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**Decision Regarding Fastlink Appeal of Decision by Commissioner Kawar Regarding MobileCom Complaint**

Final Report
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## Table of Contents

I. Background ..... 1
A. MobileCom Complaint ..... 1
B. Fastlink response ..... 2
C. Commissioner Kawar's Decision ..... 2
D. Fastlink Appeal ..... 3
E. MobileCom Comments ..... 4
II. Legal Authority ..... 4
A. Statutory Duties and Responsibilities of the TRC ..... 4
B. Specific Powers of the TRC to Be Exercised in Furtherance of Its Statutory Responsibilities and Duties ..... 5
C. Fastlink's License Undertakings ..... 6
D. Appeal of the Decision on the MobileCom Complaint Is Properly Before the Commission ..... 7
III. Findings ..... 8
A. Fastlink Customers' Ability to Choose Plans With Lower Off-Net Rates Does Not Eliminate Anti-competitive Effects of Fastlink's Overall Pricing Structure ..... 8
B. The Decision to Limit Fastlink's Off-Net Prices to No More Than 200% of Its On-Net Prices Is Reasonable ..... 11
C. Fastlink's Pricing Behavior Violates the Terms of Its License ..... 15
IV. Conclusion ..... 18

**Decision Regarding Fastlink Appeal of Decision by Commissioner Kawar Regarding MobileCom Complaint**

This decision is in regard to the Appeal filed with the TRC by Fastlink on October 23, 2003, of the Decision issued by Commissioner Fadi Kawar on October 6, 2003, resolving the complaint filed by MobileCom on April 13, 2003.

The TRC has reviewed Fastlink's appeal, and having thoroughly investigated the issues raised by Fastlink, concludes that Fastlink has engaged in anti-competitive practices in violation of Articles 4.19 and 4.19.2 of its mobile license. The TRC has determined that regulatory intervention is required in order to protect the interests of telecommunications users in Jordan, and to ensure that the market for telecommunications services develops in a competitive manner in accordance with the established powers of the government of Jordan and the requirements of the Telecommunications Law. The appeal is therefore denied.

# I. Background

### A. MobileCom Complaint

On April 13, 2003, MobileCom filed a complaint with the TRC alleging that Fastlink is engaging in anti-competitive pricing in violation of its Public Mobile Telephone License. MobileCom stated that both MobileCom and Fastlink have established retail prices for off-net mobile-to-mobile calls that are higher than retail prices for on-net calls. However, MobileCom alleged that the prices for Fastlink's offnet calls are based on excessive retail mark-ups. MobileCom therefore argued that Fastlink has selected prices that provide a disincentive for Fastlink's customers to call MobileCom customers.[1] MobileCom also alleged that the termination rate it must pay to Fastlink to complete mobile-to-mobile calls originating on Fastlink's network, and thus the retail rates MobileCom must charge to its customers for off-net calls, are substantially greater than the rates Fastlink has established for on-net calling.

[1] MobileCom's complaint also alleged that Fastlink was engaging in unlawful cross subsidization of its on-net rates by charging high off-net rates that were set at a level well above cost. MobileCom's complaint specifically stated that the differential between Fastlink's retail off-net prices and the termination rate Fastlink charges to MobileCom is approximately three times the differential between MobileCom's retail off-net prices and the termination rate MobileCom charges to Fastlink to complete Fastlink calls. The Decision by Commissioner Kawar did not reach the merits of this claim, and cross-subsidization is not an issue in this Appeal.

### B. Fastlink response

On June 12, 2003, the TRC requested a response and further information from Fastlink. On July 28, 2003, Fastlink responded by denying the allegations. Fastlink argued that its low on-net tariffs reflect its decision to reduce prices during off-peak times to more efficiently utilize its network. Second, Fastlink denied that it has set prices that discourage off-net mobile-to-mobile calling, and stated that it offers products for which there is no pricing distinction based on call termination. According to Fastlink, demand for calls terminated to the MobileCom network is low, and reducing the price for off-net calls to MobileCom will not cause an increase in demand, but will only lower Fastlink's revenue. Fastlink also responded to data requests made by the TRC concerning subscriber numbers, traffic distribution and weighted average prices, but it did not provide data on cost per minute for on-net and off-net traffic, nor did it provide the requested “cost components and methodology of computation.”

### C. Commissioner Kawar's Decision

On October 6, 2003, Commissioner Kawar found that Fastlink's retail pricing scheme allows it to abuse its dominant position in violation of Articles 4.19 and 4.19.2 of its license. The Decision held that Fastlink has created a "lock-in effect" for Fastlink customers to prefer calling other Fastlink customers in lieu of MobileCom customers. Commissioner Kawar determined that this practice creates an inherent bias for prospective customers to choose Fastlink, the dominant operator in the mobile sector, and has allowed Fastlink to maintain its market share at approximately 75%. The Decision further found that the practice has inhibited the development of competition in the market for mobile services in Jordan. The Decision stated that Fastlink is therefore in violation of article 4.19.2 of its mobile license agreement, which forbids it from engaging in the abuse of its dominant position.

The Decision noted that the TRC had previously designated Fastlink as an operator with Significant Market Power with respect to mobile services and network markets and the national market for interconnection. Commissioner Kawar found that this designation establishes that Fastlink has a dominant position in the market.

The Decision found that Fastlink's charges for off-net calls to MobileCom customers range from 200% to 1900% over Fastlink's on-net retail tariff prices for any given customer group. The Decision further found that this differential exceeds the difference between on-net and off-net pricing in more competitive mobile markets in other countries. Based on international benchmarks, Commissioner Kawar found that an on-net to off-net pricing differential of greater than 200% is inconsistent with the functioning of a competitive market, and would allow Fastlink to abuse its dominant position in the market.

The Decision also examined various pricing plans offered by Fastlink, and concluded that Fastlink's pricing practices are anti-competitive. The Decision stated that for most large customers, prices for peak and off-peak on-net calls are below Fastlink's mobile-to-mobile termination rate. For the smallest users, the "night" rates and some other rates were below the mobile-to-mobile termination rate. The Decision found that Fastlink's pricing practices created a "price squeeze" whereby if MobileCom tried to match Fastlink's on-net pricing especially for its larger customers, MobileCom would incur a financial loss. In addition, the Decision found that because the Fastlink-to-MobileCom off-net calls are priced higher than Fastlink on-net calls, and because MobileCom cannot match Fastlink's on-net prices without incurring financial loss, Jordanians considering mobile telephone services have a price incentive to choose Fastlink as their provider. The Decision specifically attributed this preference to the combination of Fastlink's large market share of 75% and its pricing practices.[2]

Based on this analysis, Commissioner Kawar ordered that the maximum ratio of off-net to on-net prices for all of Fastlink's service offerings shall be no greater than 200%, and that interconnected operators shall have the right to purchase Fastlink termination services at the weighted average of its on-net retail rates or the approved interconnection rate, whichever is lower. The Decision specified that the remedies applied are "interim" measures that will continue in effect until the appropriate regulatory framework is established to ensure that Fastlink is unable to abuse its dominant position in the market. The Decision required Fastlink to file a monthly report verifying its compliance with the remedies.

### D. Fastlink Appeal

On October 23, 2003, Fastlink filed an appeal of the Commissioner's decision. Fastlink makes three arguments. First, Fastlink argues that it offers products that have off-net prices that are similar to, or the same as, on-net prices, and that customers are free to select packages and change packages. As a result, Fastlink claims, its pricing structure has no anti-competitive effect on Fastlink's customers. Second, Fastlink argues that the Decision below relied on a flawed analysis to establish the maximum ratio of Fastlink's off-net retail prices to its on-net retail prices at 200%. Finally, Fastlink claims that the Decision erred in relying on the Designation decision of March 2003 in determining that

[2] The Decision did not reach the issue of whether Fastlink is engaging in anti-competitive cross-subsidy of its on-net services. While the Decision noted that the differential between Fastlink's on-net and off-net mobile-to-mobile pricing was a "strong indicator" of a cross-subsidy, it found that a decision on this issue could not be concluded until the TRC has completed its pending examination of Fastlink's interconnection cost model.

Fastlink is dominant in the market for mobile services, because the Designation Decision did not address retail services.[3]

### E. MobileCom Comments

On December 2, 2003, MobileCom filed a letter commenting on Fastlink's appeal. MobileCom urged the TRC to affirm Commissioner Kawar's decision.

## II. Legal Authority

### A. Statutory Duties and Responsibilities of the TRC

Pursuant to the Telecommunications Law of 1995, as amended, the TRC operates as an independent regulator of the telecommunications sector. Among other things, the TRC is charged with granting Licenses for public telecommunications networks and services, managing the use of the Radio Frequency Spectrum, and making any decisions necessary to fulfill the general policy for the telecommunications sector specified in the Telecommunications Law and by the Ministry of Information and Communications Technology.[4] The Telecommunications Law assigns the Commission specific public policy responsibilities, including requirements that the Commission "stimulate competition," "forbid anti-competitive behavior or practices," and "forbid actions by any person to abuse a dominant position."[5] Specifically, Article 6 of the Telecommunications

Law of 1995, as amended, provides that the TRC has the following duties and responsibilities:

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[3] On October 16, 2003, Fastlink filed a letter making various inquiries about the Commissioner's Decision. Specifically, Fastlink: (1) reports that some of its tariff packages are within the 200% ratio; (2) asks whether the ratio should be applied globally or on a per package basis; (3) seeks further information about the development of the benchmark; (4) seeks further detail about what "appropriate regulatory framework" would replace the remedies applied to Fastlink here; and (5) asks for further detail on the reporting obligations. This decision responds to the issues Fastlink raises in its letter, with the exception of Fastlink's request for further detail on reporting obligations (5). The TRC will respond separately to that request.

[4] Telecommunications Law of 1995, as amended, at Article 3 (a). For example, the Ministry recently released a general policy statement in favor of the introduction of further competition in the mobile services sector in the form of at least one additional Licensee under different ownership than the two current Licensees. Statement of Government Policy on the Information and Communications Technology Sectors & Postal Sector, 4 September 2003.

[5] Article 6(e).

> a) To regulate Telecommunications … Services in the Kingdom in accordance with the established general policy so as to ensure the provision of high quality telecommunications … services to users at just, reasonable, and affordable prices; and, by so doing, to make possible the optimal performance of the telecommunications … sector[].
>
> ***
>
> d) To protect the interests of users and oversee the actions of persons and Licensees to ensure that the conditions of Licenses are observed, including specified service standards, service quality and prices; and to take the necessary steps in this regard to provide for the punishment of those who violate these conditions.
>
> e) To stimulate competition in the telecommunications … sector[], relying on market forces, and so regulating them as to ensure the effective provision of telecommunications … services and to ensure that its regulations are effective and efficient; to forbid anti-competitive behavior or practices; to forbid actions by any person to abuse dominant position in the sector and to take all necessary actions in this regard.
>
> ***
>
> o) To assess the need for the adjustment of the level of regulation of any telecommunications service, or specific type or group thereof, with regard to competition or any other factor that may require such adjustment or forbearance, and to recommend the same to the Board for approval.

In summary, the language of Article 6 calls upon the TRC to "regulate," or adjust its regulation, both to protect users and to promote competition in the telecommunications sector, and to forbid anti-competitive behavior, consistent with the Kingdom's general telecommunications policy. The TRC is therefore empowered, and compelled, to take action in order to carry out the "duties and responsibilities" detailed in Article 6.

### B. Specific Powers of the TRC to Be Exercised in Furtherance of Its Statutory Responsibilities and Duties

The Telecommunications Law, at Article 12, explains the types of regulatory actions available to the Commission in fulfillment of its duties. Article 12 of the Telecommunications Law of 1995 provides that the Commission has broad authority to implement the law: "[t]he Board shall exercise all the necessary powers to carry out duties entrusted to the Commission by virtue of this Law…."[6] Among other powers, the Commission has the authority:

[6] Article 12 (a).

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2. To prepare programs and issue instructions and decisions, and to take the necessary actions in this regard.

***

4. To renew, modify, or cancel any of the licenses mentioned in Paragraph (3) of this Article in accordance with this Law and regulations issued pursuant thereto; to oversee the performance of their terms….

***

7. To establish the bases for determining rates and tariffs for telecommunications services offered to Users by Licensees, in line with the state of competition in offering of services and service levels, and to monitor the compliance of Licensees as may be necessary.

8. To set the rates and tariffs of telecommunications services offered to Users in the case where competition is absent or imperfect because of dominance by any Licensee.

***

11. To consider complaints submitted to the Board by the users against Licensees, as well as inter-Licensee disputes, and to take the necessary action concerning them; ….

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The Telecommunications Law specifically directs the Commission to resolve inter-Licensee complaints and take any "necessary action" concerning them, issue any "instructions or decisions," oversee compliance with License terms, establish the bases for determining rates and tariffs for services offered to users, and set rates and tariffs of telecommunications services offered to users if competition is absent or imperfect because of dominance by any Licensee.

### C. Fastlink's License Undertakings

The TRC is charged with ensuring that licensees comply with the terms of their licenses. The undertakings in Fastlink's license relevant to this case are:

Article 4.21 Compliance with Law

> The Licensee shall comply with all laws of the Kingdom of Jordan applicable to its operations, including the Telecommunications Law, all decisions, rules and instructions of the TRC issued in accordance with law and all policies of the Government of Jordan. Notwithstanding the foregoing, the TRC shall not impose any regulatory requirements on the Licensee where such action would constitute a breach of this agreement.
>
> Article 4.19 Anti-Competitive Practices
> The Licensee will not alone or together with others, engage in or continue or knowingly acquiesce in any anti-competitive practices and, in particular, the Licensee shall
>
> ***
>
> 4.19.2 not engage in the abuse of its dominant position, if any;
>
> ****
>
> Article 8.6 Adherence to Terms of Licensing
> 8.6.1 The Director General of the TRC shall monitor the Licensee's adherence to this License Agreement and shall take appropriate measures to oblige the Licensee to comply with this License Agreement, the Telecommunications Law, regulations, the rules, instructions and decisions of the TRC and the policies approved by the Council of Ministers. Any decision of the Director General in exercising these responsibilities shall be final and binding on the Licensee until it is overruled by the Board of Directors of the TRC.

The relevant terms of Fastlink's license therefore require it to comply with the Telecommunications Law, not engage in anti-competitive practices, and not engage in the abuse of its dominant position.

### D. Appeal of the Decision on the MobileCom Complaint Is Properly Before the Commission

The Telecommunications Law specifies the procedure to be used when resolving complaints. Article 60 of the Telecommunications Law of 1995, as amended, specifies that complaints by one Licensee against another Licensee are to be resolved by the Commission. Article 60 (a). Complaints are first assigned to a designated Commissioner. The designated Commissioner shall "propose a solution" and his decision "shall be implemented immediately upon issuance." Objections to the decision may be filed within 30 days of issuance.[7] In this case, Fastlink has filed an objection to the Commissioner's Decision within the 30-day deadline for Appeal. As a result, the Appeal is properly before the TRC for decision.

[7] Article 60(b).

# III. Findings

After a thorough examination of the record in this case, and careful consideration of Fastlink's arguments and factual presentations, the Commission finds that Fastlink's on-net and off-net pricing, coupled with its 75% market share, is interfering with the growth of competition in the mobile services market. The Commission finds that Fastlink's pricing practices constitute anti-competitive behavior in violation of Fastlink's license. First, the Commission finds that Fastlink customers' ability to choose calling packages does not cure the anti-competitive effect of its pricing. Second, the Commission finds reasonable the use of a 200% ratio that caps Fastlink's off-net pricing relative to its on-net pricing, for each service package, on the basis of the data upon which Commissioner Kawar relied as well as additional data confirming the appropriateness of the 200% ratio. The Commission decides, however, to grant Fastlink a degree of flexibility in setting its retail prices and will modify its standard to require only that the difference between Fastlink's on-net and off-net prices be reasonable, as determined on a case-by-case basis. Finally, the Commission concludes that Fastlink was previously designated as a dominant provider in the market for network and mobile services, and therefore the Decision below correctly concluded that Fastlink was abusing its dominant position. In addition, the Commission finds that, regardless of Fastlink's designation as a dominant provider, Fastlink has engaged in an anti-competitive practice in violation of its License terms. The Commission notes that the prohibition on anti-competitive practices is not dependent on a finding that the entity engaged in the behavior is dominant. In the discussion below, the Commission discusses the basis for each of these conclusions in detail.

## A. Fastlink Customers' Ability to Choose Plans With Lower Off-Net Rates Does Not Eliminate Anti-competitive Effects of Fastlink's Overall Pricing Structure

### 1. Fastlink's Argument

Fastlink asserts that users have calling plan options that allow them to minimize the cost of calling a MobileCom customer. Fastlink points to its Consumer Postpaid Segment, and it alleges that the "free minutes effect," offering the same price to terminate calls regardless of destination, enables its customers to reach MobileCom subscribers without paying more. It claims a similar result for its "Corpackages" to the corporate segment. Fastlink argues that, because its users have options that allow them to reach MobileCom customers with off-net prices that are the same as or similar to on-net prices, Fastlink is not discouraging its customers from calling MobileCom customers. As a result, Fastlink says, it is not engaging in an anti-competitive practice. In addition, Fastlink also argues that users have the option of “moving freely” between tariff packages and that this option eliminates any anti-competitive effect of Fastlink's pricing decisions because some packages have low off-net rates.

### 2. Discussion

Based on analysis of Fastlink's tariffs, the TRC concludes that it is not correct, as a factual matter, that customers have the option of freely choosing pricing plans with an effective off-net rate equivalent to the on-net rate. But even if Fastlink were correct as a factual matter, and certain customers were able to select packages with equivalent off-net and on-net prices, that would not cure the general anti-competitive effect of Fastlink's pricing practices.

#### a. Actual Alternatives Available to Customers

First, the tariff packages that Fastlink describes effectively have different on-net and off-net pricing. These packages provide equivalent pricing for off-net and on-net minutes only for a limited number of minutes. Once the customer exceeds this threshold, the price for off-net minutes exceeds the price for on-net minutes. The average customer use under these plans exceeds the threshold number of minutes. Consequently, the effective price per minute for off-net and on-net calls is different.

Second, we note that in reaching the Decision below, Commissioner Kawar carefully examined the record Fastlink had provided on its tariffed packages, and found that every product offering included an on-net price that was below the terminating access rate charged to MobileCom. For products intended for large customers, peak and off-peak rates for on-net services are below Fastlink's mobile-to-mobile termination rate. For products used by the smallest users, the on-net "night rate" and some other rates are below Fastlink's mobile-to-mobile termination rate.

Third, our examination of the alleged ability of customers to freely move between Fastlink's calling plans indicates that, in fact, Fastlink imposes substantial transaction costs on customers who seek to make that choice. For example, in the prepaid calling market, customers may only switch plans without charge once per card. Any additional changes require customers to pay 2JD, an amount that is anywhere between 10% - 16% of the entire value of the most commonly used prepaid cards. Consequently, the facts do not support Fastlink's claim that customers can move freely.

#### b. Harm to Competition

Even if Fastlink were correct on the facts, Fastlink's arguments fail to address the core issue identified by Commissioner Kawar -- a price squeeze executed by an operator with a 75% market share. In these circumstances, the pricing behavior in which Fastlink is engaging presents a tremendous obstacle to competition because this behavior enables Fastlink to "lock in" and perhaps increase its market share. A market in which one provider were able to retain a 75% market share indefinitely would never become robustly competitive, and Jordan's citizens would be denied the benefits of competition, including lower prices, customer choice, and innovative offerings.

By pricing its on-net services to its own customers significantly below the termination rate it charges to MobileCom (and therefore significantly below the prices that MobileCom can charge its customers to reach Fastlink customers), Fastlink has created a "price squeeze." Faced with a price squeeze, MobileCom has two choices. MobileCom can lose money on off-net calls, if it decides to price those calls at a rate that is competitive with Fastlink's on-net rate. Alternatively, if it decides to price at a level to recover its termination costs, MobileCom will face slower growth in customers and minutes than would occur in a competitive market. In either case, Fastlink's actions are problematic because Fastlink has a 75% market share, and therefore the vast majority of existing mobile customers use Fastlink's services.

In response to Fastlink's price squeeze, MobileCom has opted to recover its termination costs in setting its off-net prices for calls from its customers to Fastlink customers. As a result, MobileCom's growth as a competitive mobile service provider has been slowed artificially. When shopping for a mobile services provider, only those customers who primarily want to call other MobileCom customers are likely to sign up for MobileCom's services. In other words, MobileCom, the second mobile services operator in Jordan with a market share of 25%, faces a significant hurdle in selling its services to persons who may want to call Fastlink customers (who represent 75% of mobile customers).

In a competitive market, customers are able to make decisions about which service provider to select based on factors such as service quality, billing, or whether the tariff package best matches their anticipated calling patterns (*e.g.*, time of day, international rates, total amount of calling). Fastlink, by implementing a pricing plan designed to perpetuate or even increase its market share, has effectively denied customers many of the benefits of competition. In addition, Fastlink's anti-competitive practices injure potential customers who do not take service today, but would subscribe to mobile service if prices were 25% lower. Rather than compete with MobileCom, Fastlink has created an environment in which its significantly larger market share causes subscribers to select Fastlink as a provider solely because there are more subscribers on its incumbent network. Growth in competition is therefore forestalled, along with the benefits that competition brings, including downward pressure on prices.[8]

The TRC is required by statute to promote competition for the general benefit of Jordanian citizens, and to forbid anti-competitive behavior by licensees. It is the TRC's

[8] The Ministry of Information and Communications Technology has recently released a policy statement calling for the introduction of licensing at least one additional facilities-based mobile services operator in the Kingdom beginning in 2004, with the specific objective that within the next 10 years, 50% of the population will be direct subscribers to mobile services paying unit charges that are 25% lower than at present in real terms. Statement of Government Policy on the Information & Communications Technology Sectors & Postal Sector, Ministry of Information and Communications Technology, September 2003.

responsibility to determine if pricing practices harm competition in the market. In this case, the Commission finds that they do.

### B. The Decision to Limit Fastlink's Off-Net Prices to No More Than 200% of its On-Net Prices is Reasonable

#### 1. Fastlink Argument

Fastlink questions the Commissioner's decision to refer to pricing data from a group of South American countries to develop the maximum ratio of off-net-to-on-net prices for Fastlink's service offerings. Fastlink argues that the decision should have relied on pricing information from mobile operators in the United Kingdom (UK) and Sweden as benchmarks for pricing in Jordan. Fastlink also argues that the TRC used a different set of countries to benchmark Jordan's interconnection rate in the interconnection proceeding, and that the TRC should be consistent in its use of countries it will reference in comparing prices.

#### 2. Discussion

##### *a. Selection of Benchmark Countries Should Be Based on Market Structure and Demographic Similarity to Jordan*

In the previous discussion, the TRC has concluded that Fastlink's pricing practices are anti-competitive. The TRC now determines that, based on an analysis of countries that have competitive mobile services markets and that are similar to Jordan demographically, Fastlink's off-net prices must be no more than 200% of its on-net prices, on a tariff package basis. The TRC affirms Commissioner Kawar's determination that the evaluation of off-net and on-net pricing in other countries is the best way to determine what the off-net to on-net pricing relationship should be for Fastlink.

In fashioning a remedy for the anti-competitive behavior identified, the TRC's objective is a retail pricing structure for Fastlink's mobile services that is reasonable. Using benchmark data from other countries that have a competitive market structure will assist the TRC in achieving its objective because competitive markets generally result in reasonable retail pricing structures. The TRC analysis uses the number of mobile operators as a proxy for market structure, and in particular, assumes that countries with three or more mobile operators have competitive markets for mobile services. As a result, the TRC finds that pricing data from countries with at least three mobile licensees provides a starting point for determining a reasonable off-net-to-on-net price ratio.

In addition, it is important that the benchmark countries be demographically similar to Jordan because the objective is to achieve a retail pricing structure that is reasonable for the Jordanian mobile services market. In establishing demographic similarity to Jordan, the most relevant statistic to use as a point of comparison is per capita income, known as Gross National Income per capita (GNI). GNI per capita is a useful economic comparison statistic because it provides a measure of the spending

power of the population and business conditions that affect demand for mobile services in a country.[9]

Based on these two criteria, the existence of at least three mobile licensees and the GNI per capita, the TRC finds that mobile services pricing structures in the countries listed below provides a sound basis for determining whether a relationship between off-net and on-net pricing is reasonable.[10]

Selected countries appear on the following list. All selected countries have at least three mobile operators. These countries all have GNI per capita within US $2,500 of Jordan's GNI per capita. Three of the Eastern European countries examined have GNI per capita that is virtually identical to Jordan's -- Kazakhstan, Bulgaria and Romania. The TRC finds that this group of countries is demographically similar to Jordan.

| Country | GNI per capita | Country | GNI per capita |
|---|---|---|---|
| Bolivia | US $ 900 | South Africa | US $2,600 |
| Kazakhstan | US $1,510 | Jamaica | US $2,820 |
| Jordan | US $1,700 | Brazil | US $2,850 |
| Bulgaria | US $1,790 | Lithuania | US $3,660 |
| Columbia | US $1,830 | St. Lucia | US $3,840 |
| Romania | US $1,850 | Venezuela | US $4,090 |
| Peru | US $2,050 | Estonia | US $4,130 |

Fastlink's argument that the TRC should consider data from the UK and Sweden is unpersuasive. The demographics of these two countries are vastly different from Jordan. The UK has a GNI per capita of US $25,200, a level that is 14 times greater than Jordan. Similarly, Sweden's GNI per capita is US $24,800.[11] While Italy was used as a

[9] After evaluating the record, the TRC finds that the group of South American countries used as a point of reference by Commissioner Kawar may not have been sufficient. While the South American countries have similar GNI per capita compared to Jordan, the number of countries used is small. To resolve this appeal, the TRC has examined additional countries that are demographically similar to Jordan, and have a competitive market structure. It is sufficient to reference a reasonable selection of countries that meet the criteria; there is no need to extract data from all such countries.

[10] Use of these two criteria results in the exclusion of many countries from consideration.

[11] It is not clear, moreover, that the data provided by Fastlink about differences in off-net and on-net rates in the UK are complete. The TRC's examination of the UK tariffs indicates that the rates used by Fastlink for comparison were for marginal minutes beyond the first three minutes of a call. Based on data available from operators in the United States, the average call length for mobile calls is in the range of approximately 2.3 - 2.6 minutes. Consequently, Fastlink's analysis of pricing for marginal minutes, beyond the initial three minutes of a call, does not allow one to ascertain the effective prices that

benchmark country in Commissioner Kawar's decision, the TRC finds that Italy should be excluded for the same reason that the UK and Sweden are excluded -- it is not a country that is similar to Jordan demographically. Italy's GNI per capita is US $19,000.

It is neither necessary, nor advisable, to use the list of countries from the interconnection proceeding as the reference point for mobile services pricing. In determining interim interconnection rates, the TRC examined foreign interconnection rates, not retail rates. The countries were selected for the interconnection benchmark comparison list because they had set interconnection charges based on cost.[12] The TRC's policy with respect to interconnection rates is to move those rates to cost. Evaluating the experience of countries that had done so was a reasonable mechanism to use to establish interim rates during the period in which the TRC is examining cost studies.

The exercise required to develop a remedy in response to the MobileCom complaint is quite different because it involves assessment of retail pricing practices, rather than interconnection rates. In seeking countries that could serve as reasonable benchmarks for a retail pricing ratio, the two most relevant factors are: (1) whether the country has a competitive market structure; and (2) whether the country is demographically similar to Jordan. Consequently, it is necessary for the TRC to establish an off-net/on-net ratio based on countries that meet these two criteria, and to exclude from consideration those that fail to meet the criteria. This analysis results in the development of a set of benchmark countries for use in evaluating retail pricing practices that is different from the benchmark countries used in the interconnection proceeding for a substantially different purpose -- the establishment of interconnection rates.

*b. Comparison of Off-Net to On-Net Rates for Benchmarked Countries Supports the Selection of a 200% Ratio*

Mobile operators in the countries selected for use as benchmarks show a consistent pattern in the relationship of off-net to on-net pricing. Most of the operators exhibit pricing ratios of between 100% to 200%. One operator in Bulgaria, one in Lithuania, and two in Romania slightly exceed 200%, but the vast majority of operators have off-net to on-net pricing ratios at 200% or below.[13]

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customers pay in the UK, nor do the data allow one to calculate an accurate off-net-to-on-net price ratio.

[12] Explanatory Memorandum in support of the Decisions of the Telecommunications Commission concerning interconnection charges and related retail prices, June 2003 at page 11.

[13] While complete pricing information is not available for all operators in all the countries selected, the TRC has examined all available pricing data. As will be discussed below, that data is remarkably consistent.

| Country* | Off-net price as a percentage of on-net price, per minute | Country | Off-net price as a percentage of on-net price, per minute |
|---|---|---|---|
| **Bolivia (3 operators)**<br>Telecel | 150% - 200% | **South Africa (3 operators)**<br>3C Telecommun-ications (Cell C)<br>MTN<br>Vodacom | 112% - 116%<br>110% - 126%<br>116% - 158% |
| **Kazakhstan (4 operators)**<br>GSM Kazakhstan (K-Cell) | 109% - 131% | **Jamaica (3 operators)**<br>Mossel/Digicel | 177% - 197% |
| **Jordan (2 operators)**<br>**Fastlink** | **200% - 1900%** | **Brazil****<br>TIM<br>Telemar | 121%<br>100% |
| **Bulgaria (3 operators)**<br>MobilTel (M-Tel) | 240% - 257% | **Lithuania (3 operators)**<br>Bite<br>Omnitel | 144% - 204%<br>125% - 233% |
| **Columbia (3 operators)**<br>Comcel | 100% | **St. Lucia (3 operators)**<br>C&W (consumer)<br>Digicel (business) | 100%<br>118% - 122% |
| **Romania (4 operators)**<br>MobiFon (Connex)<br>Orange Romania<br>Telemobil (Zapp) | 100% - 250%<br>155% (minutes beyond initial bucket)<br>183% - 290% | **Venezuela (5 operators)**<br>Movinet<br>Telecel | 100% (minutes beyond initial bucket)<br>117% - 125% |
| **Peru (3 operators)**<br>TIM<br>Movistar | 200%<br>150% - 175% | **Estonia (3 operators)**<br>EMT | 100% - 163% |

*For each country, the number of mobile licensees is provided in parenthesis.
** Brazil has numerous operators, although many are regional, rather than national, operators.

In contrast, Fastlink's off-net to on-net pricing ratios are notably different, beginning at 200% and growing to 1900% for some products. Based on this data, the TRC finds that Fastlink's ratio of off-net to on-net prices are far in excess of international benchmarks. A 200% ratio is at the high end of the ratio found for operators in countries that are demographically similar to Jordan, and that have similar market conditions. Application of this ratio will substantially reduce the pricing differentials and will better enable the growth of competition in the market for mobile services in Jordan.

In addition, there are several other observations to make about the 200% ratio. First, the decision to constrain the percentage difference between Fastlink's off-net to on-net pricing is a narrow exercise of the TRC's authority. For example, this ruling does not constrain absolute price levels. Second, Fastlink was given an opportunity in its reply to the complaint to provide cost information that would justify its much higher off-net prices, and chose not to do so. Finally, Fastlink does not argue on appeal that the 200% ratio unreasonably burdens Fastlink or renders Fastlink unable to earn a reasonable return on investment. These observations support the view that the use of the 200% ratio of off-net to on-net prices is reasonable.[14]

Fastlink also argued that the TRC should not impose a threshold as rigid as the requirement that the difference between on-net and off-net rates not exceed 200%. Fastlink argues that such a threshold does not take into account potential future market conditions and may unduly hamper it from developing new pricing schemes that would not violate the spirit of this ruling and which could be beneficial to consumers. Fastlink has, however, submitted a set of proposed prices that complies with the 200% threshold imposed in Commissioner Kawar's decision, notwithstanding their objection to the 200% threshold articulated above.

The TRC appreciates Fastlink's concerns. While the TRC strongly believes it would be justified in applying the 200% threshold, it decides here to adopt a looser standard, that of reasonableness, to govern the allowable ratio of on-net to off-net rates. Thus, the TRC will determine, on a case-by-case basis, whether Fastlink's rates are consistent with this decision, based on whether the ratio of on-net to off-net rates is reasonable. Whether such a difference is reasonable will be determined based on market conditions that prevail in Jordan and in similar countries with competitive mobile telecommunications markets. To the extent that the TRC finds in the future that Fastlink continues to engage in anticompetitive pricing practices and that the above remedy is not sufficient to constrain its anti-competitive behavior, it reserves the right to re-impose the 200% threshold for the ratio of on-net to off-net prices.

### C. Fastlink's Pricing Behavior Violates the Terms of Its License

#### 1. Fastlink Argument

[14] On appeal, Fastlink did not challenge the second legal remedy adopted in Commissioner Kawar's decision -- that other interconnected operators shall have the right to purchase Fastlink's termination services at the weighted average of its on-net retail rates or the approved interconnection rate, whichever is lower. Fastlink also did not challenge the requirement that it file a monthly report on its compliance with decision. Accordingly, the TRC does not address these requirements in this decision, and they remain in effect pursuant to Commissioner Kawar's decision.

Fastlink argues that the TRC has previously designated Fastlink as an entity with Significant Market Power with respect to its network operations, but not with respect to its retail operations, and that the Decision of Commissioner Kawar erred in treating Fastlink as a dominant operator.[15]

**2. Discussion**

a. Designation of Fastlink as a Dominant Operator

The Designation Decision to which Fastlink refers was adopted in the context of a lengthy proceeding that had as its goal the establishment of interconnection rules that will support competition in the telecommunications sector. The Decision explained that to the extent a provider is able to exercise market power, competition may be impeded. The TRC therefore adopted a test to determine which Licensees possess market power, and then applied that test to existing operators, "designating" specific entities as "dominant." These dominant providers were then required to comply with interconnection guidelines intended to prevent them from exercising market power, for example, by raising interconnection rates or denying collocation.

The market power test adopted in the Designation Decision is as follows. First, operators with a 25% share of the market may be considered to have "significant market power," provided that the operator also exhibits some other factors relevant to its ability to exercise market power, such as economies of scale and scope, an ability to influence market conditions and prices, and control of the means of access to end users.[16] Second, the Designation Decision defined four relevant product markets in the telecommunications sector, including the "mobile telephony network and services market."[17] The other markets identified were the fixed public telephony network and services market, the leased lines market, and the national market for interconnection. In the text of the decision concerning product markets, the TRC observed that: "In this designation process, TRC is concerned primarily with market power at the network level. The above markets are being dealt with at the network level (interconnection) and not the retail level." Third, the Designation Decision determined that the relevant geographic market is the Kingdom of Jordan.[18] Finally, the TRC decided to use call termination revenue as the measure of market share.[19]

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[15] Determination re: Designation of Public Telecommunication Operators/Service Providers for the purposes of the Interconnection Guidelines in the Hashemite Kingdom of Jordan, March 17, 2003 (Designation Decision).

[16] Id. at 2-3. The Designation Decision specifies 15 such factors.

[17] Id. at 4.

[18] Id. at 5.

[19] Id. at 6.

After applying its market power test, the TRC designated Fastlink as an operator with Significant Market Power with respect to: "mobile services and network markets (network); and the national market for interconnection." The TRC stated that in the Designation Decision, that, as an immediate consequence of this designation, the terms of the Interconnection Guidelines would apply to Fastlink.[20]

In the Designation Decision the TRC defined one product market that included both mobile telephony network and services, and designated Fastlink as dominant with respect to services as well as its network. In both the text and in the conclusion of the Designation Decision, the relevant market is defined as "the mobile public telephony network and services market."[21] In the portion of the decision that designates which operators have market power in which markets, Fastlink is designated for the mobile services and network market.

The nature of Fastlink's argument is not precisely clear. To the extent that Fastlink is arguing that the use of the term "services" in the Designation Decision does not mean "retail services," Fastlink is incorrect. The term "services" is specifically defined by the Telecommunications Law and is distinct from the term "network." In the Telecommunications Law of 1995, a public telecommunications service is defined as a "… telecommunications service provided for compensation to the general public or any category thereof …." A public telecommunications network is defined as a "… telecommunications system or group of telecommunications systems for the offering of Public Telecommunications Services to Users …." The reference in the Designation Decision to mobile "services" has the same meaning as the definition of "services" found in the statute. Therefore, the proper reading of the Designation Decision is that it found Fastlink dominant for all its service offerings, including its retail offerings.

Fastlink's argument, that the language of the text indicates that the TRC limited the finding of dominance to the network, is not persuasive. While the text of the Designation Decision does state that it is "primarily" concerned with market power at the network level (not the retail level), the word "primarily" does not have the same meaning as "exclusively." The TRC focused on the network in this particular decision because of the immediate implications with respect to the application of the interconnection guidelines. Having found operators dominant, the outcome of interconnection proceeding would relate to what interconnection rules the dominant providers should follow, and the TRC would not, in the Designation Decision, address other topics that might relate to a provider's dominance.

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[20] Id. at 7. The TRC declined to designate MobileCom as an operator with Significant Market Power.

[21] Id. at 4. Both the text at 3.2.1 and the conclusion at 3.2.2 contain the identical definition.

Therefore, Commissioner Kawar correctly concluded that the March 17, 2003 Designation Decision found Fastlink to be dominant in the market for mobile services and network. Based on our finding that Fastlink's pricing has produced competitive harm, we affirm the Commissioner's conclusion that Fastlink has abused its dominant position.

2. Finding of Anti-competitive Behavior in Violation of Article 4.19 of Fastlink's License

Regardless of whether Fastlink previously has been found to be a dominant operator with respect to retail services, Fastlink's license forbids it to engage in anti-competitive behavior. Fastlink's license at Article 4.19 states "[t]he Licensee will not alone or together with others, engage in or continue or knowingly acquiesce in any anti-competitive practices…." [22]

The TRC now finds that Fastlink, by engaging in a price squeeze by setting its on-net rates below its mobile termination rate, indisputably has engaged in prohibited anti-competitive behavior in violation of its license. Due to its pricing conduct, Fastlink has been able to slow the growth of its only competitor in the mobile services market, by making the cost of calls from MobileCom customers to Fastlink customers expensive relative to on-net calls on Fastlink's network. As a result, customers will choose Fastlink as their service provider whenever the individuals they want to call are on Fastlink's network. Because Fastlink has 75% of the market share, more customers are likely to choose Fastlink than its competitor MobileCom, thereby perpetuating Fastlink's market share. Competition is therefore harmed, because Fastlink can slow or prevent its competitor's growth. Whether Fastlink increases prices to customers, or simply forestalls competition that would put downward pressure on prices of tariff packages, the effect is to harm competition to the detriment of the public, in direct opposition to the Commission's clear statutory directive to "stimulate competition" in telecommunications markets and to "ensure" "just, reasonable and affordable prices …." [23] This finding provides an independent basis for the requirement that Fastlink develop a revised pricing scheme that no longer violates its license conditions.

# IV. Conclusion

Based on our authority under Article 6 of the Telecommunications Law to regulate licensees to ensure just, reasonable and affordable prices, to make possible the optimal performance of the telecommunications sector, to ensure that the conditions of Licenses are observed, to stimulate competition in the telecommunications sector, to

[22] Section 6(e) of the Telecommunications Law requires the Commission "**…** to forbid anti-competitive behavior or practices**…**."

[23] Article 6 (a) and (e).

ensure that regulations are effective and efficient, to forbid anti-competitive behavior or practices, to forbid abuse of a dominant position, and to assess and adjust our regulations with regard to competition, the TRC denies the appeal by Fastlink. The TRC finds that Fastlink has violated the terms of its license, which require it at Article 4.19 and Article 4.19.2 not to engage in anti-competitive practices and not to engage in the abuse of its dominant position.

The TRC's decision has: (1) identified the competitive harm caused by Fastlink's anti-competitive retail pricing practices; (2) affirmed that Fastlink is classified as a dominant provider in the mobile network and services market; (3) affirmed that Fastlink has abused its dominant position in the market; (4) affirmed that Fastlink has engaged in an anti-competitive behavior or practice in violation of the terms of its license; and (5) found reasonable a narrowly tailored regulatory requirement that Fastlink maintain a differential of no more than 200% between its off-net termination prices at retail, and its on-net prices, on a per tariff package basis. (6) found that it is appropriate to provide Fastlink with greater flexibility than the 200% threshold allows and instead will review Fastlink’s rates on a case-by-case basis and require only that the difference between Fastlink’s on-net and off-net rates be reasonable.

The remedy selected by Commissioner Kawar, and which we affirm here, is narrowly tailored to address the harm identified, and is prospective in nature. Per the decision below, the revised pricing scheme shall have the following components:

(1) Based on international benchmarks, the ratio of off-net to on-net prices for all service offerings shall be reasonable, as determined by the TRC.
(2) Other interconnected operators shall have the right to purchase Fastlink termination services at the weighted average of its on-net retail rates or the approved interconnection rate, whichever is lower.

These requirements shall be considered interim in nature, and shall continue to apply until such time that the Commission determines that these conditions are no longer required to assure that the competition policies of the Kingdom will be fulfilled. For example, the TRC has not yet concluded its examination of cost-based interconnection rates, and has recently received a policy directive to establish additional facilities-based competition for mobile services, which would end the existing duopoly. The TRC anticipates that at some point in the future, a more fully competitive mobile services market will develop that will allow the removal of the two conditions on Fastlink that we apply here.