



*IN THE SUPREME COURT OF JUDICATURE OF JAMAICA*

*IN MISCELLANEOUS*

*SUIT M 40 OF 2001*

*IN THE MATTER OF AN APPLICATION  
BY INFOCHANNEL FOR AN ORDER OF  
PROHIBITION.*

*BETWEEN INFOCHANNEL LIMITED APPLICANT  
AND OFFICE OF UTILITIES REGULATIONS RESPONDENT  
AND CABLE & WIRELESS JAMAICA LTD INTERVENER*

*Dr. Lloyd Barnett and Harold Brady instructed by Brady and Company for Applicant.*

*Patrick Brooks and Maurice Manning instructed by Nunes Scholefield Deleon and Company for the Respondent.*

*Miss Hilary Phillips and Kipcho West instructed by Grant, Stewart Phillips and Company for the Intervener.*

*Heard: July 2, 3 and August 23, 2001.*

*Harris, J*

The Applicant by way of Notice of Motion seeks an Order for Prohibition. The relief sought was couched in the following terms: -  
“An order of Prohibition prohibiting the Office of Utilities Regulation (OUR) from conducting a hearing on April, 18, 2001 with respect to the

operations of the InfoChannel Limited and or specifying terms and conditions for discontinuance of specified services by C&WJ to InfoChannel Limited on the following telephone lines;

<u>GROUP A</u>	<u>GROUP B</u>
9808001	9807012
9808002	9807015
9808003	9807016
9808004	9807017
9808005	9807018
9808006	9807019
9808007	9807020
9808008	9807024
9808009	9807086
9808010	
9808011	
9808012	
9808013	
9808014	
9808015	
9898018	

pursuant to Section 51 of the Telecommunications Act. AND from issuing any other such terms and conditions under the Telecommunications Act upon the grounds set forth in statement served herewith used on the application for leave to apply for the said Orders”

### **Background**

The Applicant is a company duly incorporated under the laws of Jamaica on December 5, 1989. It has offered value-added information service based

upon telecommunication transmissions and computer network technology to the public since 1995.

It provides service to its subscribers and users of Internet services by deployment of its network and facilities including a Very Small Aperture Terminal (VSAT) Earth Station Apparatus, its bank of computers and related equipment configured for delivery of Internet services. A licence was granted to the Applicant under the Radio and Telegraph Control Act to operate the Very Small Aperture Terminal (VSAT). This license, issued by the Minister of Technology in 1998, authorized the Applicant to establish, maintain and operate the VSAT telecommunication system for provision of Internet Services.

The Telecommunications Act was enacted and came into operation on March 1, 2000.

By letter dated January 22, 2001, the Applicant was informed by The Office of Utilities Regulations (hereinafter referred to as "OUR") that Cable and Wireless Jamaica Limited (hereinafter referred to as "C&WJ") had submitted an application to it under Section 51 of the Telecommunications Act. The subject matter of the application was a complaint by C & WJ made to the OUR against the Applicant, in September 28, 2000. This was followed by a further complaint on January 24, 2001. The complaint was with

reference to allegations of Voice Over Internet Services being carried out by the Applicant in the form of incoming and outgoing bypass activities through telephone lines assigned by C&WJ to the Applicant. The letter of September 28, 2000 listed 16 lines; reference had been made to these as Group A lines. The January 24 application listed 9 additional lines. These had been designated Group B lines.

A reply dated January 25, 2001 from the Applicant was sent to OUR stating, among other things, that C&WJ's report was being analyzed by it and that it enjoys the protection of section 85 of the Telecommunications Act in addition to protection under an agreement between the Minister of Technology, C&WJ and itself. Further correspondence passed between the Applicant, through its Attorneys-at-law and the OUR. This included a written submission by the Applicant in response to C&WJ's allegations.

The Applicant was invited to a hearing which was conducted on February 21, 2001.

In a letter of March 12, 2001 the OUR directed C&WJ to impose terms and conditions, by virtue of section 51 of the Telecommunications Act, for discontinuance of service on Groups A and B telephone lines. A letter of March 14, 2001 transmitted the result of the hearing to the Applicant through their Attorneys-at-law, wherein the Applicant was

informed that C&WJ had been authorized to effect a partial disconnection of certain telephone lines to produce unidirectional dialing, as an interim measure.

On March, 15, 2001 the Applicant through its attorneys-at-law informed the OUR that Group B lines, which were neither the subject of complaint by C&WJ nor the hearing of February 21 were included on the list of lines which were subject to partial disconnection and requested that an amendment be made to the OUR's ruling.

In a letter of reply on March 15, 2001 the OUR informed the Applicant, through its attorneys-at-law, inter alia, that the lines specified in their letter were lines subject to both applications from C&WJ, in September 28,2000 and January 24, 2001. The letter also summoned the applicant to a hearing on March 21, 2001 which hearing was re-scheduled to April 4 and further postponed to April 18, 2001.

By letter of March 29, 2001 the OUR informed the Applicant of a hearing on April 18, 2001. The proposed hearing has been held in abeyance in obedience to an order of this court for a stay of all proceedings pending the outcome of the hearing of this application.

I will now turn to the application. The Applicant has placed reliance on four grounds. It is convenient for consideration to be given to the first and last grounds simultaneously. These have been expressed as follows: -

“3.1 The OUR has no jurisdiction pursuant to Section 51 of the Telecommunications Act 2000 to conduct a hearing set for April 18, 2001 into allegations of bypass operations by Cable and Wireless in its letter of complaint dated January 24, 2001 in respect of Group A as well as Group B lines.

3.4 The hearing fixed for April 18, 2001 seeks to deal with the same Group A lines in respect of which the OUR has already made a determination on March 12, 2001 and does not arise from an application from an aggrieved person resulting from the said decision”

The main issue to be determined surrounds the correctness of the decision of the OUR to conduct the hearing which it contemplates. The question to be answered therefore, is whether the OUR is empowered to conduct the proposed inquiry into allegations of bypass operations by the Applicant with respect to Groups A and B lines, in view of the fact that a hearing was conducted on February 21, 2001 and there has been no further complaint by C&WJ or any application presented under Section 60 (4) of the Telecommunications Act.

The OUR is the regulatory organ charged with the responsibility of supervising the telecommunications industry and is obliged to execute its functions within the parameters of the Telecommunications Act.

It is endowed with a wide array of duties and powers to ensure the orderly operation of telecommunication services. Although C&WJ had made the applications under section 51 of the Act and the OUR had indicated that it had dealt with the application under that section, various other sections of the Act bestow on the OUR certain powers, rights, duties and obligations. It follows therefore, that section 51 cannot be dealt with in exclusivity. It is imperative that the statute is examined as a whole.

Under section 4 (1) (a) to (i) of the Act the OUR is authorized to regulate telecommunications in accordance with the statute, inter alia, to regulate specified services and facilities and on its own initiative, or at the request of any person carry out investigations to determine whether the Act has been contravened.

Section 9 (1) of the Act renders bypass activity illegal. Section 9 (1) states:

- “9 (1) A person shall not-
- (a) own or operate a facility in Jamaica unless that person is the holder of a carrier licence granted under section 13;
  - (b) provide specified services to the public by means of that facility unless the person is also the holder of a service provider licence granted under section 13;
  - (c) sell, trade in or import any prescribed equipment unless that person is the holder of a dealer licence granted under section 13;
  - (d) engage in bypass operations.”

By section 51 the OUR is permitted to specify terms and conditions upon which a carrier or service provider may discontinue service upon its receipt of a complaint from such carrier or service provider. The relevant provision states as follows:

“51. A carrier or service provider may on application to the Office and on such terms and conditions as the offices may specify: -

- (a) discontinue the provision of specified services to any person;  
or
- (b) disconnect any facility from that carrier’s facility or another facility used to provide that service provider’s specified services;

if that carrier or service provider believes on reasonable grounds that the person who owns or operates that facility or person to whom that those specified services are provided, is engaging in bypass operations or in conduct in respect of international services that is prohibited or regulated by the international service rules.”

Section 60 (4) permits the OUR to review its decision where a person aggrieved with such decision makes an application for reconsideration.

Section 60 (4) reads:

“60 (4) A person who is aggrieved by a decision of the office may, within fourteen days of receipt of that decision, apply to the Office in the prescribed manner for a reconsideration of the matter.”

Subsection 5 continues thus:

“(5) An application under subsection (4) shall only be heard if the applicant-



- (a) relies upon new fact or changed circumstances that could, not with ordinary diligence have become known to the applicant while the matter was being considered by the Office: or
- (b) alleges that the decision was based upon material errors of fact or law.”

By section 63 (1) the OUR is permitted, on its own initiative, or on the application of any person to issue a cease and desist order in circumstances where it is satisfied that there are reasonable grounds for believing that “any conduct specified in subsection (2) is being carried out by any person.”

Section 2 states, inter alia, as follows: -

“(2) The conduct referred to in subsection (1) is as follows:-

- (a) any bypass operation in contravention of this Act or regulations made under this Act”
- (b) -----
- (c) -----

It is necessary at this stage to make reference to the definitions of certain technical words and phrases as outlined in section 2 of the Act. Those which require special reference are as follows:-

“Bypass operations” means operations that circumvent the international network of a licensed international voice carrier in the provision of international voice services.

“Data service” means a specified service other than a voice service.

“Existing telecommunications carrier” means Cable and Wireless Jamaica Limited and includes any wholly owned subsidiary or any successor or assignee of that company.

“Facility” means any physical component of a telecommunications network (other than customer equipment) including-

- (a) wire, lines, poles, duct, sites, and towers. Satellite earth stations or any other apparatus using the radio spectrum;
- (b) submarine cables and other tangible resources used in the provision of a specified service;”

“Internet access” means access to the Internet or any similar global system for linking networks together using, as the basis for communications, transmission protocols or internet protocols or any protocols amending or replacing them.

“License” means a license granted under this Act.

“the Office” means the Office of Utilities Regulation established under the Office of Utilities Regulations Act.

“specified service,” means telecommunications service or such other service as may be prescribed.

“telecommunications” means the transmission of intelligence by means of guided or unguided electromagnetic, electrochemical or other forms of energy including but not limited to intelligence-

- (a) in the form of
  - (i) speech, music or other sounds;
  - (ii) visual images, whether still or animated;
  - (iii) data or text;
  - (iv) any type of signals;
- b) in any form other than those specified in paragraph
- (c) in any combination of forms, and,
- (d) transmitted between persons and persons, things and things or persons and things.

“Telecommunications service” means a service provided by means of a telecommunications network to any person for transmission of intelligence from, to or within Jamaica without change in content or form and includes any two way or interactive service that is provided in connection with a broadcasting service or subscriber television service.

“Voice service” “ means –

- (a) the provision to or from any customer of a specified service comprising wholly or partly of real time or near real time audio communications, and for the purpose of this paragraph, the reference to real time communications is not limited to a circuit switched service;
- (b) a service determined by the Office to be a voice service within the provisions of section 52, and includes services referred to as voice over the Internet and voice over IP

In the initial letter of September 28, 2000 C&WJ, “the service provider” and the “existing telecommunications carrier”, submitted a complaint to the OUR with respect to the Applicant’s engagement in incoming and outgoing bypass operations. Evidence by way of a report was adduced by the C&WJ in support of the complaint. In the second paragraph of its letter, the C&WJ stated that the Applicant by its own admission had been engaging in and facilitating outgoing bypass operations. The C&WJ also reported that subsequent to a previous imposition of restrictions on certain of the Applicant’s telephone lines, the Applicant transferred incoming bypass activities to other lines. Evidence was also presented by

C&WJ to show that officers of C&WJ had demonstrated their ability to communicate with parties overseas by voice over Internet by utilization of the Applicant's system

The C&WJ requested, in its first complaint to the OUR, that terms and conditions be imposed to discontinue service on any lines used for outgoing bypass, to which it referred in its report. The requisition also included that it be granted the option to discontinue service for outgoing bypass operations without the necessity of having to re-apply each time a breach occurs and that the telephone lines used for incoming bypass be made unidirectional.

In its second letter of complaint dated January 24, 2001, the C&WJ alleged that the Applicant persisted in its indulgence in bypass operations. Further evidence was submitted in support of this complaint. This included an analysis of the Applicants' billing data showing the number of outgoing calls made from a telephone assigned to the applicant greatly exceeding those made to C&WJ. An exhibited graph displaying comparisons between the outgoing and incoming calls, portrayed the number of outgoing calls being excessive while incoming ones insignificant. In addition, there was also evidence obtained from customer's survey report indicating the receipt of calls by customers of C&WJ from parties overseas which had not been transmitted through C&WJ's international switch. These calls had been

traced to certain telephone numbers assigned to the Applicant. The survey also denoted that some of the C&WJ'S customers complained that the calls were poor in quality.

On March 12, 2001 the OUR conducted an inquiry into incoming bypass operations by the applicant. On March 14, 2001 OUR notified the applicant that they had authorized C &WJ to "effect partial disconnection of lines specified above to allow one way dial only as an interim measure." The OUR informed the Applicant that it had " stipulated that ten lines would remain in full service for administrative purpose." The partial disconnection was with reference to the lines in Groups A and B. The OUR having given authorization to C&WJ to impose partial disconnection on the lines by virtue of section 51 of the Act and although it stipulated that it was an interim measure, was this an order which ought to be construed as final, by which it would be debarred from proceeding any further with the matter?

The foundation of the Inquiry is laid in bypass operations. Bypass operations is an offence under the Telecommunications Act. It is my view that Parliament having endowed the OUR with wide regulatory powers and duties with respect to the matters touching telecommunication services, intended that the powers conferred by the statute, are not only inclusive of such as granted under section 51 but also those which are necessary to

accomplish its duties and obligations as are expedient to prevent breaches of the Act. It must have been the intention of parliament that the OUR ensures full compliance with the observance of all its duties as required by the Act.

Mr. Courtney Jackson, the Deputy Director General of OUR, an Engineer, who holds a Master of Science Degree in Electrical Engineering and a Master of Science Degree in Systems Engineering having 16 years experience in the field of telecommunications deposed to an affidavit dated May 18, 2001. He disclosed that he had reviewed the reports of C&WJ and was of the opinion that the Applicant was engaged in bypass operations by means of VOIP, that is voice over internet protocol, which involves the circumvention of the C&WJ's international voice services. The complaint before the OUR related to both incoming and outgoing bypass activities by the applicant Bypass operations are rendered illegal under the Act. The OUR has a responsibility to address complaints relating not only to incoming bypass activities but also those of outgoing bypass operations.

In a letter from OUR dated the March 15, 2001 under the hand of its Director General to the Applicant, the fourth, fifth and sixth paragraphs state as follows: -

*“As you are aware Terms & Conditions were issued on March 12, 2001 to CWJ. The lines subject of these terms and Conditions are the lines specified in both applications as referred to above. You will note that the Terms & Conditions impose a restriction, which allows*

*CWJ to reduce the service to "one-way dial" rather than a complete discontinuance of service.*

*As you are also aware, Cable and Wireless' applications request in the alternative, a complete discontinuance of service based on the evidence of continuing bypass operations. The writer is advised that this specific issue was not addressed in the meeting of February 21, 2001.*

*We hereby request that you attend our offices on Wednesday March 21, 2001 at 2:30 pm to state your clients position on this issue i.e. the allegation in relation to continuing bypass operations relating to:*

- 1. Outgoing traffic bypassing CWJ's network*
- 2. Incoming traffic bypassing CWJ's network"*

This letter clearly demonstrates that the matter of outgoing bypass activity had not been addressed at the hearing on February 21. It is obvious that the issue of complete disconnection of lines or the discontinuance of service had not been determined.

A subsequent letter of March 29, 2001 to the Applicant's attorneys-at-law from the OUR stated that, at the proposed hearing, "particular focus will be placed on C&WJ's allegation of Infochannel's outgoing bypass activity which was not addressed at the February 21 hearing" By this statement, the OUR is indicating that, at the hearing, emphasis will be placed on the issue of the outgoing bypass allegations. The OUR is charged with the responsibility of addressing not only incoming bypass activities but also outgoing bypass operations. Even if it is viewed that the OUR had fully

addressed the issue of incoming bypass operations, it is obvious that its ruling is inconclusive on the main issue of bypass operations, as the matter of outgoing bypass activities by the Applicant is still outstanding.

The OUR made an order in which only the issue of incoming bypass was addressed and it informed the Applicant that it was an interim measure. This must be interpreted as its reservation of the right to adjudicate on the matter of outgoing bypass. It had not fully dealt with the main issue in dispute, that is, disconnection of the facility or discontinuance of the specified service. It could not have been the intention of the legislature to have conferred such powers on the OUR as they have and at the same time restrict it from making orders to fully discharge its duties under the Act.

The OUR is not only empowered to regulate telecommunication activities but also to adjudicate on them. Bypass activity is prohibited by the Act. Further, the OUR is not restricted to act only on the receipt of a complaint but may act on its own initiative in circumstances where it has reasonable cause to suspect that a person is engaging in an activity which is prohibited by the statute. In such circumstance, it may carry out investigations and initiate process and make a ruling.

Dr Barnett urged that the OUR having made a determination with respect to Group A lines has no jurisdiction to revisit the matter unless an



application is made in accordance with statutory provisions for review in respect of which the particular procedure is followed, in that, the OUR is precluded from embarking upon any further hearing or reconsideration of the matter unless section 60(4) of the Act has been invoked.

He further submitted that the statute empowers the OUR to deal with complaints by issuing terms and conditions with respect to discontinuance. The statute makes no provision for interim orders and the concept of an interim order is inconsistent with the statutory scheme which lays down a precise and restrictive timetable by which applications for review have to be brought.

Subsections (4) and (5) of Section 60 provide for an aggrieved party to make an application for a review by the OUR of its decision and for such application to be heard only if the Applicant demonstrates that new facts or changed circumstances had arisen, which could not with ordinary diligence have become known while the matter was being considered, or that OUR'S decision was based on errors of fact or law. In my judgment, so far as the applicability of section 60 (4) is concerned, the question of its invocation would only be pertinent in circumstances where OUR had in fact made a final decision on the issue of bypass operations. Had the OUR delivered a final ruling on the matter relating to both incoming and outgoing bypass

operations, the Applicant would then be entitled to pray in aid this section of the Act.

Section 60 (4) and (5) does not in any way fetter the powers of the OUR to conduct the proposed hearing. The matter of bypass activities has not yet been completely adjudicated upon. In the performance of its regulatory role the OUR is duty bound to investigate any conduct or operation within the telecommunications system which it considers illegal and must execute its function in such a manner as to bring any matter touching a breach of the Act, to a finality. The OUR had not disposed of the principal matter in issue, that is, bypass activities. The exercise upon which the OUR intends to embark cannot be deemed one which is outside the scope of its jurisdiction.

It has also been the Applicant's contention that up to February 2001, the provision of Internet service, inclusive of Voice over Internet was not regulated by the Telephone Act nor by the Radio and Telegraph Control Act which governed wired and wireless telecommunication services. The Telephone Act was repealed by the Telecommunications Act. The Telecommunications Act made provisions for regulations for telephony, telegraph and telecommunication services.

The Applicant also maintained that a licence issued under the Radio and Telegraph Control Act, its VSAT licence, has been preserved by sections 76 and 85 of the Telecommunications Act.

Section 76 (1) of the Act provides as follows: -

“76 (1) Any licence which was, before the appointed day granted under the Radio and Telegraph Control Act and is subsisting on the appointed day shall, on and after that day, be deemed to have been granted under this Act and shall, with modifications as may be necessary, and until a licence is granted under this Act, continue to have effect in accordance with the terms thereof and subject to the provisions of this Act.”

It has not been disputed that a VSAT licence issued to the Applicant subsists by virtue of section 76. Additionally, there can be no controversy that the Applicant was authorized to provide voice telephony service. However, the Intervener, C&WJ submits that the provision of such service included the termination of calls within C&WJ's local telecommunications network.

Section 85 of the Act outlines transitional arrangements for providers of telecommunication services which had not required licencing under the Telephone nor the Radio Telegraph Control Acts. Section 85 provides:

“85 Where-

- (a) immediately before the appointed day, any person---
  - (i) was engaged in providing specified services to the public or in the selling, trading in or importation of prescribed equipment; or
  - (ii) owned or operated a facility for which no licence was required under the Radio and Telegraph Control or Telephone Act and
- (b) within ninety days after the appointed day, that person has applied for a licence under section 11 of this Act

That person shall be entitled to be so engaged or own or operate a facility for a period not exceeding ninety days beginning with the appointed day or until a licence has been granted or the application has been withdrawn, whichever is the later.”

This leads to the question as to whether the rights derived by the Applicant from its VSAT licence granted prior to the passage of the Telecommunications Act, include Voice over Internet (VOIP). The licence issued to the Applicant permitted it to offer internet service. Clause I of the licence, allowed the licensee, the Applicant, “to establish, maintain and use any radio or telegraph station or Apparatus as shall from time to time be necessary or suitable for the purpose of operating a wireless telecommunications service between its offices in Jamaica and its offices located outside of Jamaica in respect of the provisions of its internet services in Jamaica.”

Clause 1 shows that the licence was granted on terms subject to the schedule. The remarks column of the schedule demonstrates that the Applicant's satellite Earth Station, the VSAT, was permitted to transmit data only. Paragraphs 12 and 17 of Mr. Jackson's affidavit illustrate that the information brought in is data and conversion subsequently occurs. Section 85 (1) refers to specified service. Data service is defined in the Act as "a specified service other than voice service." Voice service had been expressly excluded by the Act. This clearly demonstrates that the licence had not permitted the Applicant to engage in voice service. Further, the licence granted under the Radio and Telegraph Control Act related to radio and telegraphic apparatus. It did not extend to voice services.

In SCCA 99 of 2000 Infochannel v Cable and Wireless, Downer J.A., when faced with a consideration of whether an application for an injunction had been appropriately refused, in dealing with the issue as to whether Applicant was licenced to offer voice service, at page 48, declared:-

**"As regards sec. 85 (a) (i) it speaks of "specified service" and it is pertinent to reiterate the definition. It is stated in Sec. 2 (i) of the Act that "specified service" means a telecommunications service or such other service as may be prescribed. So Infochannel was licenced to transmit "data only" pursuant to the Radio and Telegraph Control Act."**

At page 67 Harrison, J.A. dealt with the matter in the following manner: -

**“The VSAT licence granted to the appellant on June 16, 1998 under the now amended Radio and Telegraph Control Act concerned the operation of radio and telegraph apparatus. It did not include the provision of voice service which was the sole province of the respondent under the Telephone Act. More importantly, the said VSAT licence was specifically restricted to exclude voice services. The schedule to the said licence reads, “This station is permitted to transmit data only.**

**The Appellant cannot therefore claim any right to engage in voice services. The provision of internet services by the appellant by way of its VSAT licence would, therefore, exclude voice services, although no licence was required for the operation of Internet services, per se.”**

Section 9 of the Telecommunications Act makes it mandatory for a licence to be obtained by all persons who own or operate a facility or provide specified services to the public by means of that facility.

An application has been made by the Applicant for a licence under the Telecommunications Act. Under section 78 of the Act the Minister may grant licences during periods referred to as Phases 1,11 and 111. Section 77 outlines the phases as follows:

“Phase 1” means a period of eighteen months beginning on the appointed day;

“Phase 11” means a period of eighteen months commencing on the day next after the day on which phase one ends;

“Phase 111” means the period beginning on the day next after the day on which Phase 11 ends.”

Section 78 (1) of the Act specifies that during Phase 1 the Minister may grant licences set out in subsection (2). Subsection (2)(c) (ii) expressly excludes the issuing of licence which authorizes the licensee to provide voice service. Under subsection (2)(c) (iii) only a service provider’s licence authorizing the licensee to provide data services through the use of the facilities owned and operated by the existing telecommunications carrier may be granted.

The relevant subsections are set out hereunder:

“78 (2) The licences referred to in subsection (1) are as follows:-

(a)-----

(b)-----

(c) The following types of service provider licences only-

(i) -----

(ii) service provider licences authorizing the licencees to provide services (excluding voice services) to the public in relation to internet access through the use of facilities owned and operated by the existing telecommunications carrier.

(iii) Service provider licences authorizing the licencees to provide to the public, data services through the use of facilities owned and operated by the existing telecommunications carrier.”

The Minister would be precluded, by virtue of Section 78-(2)(c) (ii), from incorporating voice services in any licence he shall grant during Phase 1. Under section 78 (2) (c) (iii) the licence would allow the Applicant to provide data services only, by way of the use of C&WJ's facilities. The presumptive right which the Applicant asserts that it possesses to operate voice services has clearly been made extinct by the statutory provisions.

Under an agreement between the Applicant, the Minister of Technology and C&WJ dated August 19, 1999, the Applicant had been granted the concession to utilize voice services. The terms of the agreement with reference to the Applicant providing voice service to its subscribers would have been extirpated by the statutory provisions. As a consequence, the applicant would be barred from offering voice service. Any act by the Applicant to carry out voice service over the Internet ranks as bypass activity and would be in contravention of the Act.

These grounds fail.

I will now turn to the second and third grounds which are as follows:-

“3.2 The OUR conducted a hearing on February 21, 2001 with respect to the complaint concerning the Group A lines only, but by its decision taken and dated March 12, 2001 found that bypass operations were being conducted by InfoChannel and issued terms and conditions of discontinuance of service with respect to both Group A and Group B lines.



3.3 Although no evidence was produced at the hearing in respect of Group B lines, the OUR found that bypass operations are taking place on the said lines and issued terms and conditions to C&WJ to discontinue specified service on the said lines.”

The Applicant contends that OUR made a determination in respect of Group A and B lines, authorized restrictions on both lines, although notification was sent to the Applicant in respect of Group A lines only. Paragraph 11 of the Affidavit of Debra Newland, Senior legal Counsel attached to the OUR, dated May 18, 2001 states that the Applicant received information with respect to Group B lines under cover of her letter of January 24, 2001 and that by letter of January 31, 2000 it was invited to attend the OUR’s office to present evidence of its denial of bypass operation. In paragraph 12 she states that a date of hearing had been agreed. A letter of March 29, 2001 from the OUR’s Director General to the Applicant, suggests that the Applicant had been notified that consideration would have been given Group B lines mentioned in C&WJ’s letter of January, 24, 2001 as well as those in group A, to which reference had been made in C&WJ’s letter of September 28, 2001.

It has been refuted by the Applicant that notice in relation to the January 24 complaint had been received. Any controversy as to whether the Applicant had been in receipt of the appropriate notice is not a matter for

determination by this court, as, the issue here is not whether there had been adherence by OUR to the correct procedure with respect to notification prior to the hearing. The critical issue is whether there had been a final adjudication on the matter of bypass operations. The matter as to whether the applicant had been notified about the hearing of the Group B lines would only have been relevant if the circumstances were such that relief for certiorari had been sought.

In January 31, 2001 the OUR notified the applicant to attend its office on February 5, 2001 to present written submissions pertaining to the complaints by C&WJ. At the request of the applicant, the date of hearing was postponed to February 21, 2001, on which date a hearing was conducted. On March 14, 2001 OUR notified the applicant that it had authorized Cable and Wireless to effect partial disconnection of certain lines to allow unidirectional dialing only.

OUR'S letter of March 15, 2001 to the applicant, indicates that the lines with which the OUR had dealt were the telephone lines in both Groups A and B and that the restriction was imposed on both groups of lines. The purpose of the hearing, which was to address the issue of the outgoing bypass, had been communicate to the Applicant.

The OUR made its enquiry on February 21, 2001, handed down a decision on March 12, 2001 which was expressed as an interim measure allowing unidirectional dialing. The matter as to whether the OUR had been correct or incorrect in its decision in its inclusion of Group B lines, are issues which this court could only review on an application for certiorari. There is no application for such relief.

These grounds are unsustainable.

A further complaint of the Applicant is, that, the decision of the OUR to conduct the proposed hearing is unfair and contrary to the rules of natural justice.

Section 4 (2) of the Act which embraces the common law principles relating to natural justice reads:

“4 (2). In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice, and without prejudice to the generality of the foregoing the Office shall –

- (a) consult in good faith with persons who are or are likely to be affected by the decision;
- (b) give to such persons an opportunity to make submissions and to be heard by the office
- (c) have regard to the evidence adduced at any such hearing and to the matters contained in such submissions
- (d) give reasons in writing for its decisions
- (e) give notice of each decision in the prescribed manner.”

The OUR dealt only with incoming bypass. It had not fully inquired into the complaints from C&WJ with respect to both incoming and outgoing calls and had not reached a conclusion that the Applicant had engaged in bypass activities. The Applicant was informed that the ruling of March 12 was of an interim nature.

The Applicant complained that it did not obtain certain documents, in particular those with respect to the Group B lines which it declared it had not received prior to the February 21 hearing. It is now in possession of those documents. The proposed hearing will afford the Applicant an opportunity to make submissions and to be heard. The intended Inquiry by the OUR will not amount to a new hearing of a complaint upon which the OUR had already adjudicated and will not in any way prove prejudicial to the Applicant.

The motion is dismissed with costs to the Respondent and to the Intervener.