



ICT Decision 2014-1

Grand Cayman, 27 February 2014

LIME's Application to Reconsider the Classification of MetroNet Service as a Category 1 Service

Summary

In this Decision, the Authority denies the application by LIME to reconsider the Authority's 16 December 2013 determination regarding LIME's service filing for the introduction of MetroNet service.

Background

1. On 22 November 2012, Cable and Wireless (Cayman Islands) Limited (trading as "LIME"), submitted a service filing for the introduction of a service called MetroNet.
2. On 11 December 2012, the Information and Communications Technology Authority (the "Authority") issued interrogatories requesting additional information from LIME related to the 22 November 2012 service filing.
3. Given that the Authority did not receive any response from LIME to the 11 December 2012 interrogatories, and based on the limited information provided by LIME in the 22 November 2012 service filing, LIME's request for authorization to provide the service was denied in a 30 May 2013 determination. In that determination, the Authority stated that, if at some point in the future LIME proposed to provide such a service, LIME may make an application to the Authority to do so and that any such filing should include the information that was requested in the Authority's 11 December 2012 interrogatories.
4. On 3 December 2013, LIME submitted a new service filing for the introduction of MetroNet service. In that service filing, while LIME provided some information in response to the Authority's 11 December 2012 interrogatories, it did not provide any information on the actual level of competition in the domestic data transport market.
5. In a 16 December 2013 letter (the "Decision"), the Authority determined that MetroNet service was appropriately categorized as a Category 1 Service, noting that MetroNet, while using a different technology, provides data connectivity service functionality for business customers with multiple locations within a country

which is very similar, if not identical, to the functionality of Domestic Private Leased Circuits ("DPLC") service or an arrangement of multiple DPLCs. LIME, if it intended to introduce MetroNet service, was directed to file the necessary information and supporting documentation for a Category 1 Domestic Leased Circuits service (including full proposed tariff pages and wholesale offering) for the Authority's approval.

Application

6. In a letter dated 7 February 2014, LIME requested that the Authority reconsider the Decision pursuant to the Authority's "residual jurisdiction" under the Information and Communications Technology Authority Law (2011 revision) (the "ICTA Law").
7. LIME submitted that the Decision contained fundamental procedural or substantive flaws, such that it should be reconsidered under the Authority's residual power to reconsider decisions not covered by subsection 78(1) of the ICTA Law. More specifically, LIME argued that the Decision contained a substantive flaw when it mischaracterized MetroNet service as being similar, if not identical to, DPLC service and the Decision applied an incorrect analysis for determining the appropriate categorization of MetroNet service.

Legislative and Regulatory Framework

8. In reaching a decision on LIME's reconsideration application, the Authority notes in particular section 78 of the ICTA Law which sets out:

- 78. (1) This section shall apply to the following decisions of the Authority –*
- (a) a decision not to grant a licence;*
 - (b) a decision to revoke a licence;*
 - (c) a decision to modify a licence under section 31(4);*
 - (d) a decision to suspend a licence under section 32(1);*
 - (e) a decision that a section 36 prohibition has been infringed;*
 - (f) a decision that a section 40 prohibition has been infringed;*
 - (g) with regard to an individual exemption under Part IV-*
 - (i) a decision to grant or refuse an individual exemption;*
 - (ii) a decision to impose any condition or obligation and a decision on the type of condition or obligation where such a condition or obligation has been imposed;*
 - (iii) a decision of the date and duration of the individual exemption and as to the period fixed for such exemption;*
 - (iv) a decision to extend or not to extend the period for which an individual exemption has effect; or*
 - (v) a decision on the duration of the extension referred to in subparagraph (iv);*
 - (h) a decision to cancel an exemption;*
 - (i) a decision to impose a penalty in accordance with Part IV and a decision as to the amount of such penalty;*
 - (j) a decision to give a direction under section 47, 48 or 50;*
 - (k) a decision in relation to a pre-contract dispute under section 67;*
- and*

(l) such other decision as may be prescribed.

(2) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an application does not suspend the effect of any decision under paragraph (e), (f), (g), (h) or (j) to which the appeal relates.

(3) Where-

(a) a licensee;

(b) an applicant for a licence;

(c) party to an agreement in respect of which the Authority has made a decision under Part IV; or

(d) a person in respect of whose conduct the Authority has made a decision under Part IV,

is aggrieved by a decision specified in subsection (1) ("the original decision"), he may, within fourteen days of the receipt of the decision and written reasons therefore, apply in the prescribed manner to the Authority for a reconsideration of that decision.

(4) The Authority shall, under subsection (3), confirm, modify or reverse the decision, or any part thereof, specified in subsection (1), and render its determination within a reasonable period of time not to exceed twenty-eight days.

(5) Where the original decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.

(6) Where an application is made under subsection (2) -

(a) the Authority may, on application by the aggrieved person, order that the decision shall not take effect until a determination is made under subsection (3); and

(b) the Court shall not hear an appeal under section 80 in relation to a reconsideration under subsection (3) until the Authority has made a determination under subsection (3).

Authority's analysis

9. LIME submitted that, although the Decision did not fall within the scope of subsection 78(1) of the ICTA Law, the Authority had jurisdiction to reconsider the Decision pursuant to the Authority's "residual jurisdiction" under the ICTA Law.
10. The jurisdictional issues related to applications for reconsideration of a matter that falls outside the list of subjects enumerated in subsection 78(1) of the ICTA Law, have been considered by the Authority in a number of previous decisions, including ICT Decision 2006-2, ICT Decision 2007-2, ICT Decision 2008-3, ICT Decision 2009-1, ICT Decision 2010-2, ICT Decision 2010-3 and ICT Decision 2010-11.

11. In paragraphs 15 and 16 of ICTA Decision 2010-11¹, its most recent reconsideration decision, the Authority delineated the extent of any such residual jurisdiction to reconsider its decisions. It first set out that:

15. [...] The Authority [...] considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority [...] the Authority should decline to entertain an application for reconsideration of a matter that falls outside [section 78].the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to an application at first instance before it, it should decline to entertain an application for reconsideration of a matter that falls outside the list of those subject areas enumerated in section 78(1).

12. The Authority then further defined that "principle" in the next paragraph by emphasizing that:

*16. [...] As noted above, the Authority has ruled in the past that its power to reconsider a decision that falls outside the list of subject areas enumerated in section 78(1) is extremely limited and can only be used in **exceptional circumstances**, such as instances of accidental mistakes, fraud, or miscarriages of justice. In the absence of such exceptional circumstances, the Authority's decisions are irrevocable, unless the ICTA Law, or a court, provides otherwise. (Emphasis added).*

13. For this present case, in support of its application, LIME submitted that the Decision contained procedural or substantive flaws such that the Authority should entertain LIME's request for reconsideration.
14. The Authority disagrees with LIME's submission for the following reasons.
15. While in the third full paragraph of the second page of its request, LIME submitted that there are procedural or substantive flaws in the Decision, and the third page has a section titled "Fundamental Procedural or Substantive Flaws", LIME's reconsideration request fails to identify any fundamental flaw to the procedural approach adopted by the Authority in the proceeding that led to the Decision.
16. In terms of what LIME claims is a flaw in the substantive approach, LIME submitted that the Decision contained a substantive flaw when the Authority "mischaracterized MetroNet service as being 'similar, if not identical' to Domestic Private Leased Circuit ('DPLC') service." In addition, LIME submitted that "[b]ecause the Authority erroneously determined that MetroNet was 'similar, if not identical' to DPLC, the analysis applied by the Authority in determining the appropriate categorization of the service was also fundamentally flawed" and, as a result of it, "the Authority erroneously determined that MetroNet service should be regulated like LIME's DPLC service."

¹ <http://www.icta.ky/docs/LNP/ICT%20Decision%202010-11%20Reconsideration%20of%20LNP%20Voting%20Rights%20Decision.pdf>

17. The Authority notes that LIME's statement that the Authority determined that MetroNet is similar, if not identical, to DPLC is an incomplete and incorrect interpretation by LIME of the wording used in the Decision. In the Decision, the Authority concluded that:

MetroNet service, while using a different technology, provides data connectivity service functionality for business customers with multiple locations within a country which is very similar, if not identical, to the functionality of DPLC service or an arrangement of multiple DPLCs.
(Emphasis added).

18. The Decision expressly identified that while MetroNet would use a different technology its functionality was very similar, if not identical, to the functionality of DPLC service or an arrangement of multiple DPLCs.

19. Therefore, what LIME submits as being a "procedural or substantive flaw" appears to be simply that LIME disagrees with the Authority in its conclusion. While the Authority can understand that LIME is not in agreement with the Decision, that is not sufficient reason for the Authority to reconsider the Decision.

20. In fact, while LIME claims that the Authority's conclusion is fundamentally flawed, LIME's reconsideration request itself, when it quotes Ofcom's Statement of business connectivity market review, directly identifies the substitutability of the functionality of the two services. The quoted paragraph LIME identifies as paragraph 2.27 from Ofcom's Statement, states that:

[o]rganisations often use leased lines to build private networks linking their sites together so that offices can exchange data and access corporate applications. Virtual private networks (VPNs) provide an alternative to private data networks to achieve this functionality... (Emphasis added).

21. LIME also submitted that MetroNet service was functionally equivalent and a domestic counterpart to LIME's international MPLS IP-VPN service and, on that basis, it should be categorized as a Category 3A service.

22. However, as stated in page 2 of the Decision, unlike LIME's international MPLS IP-VPN service which does not include an access component from the customer's premises, MetroNet includes both the access component and the MPLS component. It is therefore incorrect to assert, as LIME has done, that MetroNet service is functionally equivalent to LIME's IP VPN QoS service.

23. In the section titled "Geographic Market for VPN Services" of the reconsideration request, LIME submitted that, in light of what LIME characterized as "evidence" provided in LIME's service filing and reconsideration request, there are sufficient grounds for classifying MetroNet as a Category 3A Service.

24. The Authority notes that the information submitted by LIME in the service filings, as well as in LIME's reconsideration request, did not contain any evidence that the market for the Category 1 Domestic Leased Circuits similar or equivalent services is subject to effective competition. Although LIME, in its reconsideration request stated that it "understands" Digicel may be providing VPN services to two

customers, it has provided no evidentiary bases on how it reached that "understanding". In addition, while LIME stated that it "anticipates" that one customer may self-provide or has acquired a VPN from another supplier and that the services of another provider "are likely to include VPN", it again provided no evidence to support those claims.

25. Therefore, in the Authority's view, LIME has not provided any evidence that would show the existence of effective competition in the market for domestic data transport services such as the Category 1 Domestic Leased Circuits, Wireless Backup Leased Circuits, Digital Access Circuits, Managed IP Circuits or MetroNet services.
26. In any event, even if some or all of these claims were supported, these few instances of domestic data transport services offered by competitors or self-provided by customers are not sufficient evidence in themselves to demonstrate that there is effective competition in the market for these services.
27. Finally, LIME submitted that the Decision contained a fundamental flaw in the approach adopted by the Authority in the analysis that led to the Decision because the Authority did not conduct an analysis under paragraphs 29 through 34 of Annex 5 to LIME's licence.
28. In the Authority's view, such a claim has no merit. For the reasons stated in the Decision, the Authority concluded that MetroNet service provides connectivity service functionality for business customers which is very similar, if not identical, to the functionality of DPLC service or an arrangement of multiple DPLCs. On that basis, as explained in the Decision, the Authority determined that MetroNet is appropriately categorized as a Category 1 service. Given this, the Authority was not required to conduct a separate analysis relating to new ICT services, pursuant to those paragraphs.

Conclusion

29. In light of the above, the Authority does not consider that LIME has identified any exceptional circumstances in the Authority's decision making process relating to this matter, such as instances of accidental mistakes, fraud, or miscarriages of justice. Accordingly, the Authority does not consider it is appropriate to reconsider the Decision. Therefore, LIME's reconsideration request is denied.