



ICT Decision 2007-2

Grand Cayman, 27th September 2007

Decision on Digicel's Application to Reconsider the 16 August 2007 Determination Regarding Disclosure of Information Filed in the FLLRIC Proceeding

Summary

The Authority denies the application by Digicel to reconsider its 16 August 2007 determination regarding the disclosure of information filed by C&W in the FLLRIC proceeding. In the original decision, the Authority determined that the specific direct harm to C&W that is likely to result from disclosure outweighs the public interest in disclosure in this instance and therefore that C&W's confidentiality claims are justified. In this decision, the Authority determines that it does not have jurisdiction to reconsider its 16 August 2007 determination, either under sections 78 of the Information and Communications Technology Authority Law (2006 Revision) or under its general, residual jurisdiction over its own procedures.

(Note: This summary is provided for the convenience of the reader and does not constitute part of the Decision. For details and reasons for the conclusions, the reader is referred to the various parts of the Decision.)

BACKGROUND

1. On 25 July 2007, Digicel Cayman Limited ("Digicel") requested that the Information and Communications Technology Authority ("Authority") order the public disclosure of certain information redacted by Cable and Wireless (Cayman Islands) Limited ("C&W") in its responses to the Authority's 16 April 2007 interrogatories. Digicel submitted that the information redacted by C&W is not confidential or commercially sensitive as it is not C&W-specific. Digicel also noted that, even if this information is deemed to be confidential or commercially sensitive, there is a compelling interest in disclosure under subsection 5(1) of the Information and Communications Technology Authority Law (Confidentiality) Regulations, 2003 ("Confidentiality Regulations") given the public nature and consequences of the forward-looking long-run incremental cost ("FLLRIC") model.

2. In the same letter, Digicel requested that its economic and accounting experts be given full access to all the workings of the C&W FLLRIC model in its current form. Digicel stated that its representatives would be prepared to agree to conditions of confidentiality in respect to what it characterized as "genuinely commercially sensitive C&W inputs."
3. On 6 August 2007, C&W filed a submission arguing that the information requested by Digicel should remain designated as confidential information. C&W noted that the information requested by Digicel includes actual C&W demand data provided as back-up for the prepaid platform routing factors. C&W also submitted that the outputs of the FLLRIC model are based on specific actual costs incurred by C&W in the provision of services. In its letter, C&W also opposed Digicel's proposal to allow its experts to have full access to the C&W FLLRIC model.
4. In a letter decision dated 16 August 2007 ("Determination"), the Authority determined that the specific direct harm to C&W that is likely to result from disclosure outweighs the public interest in disclosure in this instance and therefore that C&W's confidentiality claims are justified. Furthermore, the Authority noted that the Confidentiality Regulations provide a process by which parties can gain access to information that has been filed in confidence with the Authority. Therefore, the Authority concluded that it is not necessary to engage in a separate process to allow Digicel's experts to have access to the C&W FLLRIC model.

THE APPLICATION

5. On 30 August 2007, Digicel filed a request for reconsideration of the Determination. Digicel submitted that the Determination is inconsistent with the Authority's prior practice, the Information and Communications Technology Authority Law (2006 Revision) (the "Law") and ICTA Decision 2005-4 on FLLRIC. In particular, Digicel argued that the Determination lacks clarity as it does not specify what form of harm to C&W is of concern to the Authority and does not explain why the public interest in disclosure in this instance is outweighed by the specific direct harm to C&W. Digicel submitted that the information redacted in the C&W responses to interrogatories is not specific to C&W and therefore cannot be treated as confidential. Finally, Digicel argued that, in accordance with Decision 2005-4, it is in the public interest to ensure that the FLLRIC process is conducted in a transparent and accessible manner.
6. A call for comments on Digicel's request for reconsideration was issued by the Authority on 3 September 2007. In the call for comments, the Authority noted that, without restricting the scope of the issues to be considered, the following should be addressed in the comments and in Digicel's reply:
 - whether the Authority has jurisdiction, under section 78 of the Law or otherwise, to reconsider the Decision; and

- assuming that the Authority has jurisdiction, whether the Decision should be confirmed, reversed or modified, and for what reason(s).
7. The Authority received one opposing intervention from C&W. In its intervention, C&W argued that the Authority does not have jurisdiction to reconsider the Determination, either under sections 78 or 79 of the Law or under its general residual jurisdiction over its own procedures. In addition, C&W submitted that there is no substantive reason for reconsidering the Determination, as there is no fundamental flaw in the procedural or substantive approach applied by the Authority in arriving at the Determination.

AUTHORITY ANALYSIS AND DETERMINATION

8. In order to avail itself of the opportunity to apply for reconsideration of a decision of the Authority, Digicel must satisfy the requirements of section 78 of the Law. This provision seeks to limit reviews and appeals of decisions of the Authority to a subset of the types of decisions taken by the Authority. The Authority notes that the list in section 78(1) comprises those decisions which tend to be the most significant, not only in terms of the economic impact on the parties to the proceedings, but also in terms of the development of public policy in Cayman.
9. The Authority is of the view that this provision should be interpreted so as to seek finality concerning its decisions in relation to all matters not enumerated in section 78. The Authority therefore considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to a proceeding at first instance before it, the Authority should decline to entertain an application for reconsideration of a matter that falls outside the list of subject areas enumerated in section 78(1).
10. In the present case, the Determination was a decision denying a request for disclosure made pursuant to paragraph 4(1)(f) of the Confidentiality Regulations. This type of decision is not included in the list of matters to which the reconsideration process applies under section 78 of the Law. Accordingly, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in the proceeding that led to the Determination, the Authority should decline Digicel's request for reconsideration.
11. The Authority notes that Digicel's request for reconsideration does not identify any fundamental flaw to the procedural approach adopted by the Authority in the proceeding that led to the Determination. With respect to substance, whilst Digicel disagrees with the conclusion reached by the Authority, it does not identify any particular flaw with the substantive approach adopted by the Authority in reaching this conclusion. In fact, the Authority specifically noted in the Determination that it weighed the public interest in disclosure against the specific direct harm to C&W that might result from disclosure. The Authority remains of the opinion that this is the correct analytical approach when considering a request for disclosure under paragraph 4(1)(f) of the Confidentiality Regulations.

12. In light of the above, the Authority is of the view that it does not have jurisdiction to reconsider the Determination, either under sections 78 or 79 of the Law. The Authority also determines that there is no substantive or procedural reason for reconsidering that determination under its general, residual jurisdiction over its own procedures. Digicel's request for reconsideration is therefore denied.