



ICT Decision 2012-5

Grand Cayman, 13 December 2012

Determination of the jurisdictional issues related to a dispute on whether or not LIME should provide Digicel with access to its fixed wire local loop

Overview

In this Decision, the Authority determines that the Interconnection and Infrastructure Sharing Regulations, 2003 apply to the negotiations between LIME and Digicel for LIME to provide Digicel with certain requested infrastructure sharing services to allow for the unbundling of LIME's fixed wire local loop.

As LIME refused to provide those requested infrastructure sharing services, Digicel could bring that Dispute to the Authority for its determination under the Dispute Resolution Regulations, 2003.

In order to determine the Dispute, the Authority considers that it is appropriate to commence a consultation as to whether or not requiring LIME to provide infrastructure sharing services to allow for the unbundling of the fixed wire local loop is contrary to the public interest.

BACKGROUND

1. On 14 February 2012, pursuant to the *Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003* (the "Dispute Regulations"), Digicel (Cayman) Ltd ("Digicel") submitted a dispute determination request to the Information and Communications Technology Authority (the "Authority") contending that a dispute had arisen between it and Cable & Wireless (Cayman Islands) Ltd ("LIME") relating to Digicel's request for access to LIME's unbundled fixed wire local loop ("ULL") (the "Dispute").
2. The fixed wire local loop is the fixed wire (usually copper) connection that goes from the local telephone exchange (the local exchange is usually a building that houses the electronic components that route the telephone calls/data) to the network interface device ("NID") where the Licensee's network connects to the customer's premises wiring. The local loop is sometimes referred to as the "last mile". This last mile is normally owned and run by one operator (the "Local Loop Operator"), which in this case is LIME.
3. "Unbundling" LIME's fixed wire local loop would mean, in effect, LIME allowing other Licensees, such as Digicel, to connect their telecoms networks to LIME's fixed wire

local loop network. By doing so, the other Licensee would then be able to offer their own retail services over that loop, including voice and broadband internet access services, to the customer. In an ULL environment, other Licensees typically have the choice of a number of possible network options to make the necessary network connection for this to happen.

4. LIME responded to Digicel's dispute determination request on 2 March 2012, and submitted that Digicel's request was "premature" as it had not followed the proper process to bring a dispute. LIME submitted that, in any event, Digicel had "not made good faith and reasonable efforts to settle the "dispute" with LIME."
5. On 7 March 2012, Digicel sent to the Authority a reply to LIME's response which was not provided for in the procedure set out in the Dispute Regulations. LIME responded to that letter on 20 March 2012. The Authority has considered Digicel's reply and LIME's response to that reply only so far as they comment on factual issues.
6. The comments received by both Parties are summarised in the text below.

SUBMISSIONS (*in date order*)

Digicel, (14 February 2012)

7. In summary, Digicel submitted that on 17 June 2011 it had requested the provision of ULLs from LIME, and that under the Authority's Interconnection and Infrastructure Sharing Regulations, 2003 (the "Infrastructure Regulations") LIME is obliged to provide it with such requested services. (Digicel provided the Authority and LIME with copies of the 17 June 2011, 6 July 2011, 19 October 2011 and 28 November 2011 party correspondence referred to in its submission.)
8. Digicel submitted that LIME had responded to that request on 6 July 2011, where it requested from Digicel "further and better particulars of the request" for the fully ULLs at the listed locations. In that letter, LIME also asked Digicel to provide a network diagram setting out Digicel's proposal "in sufficiently complete and accurate terms to allow LIME to properly assess the request." Digicel submitted that it had responded to that request on 19 October 2011 by providing the complete technical explanation of its requirement.
9. In its 19 October 2011 letter, Digicel had stated that its definition of fully ULLs described, among other things, full Metallic Path Facility ("MPF") unbundling. Digicel gave further information that the full MPF service would consist of a "2-wire point to point metallic transmission path extending from the Network Termination Point (NTP) within the retail customer's premises to dedicated equipment room (or screened area) assigned to Digicel within the LIME local exchange at One Technology Square initially during the first phase."
10. In that letter, Digicel requested information about feasible points for connection with LIME other than at One Technology Square which "are available now or that will be available in the near future." Digicel explained that the cross-connect would then be cabled using internal or external tie-cables as appropriate depending on co-location or remote location of Digicel's DSLAM (Digital Subscriber Line Access

Multiplexor)/MSAN (Multi- Service Access Node) and HDF (Handover distribution frame) as necessary.

11. Attached to Digicel's 19 October 2011 letter was a diagram illustrating how its proposed network set-up would work, with relevant technical explanations as well as illustrated diagrams. (Paragraphs 8 to 11 when read together set out a summary of what Digicel's "Requested Services" are.)
12. Digicel submitted that it is seeking a determination from the Authority that LIME must immediately provide it with an offer for ULLs, as well as providing it with the associated information that it has requested.
13. In support of its position, Digicel referred to the definition of "Infrastructure sharing" in the Infrastructure Regulations, which states that:

"Infrastructure sharing" means the provision to licensees of access to tangibles used in connection with a public ICT network or intangibles facilitating the utilization of a public ICT network; and for the avoidance of doubt –

- (a) *tangibles include lines, cables, or wires (whether fibre optic or other), equipment, apparatus, towers, masts, tunnels, ducts, risers, holes, pits, poles, landing stations, huts, lands, buildings or facilities; and*
- (b) *intangibles include agreements, arrangements, licensees, franchises, rights of way, easements and other such interests.*

14. Digicel stated that the above definition included Digicel being able to access all components currently within the LIME network needed in the provision of local loops: the main distribution frame ("MDF"), the copper lines to the customer premises and "any other conceivable tangible component within the LIME network that may be required." Digicel submitted that the definition of "Infrastructure sharing" in the Infrastructure Regulations also covered any "intangibles" – such as agreements between the Parties that may be necessary to enable Digicel to be able to provide services over the accessed tangible components.
15. Digicel then referenced Regulation 8 (1) of the Infrastructure Regulations, which states that:

Licensees shall have a right and, when requested by other licensees, an obligation to negotiate interconnection and infrastructure sharing services in order to ensure the provision and interoperability of services throughout the Islands.

as obliging LIME to negotiate infrastructure sharing services with Digicel as a result of its request for ULLs.

16. Digicel then summarised the timeframes for responding to its request under Regulations 8(5) to 8(8) of the Infrastructure Regulations.
17. Digicel submitted that it had met the requirement under the Infrastructure Regulations for it to provide LIME with a complete and accurate request on 19 October 2011, but that on 28 November 2011 (after the deadline required for any

objection), LIME had written to it refusing to provide ULLs. Digicel stated that LIME had explained the basis for its refusal as being that:

... there is no public policy basis for LIME to be required to expend the time and resources needed to develop this service and the related facilities.

18. Digicel noted that, while Regulation 4 of the Infrastructure Regulations states that an infrastructure sharing arrangement shall not be entered in to where it is, "contrary to [...] the public interest", LIME had provided no basis for its assertion that Digicel's request was contrary to public policy/interest.
19. Digicel submitted that LIME had merely stated that the issue for LIME was the time and resource that LIME alone would devote to providing the access requested. Digicel submitted that LIME had made no attempt to establish or to argue whether and how Digicel's request was contrary to the wider interests of the Cayman Islands which, it seemed to Digicel, would provide the public interest test.
20. Further, Digicel noted that Regulation 6 of the Infrastructure Regulations states that:

Each licensee has an obligation to treat requests, to negotiate interconnection and infrastructure sharing agreements and to provide interconnection and infrastructure sharing services in good faith.

21. Digicel submitted that it did not consider LIME's refusal 40 days after Digicel's completed request to provide it with ULLs, rather than the 20 days set down in the Regulations, was "indicative of good faith".
22. Digicel referred to its letter to LIME of 19 October 2011 where it stated that:

[Digicel will need to connect its] DSLAM (Digital Subscriber Line Access Multiplexor) or MSAN (Multi-Service Access Node) to the LIME access network via Digicel's HDF at LIME's MDF at One Technology Square on Shedden Road initially, and to other LIME sites as Digicel expands to other areas. In this light we request information about feasible points for connection with LIME other than at One Technology Square which are available now or that will be available in the near future.

23. Digicel then referred to Regulation 13 of the Infrastructure Regulations which states that:

A responder shall provide, on request, information reasonably required by requestors in order to facilitate any agreements for interconnection or infrastructure sharing including information required to give effect to any agreement.

24. Digicel submitted that the information Digicel requested in its 19 October 2011 letter falls in to the bracket of information "reasonably required". However, none of that information has been provided to it by LIME.
25. Digicel asked the Authority to require LIME to:

- a. immediately provide it with a quotation for fully ULLs including all rates, terms and conditions as required under Regulation 8(9) of the Infrastructure Regulations with a minimum of:
 - date of availability;
 - installation intervals;
 - applicable rates;
 - request development and processing costs;
 - other such necessary terms and conditions required to effect interconnection or infrastructure sharing.
- b. Provide it with information about the feasible points for connection with LIME (for the purpose of providing ULLs) other than at One Technology Square which are available now or that will be available in the near future.
- c. Pay any costs that Digicel may incur as a result of being forced to take this matter to dispute.

LIME, (2 March 2012)

26. LIME stated that Digicel's determination request was "premature" as Regulation 3 of the Infrastructure Regulations requires an aggrieved licensee to send a "Notice of Grievance" containing prescribed information to the other licensee prior to submitting a determination request. LIME stated that it had no record of such a Notice from Digicel and that Digicel's 14 February 2012 letter did not refer to one.
27. LIME submitted that, in any event, Digicel had "not made good faith and reasonable efforts to settle the "dispute" with LIME, as required by" Regulation 4 of the Infrastructure Regulations. LIME stated that its 28 November 2011 letter to Digicel is "clear that [it] is prepared to discuss the provision of existing services to Digicel that would satisfy Digicel's requirements." However, LIME submitted that it had no record of Digicel responding to LIME's offer to discuss other services, prior to the receipt of the 14 February 2012 letter.
28. LIME recommended that the Authority should dismiss Digicel's claims in its 14 February 2012 dispute determination request, and allow the Parties to continue to discuss Digicel's requirements, as contemplated by Regulations 3 and 4 of the Dispute Regulations.

Digicel, (7 March 2012)

29. In reply, Digicel referred to LIME's statement that Digicel had not gone through a grievance process and should do so now. Digicel submitted that a grievance process can only work if LIME is prepared to cooperate and provide Digicel with an offer for ULLs.
30. Digicel stated that LIME, in its letters of 28 November 2011 and 2 March 2012, made it clear that it will not negotiate an offer for ULLs. Digicel submitted that LIME had already taken an unequivocal position that LIME will "not enable a grievance process to work with respect" to its request for ULLs. Digicel submitted that, since LIME will not negotiate the provision of ULLs, its only recourse is to ask the Authority to make a determination.

31. Digicel submitted that LIME appeared to want to involve Digicel in a "charade wherein Digicel writes another letter to LIME asking for ULLs", adding that "LIME wants Digicel to state specifically that [it is] "aggrieved" with LIME's refusal to make an offer for ULLs to Digicel." Digicel submitted that there would be no purpose behind such a letter other than for LIME to refuse for the third time to make an offer for ULLs and "to burn up time for its commercial benefit."
32. Digicel then referred to a 12 December 2011 letter the Authority had written to it [of which LIME had previously not been provided] where the Authority had stated that:

The proper procedure if Digicel wants to take it further (see Regulation 26 of the [Infrastructure] Regulations), would be for Digicel to submit the issue to the Authority for resolution in accordance with the Dispute Regulations (2003).

33. Digicel submitted that Regulation 26 of the Regulations permits a matter to be submitted to the Authority directly if one party believes that the other is not negotiating or processing a request in good faith. Digicel submitted that there was no doubt that LIME has told Digicel that it will not negotiate an offer for ULLs and that is why, in accordance with the Authority's guidance, Digicel submitted the matter to the Authority for resolution.

LIME, (20 March 2012)

34. LIME submitted that, as indicated in its 28 November 2011 and 2 March 2012 letters to Digicel, LIME already has products available that fully satisfy its obligations under the Infrastructure Regulations, and that it is willing to discuss and provide them to Digicel. LIME submitted that Digicel had chosen not to engage with LIME in "a good faith discussions of the issues." LIME offered to talk with Digicel about the provision of those services.
35. LIME submitted that the Authority should "dismiss Digicel's claims in its 14 February 2012 letter, and allow the Parties to continue to discuss Digicel's requirements, as contemplated by" Regulations 3 and 4 of the Dispute Regulations.

AUTHORITY'S ANALYSIS

The Authority's Statutory Remit

36. In making the Decision, the Authority is guided by its statutory remit in particular as set out in the Information and Communications Technology Law (2011 revision) (the "Law"), the Infrastructure Regulations and the Dispute Regulations.

37. Section 9 (1) of the Law states that:

[...] the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law.

38. Section 9 (3) of the Law states that, without prejudice to section 9 (1) [and section 9(2) – which deals with spectrum management issues] of the Act, the

principal functions of the Authority are – [...]

- (g) *to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;*
- (h) *to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure; [...]*

39. Regulation 11 of the Dispute Regulations states that:

11. In determining a dispute, the Authority shall act expeditiously, and in doing so may have regard to-

- (a) *the subject matter of the dispute;*
- (b) *the need to inquire into and investigate the dispute;*
- (c) *the objectives and functions of the Authority; and*
- (d) *all matters affecting the merits, and fair settlement of the dispute.*

The Authority's considerations

40. In determining the jurisdictional issues in the Dispute, the Authority has considered:
- a. whether or not the Infrastructure Regulations apply to Digicel's request to LIME for ULLs;
 - b. if the Infrastructure Regulations do apply to Digicel's request to LIME for ULLs, whether that request was properly made under the Infrastructure Regulations;
 - c. if that request was properly made, whether or not LIME denied that request as provided for under the Infrastructure Regulations; and,
 - d. if LIME did deny Digicel's request for ULLs under the Infrastructure Regulations, whether the Authority can determine the Dispute under the Dispute Regulations.

In the following paragraphs, each of these are examined in turn.

Application of the Infrastructure Regulations

41. The Infrastructure Regulations apply where there is a request from one Licensee made to another Licensee for infrastructure sharing services. As set out at Regulation 8 (1) of the Infrastructure Regulations, Licensees shall have a right and, when requested by other Licensees, an obligation to negotiate infrastructure sharing services.
42. The definition of "infrastructure sharing" as defined in the Infrastructure Regulations is set out at paragraph 13 above and applies to requests for "the provision of access" to either/both "tangibles used in connection with a public ICT network" or/and "intangibles facilitating the utilization of a public ICT network."
43. That definition goes on to give examples of what is meant by "tangibles" and includes "wires (whether fibre optic or other), equipment, apparatus, [...] buildings or facilities." It also gives examples of what is meant by "intangibles" and includes

such things as "agreements, arrangements, licensees, franchises, rights of way, easements and other such interests."

44. In this case, Digicel, a Licensee, has requested from LIME, another Licensee, access to the tangibles of LIME's public ICT Network (i.e. LIME's local exchange building, the equipment inside and the cabling between that exchange and the customer) over which LIME provides its public ICT Services to its retail customers.
45. The Authority considers that Digicel's request is a request for infrastructure sharing from LIME as defined by the Infrastructure Regulations, and therefore the Infrastructure Regulations apply to their negotiations.

Whether Digicel's request to LIME for ULLs was properly made

46. As referenced in Digicel's dispute determination request, Digicel had written to LIME on 17 June 2011 requesting, under Regulation 8 (2) of the Infrastructure Regulations, a quote from LIME for it to provide Digicel with fully ULLs – as explained by Digicel: being where, in this case, "[t]he link between [LIME's] MDF and its switching equipment is physically re-routed and connected to [Digicel's] switch, once a particular subscriber has decided to change service provider." In that letter, Digicel set out where it wanted those infrastructure sharing services.
47. Under Regulation 8 (2) of the Infrastructure Regulations, a request for a quotation to provide infrastructure sharing service must contain at least:

- (a) the reference number of the requestor's ICT Licence;*
- (b) a technical description of the requested services;*
- (c) locations;*
- (d) dates required, and*
- (e) projected quantities to be ordered with a period of 3 years forecast.*

48. The Authority considers that, in the context of the Dispute, Digicel's letters of 17 June 2011 and 19 October 2011 when read together contain sufficient information as required under Regulation 8 (2).
49. As a consequence, the Authority considers that, on 19 October 2011, Digicel made a sufficiently complete and accurate request for infrastructure sharing services under the Infrastructure Regulations. As such, LIME was obliged to either provide Digicel with a quotation (within 30 days from receipt of the request) for the Requested Services (under Regulation 8 (7)) or provide Digicel with detailed written reasons for its denial of Digicel's request (within 20 days from receipt of the request) (under Regulation 8(8)).

Whether LIME denied Digicel's request as provided for under the Infrastructure Regulations

50. LIME replied to Digicel's letter on 28 November 2011, 40 days from its receipt of Digicel's valid request, refusing that request.
51. In that letter, LIME stated that, while it had reviewed Digicel's request, *"given the current competitive environment in the Cayman Islands, there is no public policy basis for LIME to be required to expend the time and resources needed to develop*

this service and the related facilities. LIME would nonetheless be happy to discuss with Digicel the provision of any existing wholesale services that would address Digicel's needs."

52. While the Authority notes LIME's offer in its 2 March 2012 reply that it is willing to discuss with Digicel providing it with "existing services [...] that would satisfy Digicel's requirements", these are clearly not the services Digicel has requested and do not form the subject matter of the Dispute. Therefore, the Authority does not consider this relevant as to whether or not there is a dispute the Authority can seek to determine under the Dispute Regulations.
53. The Authority considers that, on the facts before it and given the previous correspondence between the Parties, LIME's 28 November 2011 letter was a clear denial by LIME under Regulation 8(8) of the Infrastructure Regulations to provide the requested services to Digicel and that denial was outside the statutory timescale provided for in those Regulations.

The Authority's jurisdiction to determine the Dispute under the Dispute Regulations

54. LIME, in its 2 March 2012 letter, also stated that Digicel's determination request was "premature" in that Regulation 3 of the Dispute Regulations requires Digicel to have sent LIME a "Notice of Grievance" containing prescribed information prior to submitting the dispute determination request to the Authority. LIME submitted that it had no record of such a Notice from Digicel, and that Digicel's 14 February 2012 dispute determination request letter did not refer to one either.
55. The Authority notes that the Infrastructure Regulations allow a Licensee, where it "disagrees with the basis for any refusal" (Regulation 4 (4) of the Infrastructure Regulations) or more generally where "there is a dispute between the parties as to the terms and conditions for the provision of [...] infrastructure sharing" (Regulation 26 of the Infrastructure Regulations) to refer the matter to the Authority in accordance with the Dispute Regulations. So far as it is relevant, given the specifics of this case and that the Authority considers that LIME clearly denied Digicel's request to be provided with ULLs, the Authority considers that to require the Parties to now go through the procedure set out at Regulation 3 of the Dispute Regulations would serve no reasonable purpose. Therefore, the Authority considers that it can move to determine the Dispute under the Dispute Regulations.
56. As an aside, the Authority notes Digicel's reference in its 7 March 2012 response to a statement made by the Authority to Digicel in correspondence between the Parties. The statement was provided by the Authority in response to Digicel asking the Authority to issue a *Cease and Desist Order* against LIME for it, as it submitted, ignoring the Infrastructure Regulations. In reply to that request, the Authority set out that where, as it understood, Digicel had been refused the Infrastructure sharing it sought from LIME, the proper procedure if Digicel wanted to take it further would be for Digicel to submit the issue to the Authority for resolution in accordance with the Dispute Regulations. However, whether or not to bring such a matter to the Authority was up to Digicel to decide and any determination request would have to be in the form and format set out in the Dispute Regulations.

57. The Authority considers that the dispute determination request to the Authority under the Dispute Regulations was properly made by Digicel and that the Authority can determine the Dispute under the Dispute Regulations.

Remaining Procedures

58. It remains to the Authority to consider the substantive question as to whether or not, under the Dispute Regulations, LIME should be required by the Authority to provide Digicel with a quote under the Infrastructure Regulations for the infrastructure sharing services Digicel has requested.

59. In this regard, the Authority notes that Regulation 4 (2) of the Infrastructure Regulations states that:

[Licensees] shall not negotiate or propose to enter into an [...] infrastructure sharing agreement where the Authority determines that –

- (a) interconnection or infrastructure sharing would endanger life or safety, or irreparably damage property or threaten the integrity, security or interoperability of a public ICT service or public ICT network;*
- (b) the licence issued to the responder exempts it from the obligation to provide interconnection of infrastructure sharing;*
- (c) the licence issued to the requestor does not authorise it to operate the public ICT network or to provide the public ICT service for which infrastructure sharing or interconnection is sought; or*
- (d) the requested interconnection or infrastructure sharing is contrary to the laws of the Islands or the public interest.*

60. Also, Regulation 4 (3) of the Infrastructure Regulations states that the responder (LIME in this instance):

shall not refuse to provide infrastructure sharing services, except where –

- (a) there is insufficient capacity, taking into account its reasonably anticipated requirements; or,*
- (b) such provision would create a technical or engineering difficulty that could not be reasonably addressed.*

61. The Authority has no evidence before it that either Regulations 4 (2) (a) – (c) or Regulations 4 (3) (a) or (b) of the Infrastructure Regulations are engaged. However, the Authority notes that LIME, in its letter to Digicel of 28 November 2011, stated as its reason to refuse to negotiate with Digicel that "[...] *there is no public policy basis for LIME to be required to expend the time and resources needed to develop this service and the related facilities.*"

62. The Authority notes that LIME did not expand on why it had stated that there "is no public policy basis" for LIME to provide Digicel with a quotation for the provision of the Requested Services. The Authority assumes that LIME's reference to a "public policy basis" for not negotiating the terms and conditions for the provision of the Requested Services is in reference to Regulation 4 (2) (d) of the Infrastructure Regulations.

63. In relation to whether or not the requested infrastructure sharing is contrary to the public interest, the Authority considers it appropriate to commence a consultation to seek views on this issue as this issue is not just relevant to the Parties but also to other Licensees (who may also want to request similar infrastructure sharing services from LIME) as well as the retail customers and potential retail customers of the Licensees.

AUTHORITY'S DECISION

64. Therefore, in relation to the jurisdictional issues of the Dispute, the Authority determines that, in relation to the Dispute:
- a. The Infrastructure Regulations apply to the negotiations between Digicel and LIME for the provision by LIME to Digicel of the Requested Services.
 - b. Digicel made a sufficiently complete and accurate request under the Infrastructure Regulations for the Requested Services, for LIME to be required to either provide to Digicel a valid quotation for the provision of the Requested Services or deny that request (with detailed written reasons).
 - c. Under Regulation 8 (8) of the Infrastructure Regulations, LIME denied Digicel's request to provide Digicel with the Requested Services.
 - d. As a consequence of LIME's denial as referenced above, Digicel was able to refer the matter as a dispute determination request to the Authority in accordance with the Dispute Regulations, for the Authority to determine the Dispute.
65. Going forward, the Authority will commence shortly a consultation as to whether or not requiring LIME to provide infrastructure sharing services to allow for the unbundling of the fixed wire local loop is contrary to the public interest.
66. Finally, the Authority notes that Digicel has asked for the Authority to direct LIME to pay any costs Digicel incurred as a result of bringing "this matter to dispute." However, the Authority does not consider there is sufficient evidence before it to justify such a direction.