



## ICT Decision 2007-1

Grand Cayman, 19th July 2007

### **Decision on EOCG Wireless (Cayman) Limited's Application for an ICT Licence**

#### ***Summary***

*The Authority denies the application by EOCG Wireless (Cayman) Limited for an ICT Network and ICT Services licence to provide wireless telecommunications services in the Cayman Islands. The Authority determines that EOCG's experience of successfully bringing mobile service to market is limited. The Authority is also concerned that EOCG may have been less than forthright in its dealings with the Authority during the course of two separate applications. Furthermore, the Authority notes that, in the recent past, EOCG has twice entered into close working agreements with other companies, and in each case its partner has taken steps to terminate the agreement in less than 12 months. The Authority has therefore determined that it is not in the public interest to grant an ICT Licence to EOCG.*

(Note: This overview 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.)

#### **THE APPLICATION**

1. On 22 December 2006, the Information and Communications Technology Authority ("the Authority") received an application by EOCG Wireless (Cayman) Limited ("EOCG") for an ICT Network and ICT Services licence to provide wireless telecommunications services in the Cayman Islands. EOCG intended to provide CDMA, EVDO and broadband-based enterprise solutions.
2. In 2005, EOCG filed a similar application, but this application was later withdrawn.<sup>1</sup> EOCG subsequently entered into an agreement with Blue Sky Wireless to provide service in the Cayman Islands. This agreement was terminated on 15 September 2006.

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<sup>1</sup> In reaching its decision, the Authority noted that the January 2005 application was filed by a different legal entity than the current application, but that the majority shareholder (Zocor Limited) was the same in each case. The explanation for the change in the legal entity applying for the licence was given in an e-mail by EOCG's external counsel dated 31 January 2007. This e-mail indicated that "it worked out to be cheaper and faster to incorporate a new company rather than resurrect ECL and this is why EOCG Wireless (Cayman) Limited was formed for the purposes of the present application."

3. A call for comments on the December 2006 application was published in the Cayman Gazette on 19 March 2007. The Authority received one opposing intervention from Blue Sky Wireless Limited (“Blue Sky Wireless”).
4. In considering this application, the Authority had regard to:
  - The Information and Communications Technology Law (2006 Revision) (“the Law”), and in particular section 26 thereof;
  - The application itself, the formal and informal inquiries made by the Authority of EOCG in connection with the application and the responses provided by or on behalf of EOCG;
  - Blue Sky Wireless’ response to the Call for Comments and EOCG’s reply thereto;
  - The application for an ICT licence submitted by EOCG Cayman Limited on 25 January 2005 and subsequently withdrawn, together with the formal and informal enquiries made by the Authority of EOCG in connection with that application and the responses provided by or on behalf of EOCG; and
  - The results of the Authority’s own due diligence investigations.
5. The Authority has determined that it is not in the public interest to grant an ICT Licence to EOCG.<sup>2</sup> The rationale for this determination is set out below.

## **AUTHORITY ANALYSIS AND DETERMINATION**

### **a. Technical Qualifications, Compliance and Performance of Obligations (ss. 26(2)(a), (b) and (c))**

6. Under ss. 26(2)(a) of the Law, the Authority may, where necessary before granting a licence, take into account whether the applicant possesses the technical qualification necessary to perform the licence obligations. Further, pursuant to ss. 26(2)(b) and (c), the Authority may take into account whether the applicant has complied with the obligations of any current or prior licence, and whether the applicant intends to perform the obligations attached to the licence for which it is applying within a reasonable period of time.

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<sup>2</sup> The Chairman of the Board, Mr. Samuel Jackson, did not participate in any discussion of the EOCG application because of a potential conflict of interest.

7. In its 2005 Application, EOCG stated that “The Parent has a wealth of experience in the provision of ICT networks and services and holds interests in companies which provide or will be providing ICT networks and/or services in [REDACTED], [REDACTED], [REDACTED], [REDACTED] and [REDACTED]”. In the current application, EOCG stated “EOCG has a wealth of experience in the provision of ICT networks and services and owns companies which provide ICT networks and/or services in [REDACTED], [REDACTED], [REDACTED] and, commencing [REDACTED], [REDACTED]”.
8. The Authority notes that [REDACTED], [REDACTED], [REDACTED] and [REDACTED] were dropped from the second list. The Authority has been advised by the Netherlands Antilles’ regulator that EOCG has to date complied with the terms of its licence and rolled out service in three islands in the Netherlands Antilles. However, it has been informed by the regulator in [REDACTED] that as at 29 June 2007, EOCG had not commenced the build out of its network in that country despite the fact that it forecast (in its current application) a start date in [REDACTED]. Therefore, it appears that EOCG has not brought to market its CDMA services in any foreign jurisdiction other than the Netherlands Antilles.
9. With respect to developments in the Cayman Islands, EOCG entered into an agreement with Blue Sky Wireless [REDACTED]. Neither EOCG nor Blue Sky Wireless provided a clear explanation to the Authority of the circumstances surrounding the breakdown of their relationship.
10. The Authority notes, however that, between September 2005 and September 2006, Blue Sky Wireless had to twice seek amendments to its licence because of delays in the roll-out dates for the full range of its networks and services. When the agreement with EOCG was terminated on [REDACTED], the roll out had not been completed. In the absence of specific information regarding the breakdown of the relationship between EOCG and Blue Sky Wireless, the Authority can only assume that EOCG was at least partly responsible for the delays in Blue Sky Wireless’ deployment.
11. The Authority therefore concludes that as a company, and despite its optimistic statements in 2005, EOCG’s experience of successfully bringing a mobile provider to market is limited to three islands in the Netherlands Antilles.

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<sup>3</sup> The relationship between Blue Sky Wireless and EOCG was characterized by EOCG’s external counsel, in an e-mail dated 31 January 2007, as [REDACTED]. However, clause 4.1 of the Agreement between EOCG and Blue Sky Wireless states that “[REDACTED]”.

**b. Fit and Proper Person (ss. 26(2)(d) and ss. 26(3))**

12. Under ss. 26(2)(d) and 26(3) of the Law, the Authority may take into account, before granting a licence, whether the applicant is a fit and proper person. In determining whether an applicant is fit and proper, the Authority must consider all of the circumstances, including evidence of that person's honesty, integrity and reputation.

13. In its 2005 application, EOCG answered "No" to the following two questions on the application form:

"14. Have any directors of the Company been a director of a company which has gone into liquidation, official receivership, administration, or become insolvent (either while he was a director or within 3 years of his ceasing to be a director)?

17. Has any director of the Company or any member of the Company's managerial staff ever been, or are they now, the defendant or respondent in any proceedings in any court in any jurisdiction involving dishonesty, fraud, theft or violence?"

14. The Certification at the end of the Application, which was signed by Mr. Gilbert Armenta as President and CEO of the company states:

"1. The Applicant by submitting this form and any attachments thereto represents, warrants and undertakes to and with the ICTA that all information, facts and matters (together the 'Information') contained or referred to in the form and any attachments thereto are true and accurate as at the date of the application and correct in all respects and that nothing has been omitted which renders any of such Information incomplete, false or misleading.

2. So far as such Information relates in whole or in part to past or present matters of fact upon submission of the form, they shall also be deemed to constitute fundamental representations upon the faith of which the ICTA may grant the Licence or Licences applied for.

3. Promptly upon the occurrence of or promptly upon the Applicant becoming aware of the impending or threatened occurrence of any event which would or might reasonably be expected to cause or constitute a breach of the representations, warranties and undertakings in sub-clause 1 above (or would have caused or constituted a breach of the representations, warranties and undertakings in sub-clause 1 had such event occurred or been known to the Applicant prior to the date of application), the Applicant shall give written notice of the same to the ICTA and shall use its best endeavours promptly to prevent or remedy the same.

4. Where the Information consists of any audited accounts of the Applicant, the Applicant by submitting this form and any attachments thereto represents, warrants and undertakes to and with the ICTA that those accounts are accurate in all material respects and show a true, complete and fair view of the state of affairs, financial position, assets and liabilities of the Applicant and of its results for the financial period therein stated.
  5. The Applicant further certifies that, to the best of its knowledge, any matters which might influence the ICT Authority's judgement as to whether the Applicant, its directors and substantial shareholders are fit and proper persons to hold an ICT licence have been made known to the ICT Authority."
15. As a result of its due diligence investigations, the Authority became aware that Gilbert Armenta and Darlene Armenta, doing business as "Advanced Communications", filed for bankruptcy in the United States in 1994. When asked to clarify why this bankruptcy had not been declared, Mr. J. Reid Bingham, the then Executive Vice President and General Counsel of EOCG Cayman Limited, stated in a letter dated 19 September 2005:
- "As a result, Mr. Armenta was forced to seek protection under the bankruptcy laws and filed for personal bankruptcy which, as a sole proprietorship, included his business debts d/b/a "Advanced Communications." Since the Authority's Application does not call for information regarding personal bankruptcies and since "Advanced Communications" was a trade name and was never separately incorporated or organized as a "company," Mr. Armenta answered "no" to question 14 of the Application."
16. The Authority also uncovered that the Quarterly Journal of the Office of the Comptroller of Currency, Vol 23, No. 3, dated September 2004, reported:
- "The OCC continued to pursue enforcement actions against the directors and officers of a closed national bank who were involved in suspicious loan transactions and other activities that resulted in overstatement of the bank's earnings and concealment of losses. The bank's former counsel consented to a personal cease-and desist order, a restitution order in the amount of \$195,000, and assessment of a \$25,000 civil penalty.....(In the Matter of J. Reid Bingham, Hamilton Bank, N.A., Florida Enforcement Action No. 2004-2 (February 17, 2004))"
18. By way of explanation, Mr. Bingham in his 19 September 2005 letter to the Authority stated:

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[REDACTED]

[REDACTED]

[REDACTED]

19. In its current application, EOCG answered “Yes” to question 14 and “No” to question 17 on the Application Form. These questions had been slightly modified from those in 2005, and read:

14. Have any directors or officers of the Company ever declared personal bankruptcy or been a director or officer of a company which has gone into liquidation, official receivership, administration, or become insolvent (either while he was a director or officer or within 3 years of his ceasing to be a director or officer)?

17. Has any director of the Company or any member of the Company’s managerial staff ever been, or are they now, the defendant or respondent in any proceedings in any court in any jurisdiction involving non payment of debt, dishonesty, fraud, theft, restitution or violence?

20. The Authority’s investigations disclosed that Mr. Armenta in 2001 was the defendant or respondent in a case in Scottsdale Justice Court involving the non-payment of a debt by Mr. Armenta, and that a judgement was entered against him. When queried by the Authority, EOCG’s external counsel stated in an email sent on 31 January 2007:

“ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

21. No explanation was given as to why Mr. Armenta did not disclose these facts on either the 2005 or the 2006 Application Form.
22. The Authority's concern about the above facts is not so much the events themselves. Rather, the Authority is concerned that these facts were not disclosed when EOCG filed its applications for a licence. Furthermore, the Authority is concerned that, despite the previous exchanges of correspondence with the Authority in 2005, Mr. Armenta chose not to disclose in the current application the judgement against him. The Authority further notes that although Mr. Bingham was not cited as a director of the 2006 Applicant (EOCG Wireless (Cayman) Limited), he is a director of the parent company, E. Oliver Capital Group LLC.
23. On another matter, the Authority notes that since February 2007, EOCG has made the following false statements on a number of web sites:

“MIO is the largest provider of 3<sup>rd</sup> Generation mobile communications service in the Netherlands Antilles and the Cayman Islands.

MIO currently has licenses to operate in Aruba, Bonaire, Curacao, St Maarten and the Cayman Islands.”
24. Despite the fact that EOCG has never held a licence to operate in the Cayman Islands, and despite the fact that these erroneous statements were drawn to the attention of the EOCG Executive Vice President (Archbold/Perry) some months ago, these statements continue to appear on the following web pages:

[http://curacao.mio.an/3g/about\\_us.php](http://curacao.mio.an/3g/about_us.php)  
<http://www.novatelwireless.com/partners/operators/latinamerica.html>  
<http://www.cdg.org/cdg/members/eocg.asp>

25. Finally, as part of its due diligence, the Authority became aware of a dispute between E. Oliver Capital Group LLC and Videolocity International Inc. Videolocity is the developer and patent holder of video-on-demand technology which EOCG plans to deploy in the Cayman Islands. In December 2005, both parties formed a joint venture to further develop and market the technology. On 8 September 2006, however, Videolocity mailed a formal default notification indicating that E. Oliver Capital Group LLC's had continuously failed to contribute funds and make cash advances to Videolocity as required under the Operating Agreement.
26. When the Authority inquired about this dispute, EOCG's external counsel responded in an email dated 31 January 07:

“Videolocity International Inc. is a public company and is therefore required to file its financial statements with the SEC. My understanding is that United States generally accepted accounting principles require disclosure of any material litigation or dispute, as such matters can entail large liabilities which anyone considering the financial accounts must be aware of in order to obtain a true and fair account of that company's financial situation. A dispute did arise between EOCG and Videolocity and Videolocity filed a default notice as part of that dispute.

I attach a copy of the Agreement which settled this dispute, once again in an amicable fashion. Once again, the agreement bringing the dispute to an end contains a non disparagement clause and so I am again constrained in my ability to present EOCG's side of the story. However, I would ask you to consider the following aspects of the settlement agreement:-

1. Videolocity agreed to pay EOCG US\$150,000;
2. EOCG obtained a royalty free license to use the patents and trademarks in dispute, worldwide; and
3. EOCG obtained a royalty free exclusive licence to use the patents and trademarks in dispute in the islands of the Caribbean in which EOCG operates.

Given the outcome of the dispute, I leave it to you to draw your own conclusions as to the rights and wrongs of the parties. I am instructed that my clients do not anticipate any difficulty at all in providing VOD nor any difficulty in using the patents and trademarks the subject of its dispute with Videolocity.”

27. Based on its review of Videolocity's filings with the United States' Security and Exchange Commission (“SEC”), the Authority is not persuaded that the dispute with Videolocity was settled in an amicable fashion. In its 10KSB filing of 12 February 07 covering the period to 31 October 06, Videolocity states that:



“After weeks of negotiations, and upon the advice of legal counsel, to avoid what counsel perceived could be a lengthy (up to five years) and costly legal battle, which Videolocity potentially could not survive, on October 10, 2006 we reached a compromise agreement with E. Oliver Capital Group LLC. The agreement consisted of Videolocity purchasing all of the Intellectual Property Technology originally transferred to the joint venture; and any other intellectual property rights including High Speed Internet Access together with digital streaming video technology, existing license agreements and agreements for Video-on-Demand programming. The agreement required the transfer, sale, assignment, and conveyance to Videolocity all of the right, title and interest to the Intellectual Property Technology.

Under the agreement, we paid \$150,000, which was rationalized because EOCG Media had provided for the further development of the intellectual properties throughout the year. Additionally, under the agreement we granted a non-exclusive worldwide license to the Intellectual Property and an exclusive license in certain territories within the Caribbean for a term of five years. The agreement also provided that with respect to the exclusive licensed territory in which E. Oliver Capital Group LLC does not secure an agreement to provide the intellectual property technology to an end-user within the exclusive licensed territory, the term of the exclusive license for that exclusive licensed territory shall terminate two years from October 10, 2006. The agreement also stated that Videolocity does not assume, or otherwise become responsible for any liabilities, obligations or expenses of E. Oliver Capital Group LLC during their ownership of the Intellectual Property and released each party to the agreement from any and all claims presently known or unknown at the time of the agreement.”

28. This SEC filing, along with a separate 10QSB filing of 18 September 06, suggests that the settlement was far from amicable, that the payment of \$150,000 was to purchase back the rights to Videolocity’s technology, and that EOCG’s exclusive licence in the Caribbean may expire in October 2008.
29. From the Authority’s perspective, it is of concern that in the recent past EOCG has twice entered into close working agreements with other companies (Blue Sky Wireless and Videolocity), and in each case its partner has taken steps to terminate the agreement in under 12 months.

**c. Competition, Promotion of New Networks and Services and Investments (ss. 26(2)(f), (h) and (i))**

30. Under ss. 26(2)(f), the Authority may consider whether the grant of a licence would promote competition among ICT service and ICT network providers. The Authority is also permitted, under ss. 26(2)(h) and (i), to take into consideration whether the grant of a licence would lead to the introduction of new ICT services or ICT networks and bring new investments to the Cayman Islands.
31. In its intervention, Blue Sky Wireless argued that the mobile market in the Cayman Islands cannot sustain another service provider. Blue Sky Wireless also noted that approval of this application would have a detrimental impact on the profitability of existing licensees and that, in order to prevent an outflow of roaming revenues out of the Cayman Islands, it is crucial that CDMA licensees be Caymanian-owned.
32. In reply, EOCG reiterated that the choices available to the public in terms of telecommunications services are limited and, in the case of CDMA roaming services, non-existent. It noted that the roll out of CDMA will increase Cayman's ability to compete in the global market place and provide a useful service for visitors. EOCG also noted that, in the absence of any comments from Cable & Wireless and Digicel, it was reasonable to infer that the introduction of CDMA service would not have a significant detrimental impact on existing wireless carriers.
33. Whilst the Authority does not concur with Blue Sky Wireless' contention that the Cayman Islands cannot sustain another service provider, the Authority notes that Blue Sky Wireless currently offers limited CDMA service in the Cayman Islands, and is planning to expand these services island-wide in the near future. Both Cable & Wireless and Digicel also intend to deploy CDMA technology utilizing already allocated spectrum. The Authority therefore does not accept EOCG's assumption that there is a gap in the market and that approval of its application would lead to the introduction of a new ICT network or ICT service.
34. While the granting of a licence to EOCG would likely bring new investment in the Cayman Islands, the Authority notes that it would require the allocation of additional spectrum in the 1900 band. Furthermore, because of shortage of space on existing towers, EOCG would likely be seeking the construction of additional towers.

**d. Caymanian Participation (ss. 26(2)(g))**

35. Under ss. 26(2)(g) of the Law, the Authority may consider the extent of Caymanian participation in the applicant in assessing an application for an ICT network or ICT service licence. The Authority notes that 15% of EOCG Wireless (Cayman) Limited is Caymanian owned, and that this shareholder has the option of purchasing a further 5%. It was further noted that a Caymanian was one of three

directors of the company, and that the company plans to employ 5 Caymanians initially, rising to 12 Caymanians after one year. The Authority considers that these levels of Caymanian participation are consistent with the levels proposed by, and approved for, other licensees.

**e. Interests of the Public, Subscribers and Users (ss. 26(2)(e) and (j))**

36. After thorough and careful consideration of all the facts before it, including those detailed above, the Authority is of the view that its concerns about the company, and in particular the Company's failure to be totally forthright in its dealings with the Authority during the course of two separate applications, significantly outweighs any benefits that might accrue to the public, subscribers and users should the application be granted. The Authority therefore denies the application.