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### MEDIA RELEASE

#### RE: REQUEST FOR RULING IN THE MATTER OF AN ALLEGED BREACH OF THE TELECOMMUNICATIONS ACT BY SYMBIOTE INVESTMENT LIMITED

I have taken note of an article in today's Gleaner entitled "SYMBIOTE DODGES FIRST BULLET – DPP refuses to press charges over spectrum use" which seems to have used "partial facts" from unnamed sources and extracts of the Contractor General's Report creating an unfortunate impression designed to undermine the rationale of the DPP's ruling. I now in a bid to give clarity in the public's interest, provide a summary of our detailed 5 page ruling to the police in this matter.

The Office of the DPP was asked to proffer a ruling on September 22, 2016 in the captioned matter concerning whether or not criminal charges should be laid against Symbiote Investment Limited 'Symbiote' for Breaches of Section 63A(1)(b) of the Telecommunications Act. Having assessed the file, the office issued a ruling that criminal charges ought not to be laid as the prosecution would not be able to satisfy the very high standard of proof beyond a reasonable doubt and as such, a viable prosecution could not be mounted. This ruling was prepared and researched by my head of the Cybercrimes Unit, Mrs Andrea Martin-Swaby, Deputy Director of Public Prosecutions. I discussed it with her and approved the content and decision in this ruling.

The reasons for the decision were as follows:

1. The ODPP was asked to determine whether criminal charges ought to be advanced against Symbiote Investment Limited for Breach of section 63(A)(1)(b) of the Telecommunications Amendment Act 2012. The section creates an offence of the use of a spectrum without first obtaining a licence. The section when read in its entirety implies that the prosecution must prove a mental element of a deliberate use of the spectrum without a licence.
2. The material provided to us in statements on file established the following:
  - a) That in October 2015 Symbiote applied to the Spectrum Authority for a domestic mobile spectrum licence for frequencies in the 700 Mhz band. Background checks were done in relation to the principals of the company and no adverse trace on the shareholders or directors were found.
  - b) The Spectrum Management Authority (SMA) submitted its recommendations to the Minister on November 10, 2015 for the licence to be granted to the company.
  - c) Subsequent to the recommendation of Spectrum Management, unauthorised use of the frequency within the 746.27 Mhz – 755.678 Mhz was detected in January 2016.
  - d) Consequent upon this, SMA wrote to Symbiote enquiring whether they were responsible for the unauthorised use AT THAT TIME. The company's attorney responded in a letter acknowledging the usage of equipment to conduct testing and sought guidance from Spectrum Management as to the way forward in respect of testing their equipment.
  - e) Following the cease and desist order on February 17, 2016 the company director in a statement declared that there was no usage of the spectrum following the cease and desist order. The company also indicated that they do not own any cell site and that they operated through contractual arrangements and further that the towers of interest were also used by other operators in the broadcasting and telecommunications industry.

3. Based on the above material, the prosecution would not seek to lay criminal charges in respect of the usage prior to the cease and desist order as there was no evidentiary material to satisfy proof beyond a reasonable doubt of the mental element required for the offence.
4. In respect of the alleged unauthorised usage after the cease and desist order which was denied by Symbiote, the prosecution would now have to prove to the requisite standard that it was this company that engaged in the unauthorised use of the spectrum AFTER this cease and desist order.

### **THE INADEQUACY OF THE INVESTIGATION OF THE USAGE AFTER THE CEASE AND DESIST ORDER**

In the investigation of matters that concern the use of digital equipment, (in this case, cell towers and electronic communication devices) the usual practice is for the equipment themselves to be seized and tested. The Cybercrime Act of Jamaica allows a constable to search and seize equipment from premises where it is suspected that the said digital equipment was involved in the commission of the crime.

Based on the material provided to us on the file submitted, it was believed that the cell tower on Sutton Street as well as Eastwood Park Road were being used in the commission of this alleged offence. Yet the cell site equipment which were alleged to be used by the company were never themselves seized and tested by the Jamaica Constabulary Force in investigating this matter. This perhaps may have been an oversight but this was fatal to the attribution of the activity on the spectrum to the actual equipment perceived as belonging to the company Symbiote Investment.

5. To satisfy ourselves regarding the extent of the technical parameters investigation in this matter, the Deputy DPP met with technical and legal personnel from the Spectrum Management Authority who confirmed that there was no seizure and testing of any equipment during the material time. It was also confirmed that were the prosecution to mount a case on the material available on the file, we would not be able to evidentially exclude the possibility of the spectrum being used by other persons or entities facilitated by their equipment. This lacunae would have clearly provided the basis for reasonable doubt. **It was to be noted that there was no statement on file to indicate that the spectrum was not being used by other service providers within the telecommunications industry.** This was confirmed by the representatives from the SMA.
  
6. The prosecution did not have the evidentiary material to ground attribution of the use of the frequency within the 746.27 Mhz – 755.678 Mhz during the period February to September 2016 to Symbiote Investment Limited and their equipment.

## CONCLUSION:

As a result of this, the Office of the DPP declined to recommend that criminal charges be laid against Symbiote as computer generated or digital evidence must first be attributable to a person or in this case a company before it can be used against them in a criminal trial. **Simply put, the prosecution had neither evidence to attribute the use of the spectrum by Symbiote nor to exclude the use of the spectrum by other service providers.**

It is the first hurdle in seeking to create a nexus between an entity or person and the offending conduct. Without being able to definitively create this nexus to the requisite standard i.e. beyond a reasonable doubt, a decision to prosecute cannot be taken or recommended because we would not be able to overcome the previously described hurdles to mount a viable prosecution.

I hope that this explanation provides some clarity and underlines the integrity of the decision making process in this matter.

**Paula V Llewellyn, QC**  
Director of Public Prosecutions