to their peculiar needs as small island developing states.

In one country with a population of 108,000 with approximately 28,000 households, there was a waiting list for fixed line connections in excess of 2000. Today, 70 per cent of the population has cell phones and access has exceeded 95 per cent.

The other significant experience deals with the issue of pricing for certain telecommunications services. Partly due to historical reasons and the regulatory risks involved, ECTEL recently embarked on a process of discussions/negotiations as an initial approach in determining the regulated prices for fixed line services through a Price Cap Regime. But this process is on-going and is subject to the independent judgment of the regulator in each member state.

Perhaps one final thought on the Consistency issue deals with the consistent application of incentives to investors. Thus, while this is not itself a regulatory function, and is administered by the respective Ministries of Telecommunications and Finance, ensuring that all operators, existing and new, enjoy initial uniform concessions, can give a boost to investor confidence. This usually means compliance with legislative and international telecommunications obligations.

CONCLUSION

Four years after the launching of ECTEL, a model now recommended by the World Bank for SIDS with similar geographic region, we can state with some confidence that the successful transformation of a market from monopoly to competition requires vision, steadfastness and commitment from policy makers. The transformation also calls for open and fair regulatory procedures, enforcement mechanisms and principled decision-making applied on a consistent basis.