Camford | info vol.3 no.3 june.2001 | the journal of policy, regulation and strategy for telecommunications information and media

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1463-6697/01/030189-05

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caribbean cooperation:
rise of the regional regulator

Donnie DeFreitas, Charles Kenny and Robert Schware

Five member countries of the Organization of East Caribbean States are undergoing a unique experiment in telecommunications liberalization. The reform, supported by a World Bank loan for technical assistance and equipment, has two interesting features. First, it has recently been dramatically enhanced by a legal ruling in one of the member countries that monopoly telecommunications provision is unconstitutional; and second, it is based on a regional rather than a national model of regulation. Already the reforms have begun to show results, with the current monopoly service provider slashing the prices of international calls.

The member countries of the Organization of East Caribbean States (OECS) – St Lucia, Dominica, Grenada, St Vincent and the Grenadines, and St Kitts and Nevis – are undergoing significant economic change. Traditional agricultural production is being adversely affected by weak local markets, as well as declining European markets resulting from the renegotiation of trade agreements that traditionally provided preferential access to Caribbean goods. Banana exports, which account for a significant percentage of member country exports – over 50 per cent of St Lucia's visible exports in 1997, for example – face the most significant threat. Not surprisingly, the region is keen to diversify its economic base away from a heavy reliance on farming and tourism.

Donnie DeFreitas is Project Manager, OECS Telecommunications Reform Project, St Lucia; **Robert Schware** is Senior Informatics Specialist and **Charles Kenny** is an economist at the World Bank (Tel: +1 202 473 3540; Fax: +1 202 522 3001; email ckenny@worldbank.org). The views presented in this paper are the authors' own and do not necessarily represent the views of OECS, the World Bank, the executive directors of either institution or the countries that they represent.

One important element of this diversification is information services, which are expected to create 1500 new jobs in the OECS by 2002. Indeed, a strong Information and Communications Technology (ICT) sector will offer the OECS advantages well beyond the export of information services. For example, ICT can be deployed to support, among other tasks:

- participation in global industries, leading to process improvement, business development, industry diversification and employment opportunities;
- trade process reform, including ports and customs, and technical controls such as prohibitions and restrictions, government trade licensing and approvals, and other non-tariff barriers;
- distance education and computer-aided education; and
- improved participation in government and an increased voice for the poor.

An efficient telecommunications sector is central to the growth of ICT-related industries and services. However, historically, the monopoly service provider has failed to establish such efficiency. Telecommunications services are expensive, costs are unbalanced, and there is limited availability of new and value-added services (for example, there is no packet-switched service for business).

Although the exact nature of incumbents' rights and advantages under legal agreements varies between the islands, at the beginning of 2001 they included:

- monopoly provision clauses;
- customs, tax and exchange control exemptions;
- nominal rental of government-owned properties;
- the right to lay cables; and
- the right of capital sale (at depreciated value) to government at the end of monopoly provision.

In response to this problem, the islands want to see the rapid introduction of a well-regulated competitive market in both basic and value-added services. And they want to bring it about more rapidly than some other Caribbean countries.[1]

The first step towards more efficient telecommunications provision in the OECS is to negotiate the removal of monopoly service provision clauses in the agreements with incumbent providers, currently set to expire between 2001 (in St Lucia) and 2020 (in Dominica). The countries are keen to establish an open, competitive regime overseen by a transparent and efficient regulatory agency. In October 1998, a World Bank project responded to the OECS request for help to review laws, licences and agreements, and to set up a regional telecommunications authority.

1. In Jamaica, for example, the government has presented a new telecommunications law to parliament that extends and enforces monopoly service provision by the incumbent for between six years and perpetuity, depending on service. Full compensation will be provided to the incumbent for all losses if the agreement is not signed, if its major provisions are not adhered to, or if the new law is held to be void, regardless of subsequent changes in government. In return, the incumbent will undertake certain service commitments including line rollout and the provision of internet terminals, make payments for use of spectrum, and support various scholarships and the refurbishment of a tire factory.

The Marpin case and the 'freedom to receive ideas'

As part of the regional approach to liberalization, joint negotiations have been held between the incumbent and a high-level team, which includes ministers and technical experts authorized by the countries' prime ministers. The course of these negotiations has been significantly affected by a recent court case regarding the legality of monopoly provision in the islands.

In 1997, Marpin Communications, a cable television provider in Dominica, expanded into internet service provision through an agreement with the incumbent telecommunications company on the island. In 1998, its 1-800 connection through the incumbent's network was disconnected. Marpin took the monopoly to court, arguing that the legislation and licence-conferring monopoly powers on the incumbent amounted to an unconstitutional hindrance to free speech and the freedom to receive and communicate ideas.

The opinion of Judge Cenac of Dominica, subsequently supported by the Eastern Caribbean Appeals Court, was that the incumbent's telecommunications monopoly was illegal. Section 10[1] of Dominica's Constitution guarantees 'freedom to receive ideas and information, freedom to communicate ideas and information without interference'. Section 10[2] does allow certain exceptions, including for 'reasonably required regulation' or laws required in the interests of public safety, for preserving the reputations and freedoms of others, and 'regulating the technical operation of telephony, telegraphy, posts, wireless broadcasting or television'. However, both the judge and the Appeals Court argued that the 20-year exclusive licence with the incumbent operator did not fall under this 'reasonably required regulation' exception.

Five elements seem to have been central to the Appeals Court's decision:

- The user is forced to use the incumbent's facilities to communicate.
- Ministries are prevented from considering licence applications, thus denying the applicant's freedom of expression.
- Cost and quality of service are considered irrelevant in the award of the licence.
- Constitutional precedents allow for more than one operator in the telecommunications sector.
- No major change is required, beyond a lower threshold of 'hindrance' to ensure the freedom of expression of potential licensees.

The decision was again appealed to the Privy Council (the final court of appeal, based in London), which issued a judgement in October 2000. The presiding officers felt that there was no question that Marpin's freedom to communicate ideas and information was significantly hindered by the monopoly. They also cited the case of Retrofit Zimbabwe, a company that wanted to set up a mobile cellular system to compete with the state monopoly. In this case, unanimous rulings by Zimbabwe's Supreme Court declared that the monopoly infringed freedom of speech and that this infringement went further than could be reasonably justified in a democratic society.

The Privy Council noted that the real issue at stake was the impact of monopoly service provision on the ability of the people of Dominica to communicate. They noted that one of the reasons the Zimbabwe case was declared unconstitutional was because the public provider was furnishing 'a public-switched telephone network of dubious worth, available to only a small percentage of the populace'.

The Council also affirmed that section 10[2] of Dominica's Constitution justified the continuation of a monopoly only 'if regulated exclusivity in telecommunications could be shown to better safeguard freedom of speech through widespread provision of an affordable network'. As the lower courts had not ruled on this issue, the Council decided to return the case to them for reconsideration.

Even if the monopoly was not yet broken, the ruling had a significant impact across the OECS. Similar 'freedom of speech' provisions exist in other OECS countries' Constitutions, all of which fall under the jurisdiction of the same Appeals Court. Further, combined with the case law of Zimbabwe, the Marpin decision indicates that there is growing legal opinion around the world that monopoly telecommunications provision runs counter to free speech, and that the burden of proof to refute this allegation is on the monopoly providers themselves.

The joint OECS Negotiating Committee is now acting on the assumption that it would be illegal for it to negotiate the retention of exclusivity clauses, as the verdicts of both the court in Dominica and the Eastern Caribbean Appeals Court clearly indicate that exclusivity should be ended forthwith. The Committee also argues that requests for compensation for early termination of exclusivity clauses run counter to the lower court's decision.

The cost-effective regional solution: ECTEL

Strong regulatory institutions are vital to an expanding and increasingly competitive telecommunications market. However, the creation and operation of an efficient regulatory agency involves certain fixed costs. Apart from spectrum monitoring equipment, computers and programs, there is the cost of professional assistance for activities such as interconnection, cost estimation and spectrum management. This places significant burdens on the resources of small countries.

For example, the *total* cost of government in Dominica is $41 million a year. Compare this to the budget of the US regulator – the Federal Communications Commission – which runs to $210 million a year (excluding the budgets of state communications commissions). Even a bare-bones regulatory authority is likely to cost in the region of $2 million each year, or 5% of Dominica's government budget. But there are also broader economic arguments for a regional solution. The harmonization of regulation and negotiation with incumbents, for example, would help attract investors, as would allowing for a greater degree of independence in regulatory advice.

Consequently, St Lucia, Dominica, Grenada, St Vincent and the Grenadines, and St Kitts and Nevis have set up a regional authority. The Eastern Caribbean Telecommunications Authority (ECTEL) was created by a treaty between the five countries, signed on 4 May 2000 by their heads of state. It will oversee liberalization and fair competition practices in the Eastern Caribbean's telecommunications market. It will be the first regional telecommunications authority in the world.

ECTEL is in the process of developing from a legal entity into a functioning institution. It is designed to promote liberalization and fair competition, harmonization of regulations and policies across member states, universal service, fair pricing, access to advanced services and overall sector development. Although the member countries will retain their sovereign power over licensing and regulation, ECTEL will provide technical expertise, advice and support for the creation of coordinated national regulations at the country level. It will promote the introduction and development of harmonized, transparent and objective regulation of telecommunications in the region, working in tandem with new telecommunications bills that will establish a National Telecommunications Commission as the regulatory mechanism for each country.

ECTEL's powers and responsibilities under the treaty include:

- advising and coordinating with the contracting states and with other states and international bodies regarding telecommunications;
- recommending regional policies on issues

including universal service, interconnection, numbering and pricing, forms and areas of licensing and frequency authorization, methods of standardizing applications procedures, cost-based pricing regimes;
- recommending licence terms and conditions, systems of frequency authorization management, licence fee structures, technical standards and procedures for the approval of equipment, management systems for universal service funds;
- designing and operating open tender proceedings for individual licences;
- reviewing all individual licence applications made in contracting states;
- maintaining a harmonized regional radio spectrum plan and managing radio spectrum and frequency authorization;
- mediating or issuing opinions on disputes between licensees; and
- monitoring, in collaboration with states, the effectiveness of the service.

ECTEL will have a Board of Directors (one from each signatory) reporting to a Council of Ministers. The organization will be funded by regular payments from member countries. These payments will be linked to the fees countries receive for the use of radio spectrum. The spectrum management report commissioned by the OECS Project Management Unit (PMU) recommends that, on average, licence fees for spectrum use and landline provision should be tripled. This would provide revenues of a little over $0.5 million per year per country to support ECTEL's work.

A Project Management Unit (PMU) has acted as a forerunner to ECTEL, and regional progress toward legal and regulatory reform in the sector is already being supported through it. The PMU has provided documents including policy papers, draft 'parliament-ready' legislation, draft interconnection agreements, draft fair trade legislation, draft licences for paging, GMPCS, cellular and the spectrum-related elements of broadcasting, and evaluations of spectrum management, the state of liberalization, and the impact of WTO agreements and the FCC accounting rates decision in the OECS member countries.

The new laws and sector policies proposed by the OECS and implemented by project countries lay out plans to move toward telecommunications entities and pro-competitive regulation for all sectors of telecommunications and related value-added services, coordinated and advised by ECTEL. In particular, the regulator(s) will seek to:

- collect appropriate fees for spectrum usage and regulatory costs;
- ensure that licence-holders adhere to conditions;
- ensure cost-related tariffs and prevent cross subsidy;
- prevent abuse by dominant operators (especially over interconnection);
- approve equipment and set technical standards;
- liberalize leased line provision, value-added services, customer premise equipment and private networks;
- publish timely information on quality and cost of services;
- ensure free and simple access to emergency services.

Under the ECTEL treaty, universal service funds will be created in each country and funded through an equal percentage levy on licence holders in the country. This fund will be used to compensate licensees ordered to provide universal service by the minister in charge of telecommunications. Universal service is taken to include:

- public voice telephony,
- internet access,
- services to schools, hospitals and the disabled, and
- affordable costs.

Early results: a step towards reform

At the time of writing full competition has yet to begin and the monopoly provider continues to withhold relevant data. The PMU is planning to undertake a full economic impact study towards the close of the project period. However, the project, and in particular the creation of ECTEL, has already had a significant impact on the telecommunications sector in the partner countries.

The Marpin decision has spurred efforts by the project countries to move towards open competition. Several aspects of the project are especially timely, such as its support for the use of consultants to provide model telecommunications laws, its backing for negotiation with incumbent operators, and its creation of a regulatory body capable of enforcing fair and open competition.

The common regulatory system across the five countries will help to bring an early end to existing licence arrangements and facilitate competition. There will be, for the first time, procedures for the setting of cost-based tariffs and interconnection that will ensure a level playing field for all. The member countries will also take control of numbering and spectrum management. Government officials have attended training sessions, ministers have held public discussions and debate on the issues, and public support for reform has grown, with improved understanding and information on the activities of incumbent operators.

Governments are already moving towards complementary legislation on e-commerce and broadcasting. The sub-region's lead in the movement toward liberalization of the sector is encouraging other countries within the region to join ECTEL. A number of local and international operators have already expressed an interest in applying for licences.

The project, and the creation of ECTEL, should also create a new source of fiscal revenue. In addition to the revenue from graduated licence fees for spectrum use and landline provision noted earlier, fees would be collected for numbering and cable-landing. At the same time, increased awareness of the incumbent's accounting procedures should allow member states to collect greater taxes and royalties in the short run.

Since the inception of the project, the incumbent has reduced tariffs significantly. It has also made several proposals to further reduce and rebalance tariffs. So far, the telecommunications reform project has been partly responsible for reductions in overseas telephone charges of up to 50%. For example, the per-minute cost of a daytime call to the USA from the project countries has fallen between 24 and 42% (see Table 1). The lower rates will help stimulate new, more diverse businesses in the services sector in these small economies, while also opening greater opportunities for economic integration.

Conclusion

The Marpin case put the burden of proof squarely on the monopoly provider to demonstrate that communication technologies are more freely available under a monopoly than under competition. Experience suggests that this is a difficult case to make, and there is mounting worldwide economic, political and legal pressure to deregulate and open up telecoms markets.

However, for competition to provide a superior alternative to monopoly, a strong regulatory system is vital. Any such system involves significant fixed costs. In such a fast-moving sector, the great complexity involved in creating a regulator to cover several independent member states requires significant resources. Establishing ECTEL required legislation to be passed in member countries and the assent of national telecommunication regulatory bodies, but this process was finished a year ahead of project schedule.

The OECS Secretariat, the project's management unit and implementation committee, line ministries and extensive public consultation processes were all crucial to this effort. This suggests, *especially* in multi-country initiatives of this nature, the centrality of strong commitment and close involvement of the regional coordinating body (in this case the OECS), participant countries and their citizens. While the process is complex, however, the potential payoffs are large, and the ECTEL project suggests a model for telecommunications regulatory reform in other small economies.

Table 1: Service provider telephone rate reductions, 1 October 1999.

Calls to	*Percentage savings in daytime calls from*				
	Dominica	*Grenada*	*St Kitts*	*St Lucia*	*St Vincent*
Jamaica	17	11	11	10	10
Venezuela	13	10	11	10	11
USA	42	19–28	28	35	24
Canada	40	26	26	33	21
UK	33	20	11	36	34
France	39	43	35	31	25
South America (a)	11	29	11	10	11
Rest of World (b)	46	23–40	39	28	28–37

(a) excluding Guyana, Venezuela, (b) excluding other Caribbean countries and rest of Europe.