



ICT Decision 2005-5

Grand Cayman, 8th November 2005

Decision on Cingular Wireless Application to Transfer of Ownership of Wireless Ventures (Cayman Islands) Ltd. to Digicel Ltd.

Summary

The Authority grants its consent to the application by Cingular to sell the shares of its operating company in Cayman to Digicel.

On 27 July 2005, Cingular applied to the Authority to transfer the shares of the parent of Wireless Ventures (Cayman Islands) Ltd. The Authority's consent to the transaction is required pursuant to subsection 25(1) of the ICTA Law, which specifies that this consent shall not be unreasonably withheld.

The Authority chose to seek public comment and published a notice in the Cayman Islands Gazette inviting comments. The Authority received comments from one individual and five licensees.

In addition, the Authority posed two rounds of written questions to each of Cingular and Digicel to understand more fully the effect of the proposed transaction on customers. The Authority has also considered its effect on the level of competition in Cayman and whether any issue arises concerning potential abuse of dominant position.

The Authority has granted its consent to the acquisition on the basis of Digicel accepting five conditions, as follows:

- 1. Immediately upon the closing of the acquisition, Digicel shall relinquish the entire GSM1900 spectrum which was originally allocated to Digicel by the Authority, i.e. 1905 to 1909.8 MHz paired with 1985 to 1989.9 MHz.*
- 2. Upon written request from the Authority, Digicel shall implement the re-tuning of the Wireless Ventures' current GSM850 spectrum (841 to 848 MHz paired with 886 to 893 MHz) to 836.1 to 843 MHz paired with 881.1 to 888 MHz, in a time scale to be determined by the Authority. Should the Authority require such re-tuning, Digicel shall be responsible for its own costs.*

3. *Digicel undertakes that if Wireless Ventures post-paid contract customers, during the term of their existing contract, receive a materially inferior or reduced service functionality following the sale to Digicel in comparison to that received from Wireless Ventures prior to the sale, Digicel shall waive any penalty, any claim for liquidated damages and any early termination fee payable by that contract customer. In the event that a dispute arises between the customer and Digicel concerning these matters, the Authority may intervene and make a final and binding decision.*
4. *Within seven days of the closing of the sale, Digicel undertakes to notify in writing all current Wireless Ventures' customers of the new ownership of Wireless Ventures, and, in the case of post-paid contract customers, of the undertaking it has given in paragraph (3) above. In addition, within two days of migrating a post-paid contract customer from the Wireless Ventures' platform (i.e. a blue SIM) to the Digicel platform (i.e. a red SIM), Digicel shall again notify such customers in writing of the undertaking it has given in paragraph (3) above. Digicel is required to obtain from the Authority prior approval of the text of each of these communications.*
5. *The Authority has accepted Digicel's amended roll-out dates for its fixed wireless networks and services. These now form part of the conditions of Digicel's ICT Licence, and accordingly failure to meet these roll-out dates would make Digicel liable to an administrative fine by the Authority under the provisions of section 58 of the ICT Authority Law. Commencing 31st January 2006, Digicel shall submit to the Authority monthly reports of its progress with the implementation of its residential fixed wireless service. These reports shall include a comparison between actual progress and the project milestones it has filed with the Authority.*

(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.)

Background

The Transaction

1. Digicel Limited, the parent of Digicel Cayman Limited, is purchasing from Cingular Wireless ("Cingular") the shares of AWS Caribbean Holdings Inc, the Parent of Wireless Ventures (Cayman Islands) Ltd. Upon regulatory approval, Digicel Limited will own two licensed operating companies in the Cayman Islands – Wireless Ventures (Cayman Islands) Ltd. ("WVCI") and Digicel Cayman Ltd. ("Digicel").
2. Under a Transition Services Agreement between the two companies, Cingular will continue to provide services and support to WVCI for up to thirty months. Digicel

has stated that, as quickly as possible, it will augment its own networks and services to a level where they at least equal those currently being provided by WVICI. Digicel plans to cease reliance on the Transition Services Agreement and provide all networks and services itself more quickly than the maximum of thirty months allowed in the Agreement.

Legal Position

3. Section 25 of the Information and Communications Technology Authority Law (2004 Revision) ("the Law") reads, in part, as follows:

(1) ... a person owning or having an interest in shares in the licence shall not transfer or otherwise dispose of or deal in those shares or that interest without the prior written consent of the Authority whose consent shall not be unreasonably refused.

(2) In subsection (1), the reference to shares being issued, transferred, disposed of, or dealt with includes the issue, transfer or disposal of, or dealing with either the legal or a beneficial interest in the shares.

4. The Law gives no direct guidance on the matters to be considered by the Authority when determining whether or not to grant such approval. If it were to deny a request, it must give its reasons in writing.

The Initial Effect

5. On the day that the transaction is completed, there will be little change as far as Cayman is concerned. WVICI will continue to be a licensee that provides mobile networks and services to its customers using its own network. Only a parent corporation will have changed from Cingular to Digicel Limited.
6. The difference from previous similar transactions is that Digicel Limited already owns a company that holds an ICT licence and operates in the Cayman Islands. On the day that the transaction is completed, Digicel Limited will therefore own two separate licensees operating in the Cayman Islands, WVICI and Digicel.

Subsequent Effect

7. Digicel Limited does not wish to own two different companies providing almost identical services in the Cayman Islands. It has stated that it will wish to seek the Authority's approval to amend the Digicel licence to incorporate those resources that are currently allocated to WVICI. As a corollary, WVICI would surrender its licence.

Process

8. Following a number of informal meetings with representatives of Cingular and Digicel, and receipt of non-redacted versions of the various agreements between the two companies, the Authority received on 27 July 2005 a formal request for approval of the sale. On 1 August 2005, the Authority published in the Gazette a Notice detailing the proposed sale and inviting interested parties to make submissions to the Authority within fourteen days. Concurrently, the Authority issued interrogatories to Cingular and Digicel.

Comments Received

9. The Authority received comments from one individual and five licensees.
10. Mr. J. Wallace Platts wrote in favour of approval of the proposed share purchase, noting that he has received excellent service from Digicel and arguing that Cayman, as a small country, cannot support a large number of competitors.

Cable & Wireless

11. Cable and Wireless (Cayman Islands) Limited ("C&W") did not oppose the transaction per se, but sought a transparent public process, including the posing of relevant questions by the Authority and interested parties to Cingular and Digicel. C&W argued that Digicel likely commands approximately 55% of the market for mobile services in Cayman, so that there is no justification for imposing on C&W a greater level of regulation. C&W stressed that the market in Cayman should properly be viewed as part of the regional market where undoubtedly Digicel has significant market strength.
12. In this regard, C&W advocated a lower level of regulation on both companies, noting that the current obligations upon C&W flow from the era before there was any mobile competition whatsoever. Furthermore, C&W advocated scrutiny of any roaming arrangement with Cingular to ensure it would not be so favourable as to distort competition in Cayman.
13. C&W also sought that, should the transaction be approved, Digicel's access to spectrum and numbering resources be reviewed. In this regard, C&W noted that some frequencies, particularly control channels, are more valuable than others. C&W calculated the combined GSM spectrum allocation of Digicel and WVICI to be 38.4 MHz, contrasted with 22.8 MHz granted to C&W. C&W also advocated that the Authority reverse its 2003 determination to permit the use of a foreign Home Network Identifier ("HNI").
14. Finally, C&W sought a requirement that all WVICI customers be permitted to opt out of their contracts without penalty, since many customers may have chosen WVICI as

their service provider based on factors other than price. As a corollary, C&W argued that the Authority should require Digicel and WVICI to unlock the handsets of any such customers who choose to switch service providers so that handsets might be readily redeployed. C&W noted that most of C&W's handsets were unlocked in 2004. Furthermore, C&W argued, adequate consumer information should be provided by way of a billing insert and sufficient particulars on the WVICI and Digicel websites.

WestStar

15. WestStar opposed the acquisition, arguing that a decrease from three active mobile operators to two is inconsistent with the duties of the Authority. WestStar contended that Digicel would become the dominant provider of mobile telecommunications in Cayman and that it would accordingly engage in cross-subsidization of fixed wireless and data services. WestStar also argued that the GSM spectrum currently accorded to WVICI should not be permitted to flow to Digicel, as this would permit Digicel to control the majority of GSM spectrum in Cayman.

TeleCayman

16. TeleCayman opposed the transaction on the basis that equity participation by Caymanians should be a part of the proposal. TeleCayman was of the view that the acquisition would lead to unreasonable spectrum allocations to the merged entity. TeleCayman sought of the Authority a policy statement and public consultation addressing how the Authority will in future allocate spectrum. TeleCayman feared that smaller players would be squeezed out of the marketplace in Cayman, leaving only C&W and Digicel. In this regard, TeleCayman requested that the Authority block the deployment of fixed wireless services by Digicel.

Potential Investors in WVICI

17. Three intervention statements were filed on behalf of Messrs Norberg Thompson, Gene Thompson, Rex Crighton, Dale Crighton and Optimum Solutions Ltd, opposing the transaction on the basis that more time should be accorded for these persons to negotiate with Cingular with a view to achieving local equity participation in WVICI. These persons contended that negotiations with Cingular, and, before Cingular's acquisition of the licensee, with AT&T Wireless, had never produced acceptable terms upon which these potential investors could reasonably invest.
18. The potential investors noted that considerable effort and out-of-pocket expenses were willingly expended on the basis that an investment in equity would be ultimately forthcoming from ongoing negotiations. They contended, however, that they were being asked to invest based on a business case that they could neither monitor nor confirm, and which contained materially incorrect assumptions. They provided a series of documents to the Authority in seeking to back these claims. The potential

investors stated that they sought, and ultimately were successful in achieving, an increase in the roaming revenue booked to WVCI.

19. The potential investors sought of the Authority confirmation of any further procedures it intended to adopt in assessing their complaints before reaching a decision on the proposed purchase. The potential investors noted their willingness to meet with the Authority to discuss their concerns.

WestTel

20. WestTel filed an application pursuant to section 41 of the Law seeking that the Authority conduct an investigation, arguing that sections 36 and 40 have been infringed. WestTel argued that these sections, respectively addressing an agreement which may affect trade in Cayman and conduct which amounts to the abuse of a dominant position, apply to an agreement for the purchase of shares.
21. WestTel submitted that the short period of fourteen days for comment pursuant to the Gazette Notice could not have been intended to remove from interested parties other rights deriving from other provisions of the Law.
22. WestTel characterized the process set out for addressing its request for an investigation of Application, Answer, and Reply as a preliminary process which serves to permit the Authority to determine whether prima facie grounds exist requiring it to conduct a full investigation. WestTel submitted that it had established an arguable case that the proposed transaction would have the effect of infringing the prohibitions addressed in sections 36 and 40 through setting out the following six propositions:
 1. There are currently three cellular providers in the market delivering service. If the acquisition is allowed by ICTA this will create a duopoly. If ICTA allows the acquisition, thus creating a duopoly this would be in direct conflict of ICTA's responsibilities to maintain a competitive market.
 2. Digicel has no long term vested interest in the Cayman Islands. As ICTA was created by the Caymanian government to protect interests of Caymanians, Digicel's overall plan of acquiring companies and selling companies to interests outside of Cayman is in direct conflict of the best interest of the Caymanian people and government
 3. By Digicel acquiring Cingular this will effectively make them the prominent cellular provider in Cayman. Digicel has been licensed for fixed wireless and data service as well as Cellular. It is our concern that a dominant provider for cellular services will cross-subsidise the cost of acquisition for fixed wireless and data services making them in breach of their license and all ICTA regulations.
 4. Any spectrum licensed to Cingular should not be permitted to be part of the acquisition for the following reasons. If the licence of the GSM spectrum is allowed by ICTA effectively this will give Digicel control of the majority of the GSM spectrum.

5. It is our belief based on historical corporate behaviour that Digicel is trying to acquire Cingular for the sole purpose of creating a higher value for the purpose of a sale of the two entities which will have a direct impact on the economy of the Cayman Islands.
 6. With the acquisition of Cingular by Digicel (sic) becomes the dominant controlling party of the infrastructure used in fixed wireless and cellular therefore they are gaining an anticompetitive advantage in the Cayman market.
23. WestTel noted that neither WVCI nor Digicel have applied for an exemption to be granted by the Authority, pursuant to section 37, for the agreement that would lead to the acquisition of shares. Hence, WestTel argued, the Authority may not grant an exemption to the infringement addressed by section 36.

Responses to Comments

24. Although technically Cingular is the applicant in the current proceeding, Digicel took the lead in responding to most of the comments received in response to the Gazette Notice. Digicel responded to C&W on the issue of a public process by noting that both it and Cingular had provided extensive information to the Authority.
25. On the issue of the nature of the market in question, Digicel contended that it would not, even upon completion of the transaction, be in a position to exercise any market power. Digicel argued that the presence of C&W in the overall market accorded dominance to C&W and rendered impossible the exercise by Digicel of any market power.
26. Digicel argued that it was not seeking to hoard spectrum, but only to retain those frequencies required to afford to its customers a high quality of service.
27. Digicel concurred with C&W that many WVCI customers may have chosen WVCI on the basis of factors other than price. Digicel stressed, however, that all WVCI customers would enjoy exactly the same services throughout the current term of their contracts, undisturbed by the share transfer, as a function of the Transition Services Agreement between Digicel and Cingular. Digicel submitted that the price of the transfer of shares reflects customers and not merely assets.
28. Digicel replied to TeleCayman by arguing that its intervention sought to restrict the number of entrants in the fixed wireless market to shield TeleCayman from competitive pressures.
29. Digicel submitted that any allegation of abusive conduct by the merged entity may properly be addressed by the Authority pursuant to section 40(1) of the Law.
30. In response to the potential investors, Cingular characterized their ongoing strategy as one of delay, in an effort to force Cingular to provide "sweat equity", a concept never accepted by Cingular or, indeed, by AT&T Wireless. Cingular argued that it had

made numerous attempts over the years to accommodate the investment desires of the potential investors. Cingular in turn provided its own documentary evidence in support of its claim. Cingular submitted that no response or counter-proposal was ever forthcoming to a series of invitations to invest. Finally, Cingular invited a list of any outstanding out-of-pocket expenses to be tendered to Cingular for reimbursement.

31. Digicel responded to the Application by WestTel arguing against conducting an investigation under section 41 of the Law. Digicel submitted that the Authority is in a position to take into account concerns that relate to the competitive environment in exercising its jurisdiction pursuant to section 25(1), rendering unnecessary a separate investigation. Digicel also argued that the provisions of section 36 and 40 may not apply to a transaction covered by the provisions of section 25(1).

Authority Interrogatories and Responses

Digicel – First Interrogatories

32. Two letters were sent to Digicel seeking further information. In the first, the Authority sought an explanation as to why Digicel had failed to roll out fixed wireless services by 1 September 2004, the date to which it had committed in its licence. The Authority also required a statement of how and in what timescale Digicel intended to remedy this breach of its licence. In the second letter, the Authority set out a number of interrogatories concerning the networks and services to be provided, and resources utilized, during and after the transition period.
33. With respect to fixed wireless, Digicel stated in its response that the fixed wireless technology that it had originally planned to deploy in 2004 proved to be unsuitable. Hurricane Ivan then disrupted its plans, but it began to offer limited fixed wireless services in the corporate market in January 2005. It has now identified a new supplier, and has engaged a Group Technology Officer to implement its plans. A network provided by the new supplier was tested on site during August and September 2005, and Digicel launched business services during October 2005. Digicel expects to launch residential services in June 2006. Digicel emphasised its continued commitment to the provision of fixed wireless services, and attached a letter from its equipment supplier confirming its relationship with Digicel and the planned commercial launch of its residential services equipment in March 2006.
34. In its response to the Authority's second letter, Digicel stated that during the transition period (up to a maximum of thirty months from the date of closing) WVICI customers will continue to receive the same services that they currently enjoy. These services will continue to be provided using the WVICI infrastructure. Digicel submitted that it will use the transition period to provision identical or better services on their own network. Specific details were provided in confidence to the Authority concerning a wide array of specific service features.

35. Digicel stated that during the transition period it will require the entire existing Wireless Ventures spectrum in order to provide continuing services to Wireless Venture's subscribers. Digicel noted that it would, however, be prepared to relinquish a part or the entire 1900 spectrum currently allocated to Digicel. Although Digicel will conduct a spectrum optimisation exercise, it does not anticipate that it will be able to relinquish any spectrum in the GSM850 or GSM1800 bands. Digicel argued that retuning its GSM850 band network to the frequencies suggested by the Authority would be costly, cause temporary disruption of service, and would reduce its available spectrum by 0.1 MHz. This in turn would reduce the quality of service provided to its WVICI customers.
36. As requested by the Authority, Digicel detailed each of the number ranges currently issued to it, together with their percentage utilization. It believes that it could return one block of numbers to the Authority if required, and would be prepared to discuss the matter further if need be.
37. With respect to retail outlets, WVICI currently operates two stores and licenses independent dealers to operate a number of other outlets. These stores will be maintained during the transition period. However, in areas where two retail outlets are in close proximity, Digicel submitted that it will have to examine the commercial viability of maintaining such arrangements. Digicel stated, however, that it does not anticipate any involuntary staff redundancies as a result of the sale.
38. Digicel provided a listing of all communications towers from which WVICI and Digicel currently operate. WVICI owns eighteen towers and leases space on one other. Digicel owns five and leases space on a further twenty-one. Wherever possible, Digicel plans to move from leased spaces to the WVICI towers.
39. Digicel submitted that the use of Cingular's US HNI is essential during the transition period in order to make use of Cingular's infrastructure. By the end of the transition period, Digicel is required by its contract with Cingular to cease using the US HNI. Digicel also submitted that if the Authority were to withdraw its permission for Digicel to use the Jamaican HNI for its Cayman subscribers, it would have a materially detrimental effect on Digicel's operations as all handsets would have to be recalled.

Digicel – Second Interrogatories

40. The Authority wrote to Digicel requesting further clarification of a number of points made in Digicel's earlier responses. In response, Digicel provided more details on its plans to roll out certain services. In addition, Digicel also submitted that Digicel's equivalent service to WVICI's mMode is Digicel Live which it believes is a more developed product than mMode. It is offered to both pre-paid and post-paid subscribers, whilst only post-paid customers can access Cingular's mMode.

41. Digicel believes that by the end of the transitional period, its roaming agreements will be the same or better than those currently available to WVICI customers. In the event that a customer is adversely affected by the fact that they do not have a roaming capability that they had under WVICI service, Digicel undertakes to grant those customers the opportunity to terminate their contracts without penalty.
42. With respect to spectrum utilisation, Digicel pointed out that of nineteen WVICI towers, only six (covering the Seven Mile Beach and downtown George Town areas) carry GSM1900 equipment. GSM850 equipment is installed on all nineteen towers to provide coverage of all three Cayman Islands. Digicel therefore argues that it needs the entire WVICI GSM850 spectrum in order to provide an acceptable quality of service. Digicel estimates that the cost for retuning its network as suggested by the Authority would be US\$150,000 and might cause a twenty minute disruption in service to some subscribers. Digicel argues that it cannot give up 0.1 MHz of spectrum in the GSM850 band without adversely affecting the quality of its GSM service.
43. Digicel confirmed that it would continue to honour the Tower Master Lease Agreements that have been entered into by WVICI. Finally, Digicel stated that if it had to cease the use of the Jamaican HNI on its Cayman Network, it would have to recall all handsets in order to replace the SIM cards. In addition, all roaming agreements would have to be amended to include the new HNI. It also believes that it would cost US\$1.3 million to replace the SIM cards and make the necessary network reconfigurations.

Cingular – First Interrogatories

44. Cingular was asked to provide information on in-use number blocks (NXXs), contract termination penalties, and roaming turnover and revenue. Cingular initially responded on 26 August 2005 but its answer was unclear and incomplete. It was requested to resubmit its answers and it did so on 20 September 2005.
45. Cingular provided comprehensive details of the number blocks (NXXs) currently assigned to WVICI, together with their current utilisation. Cingular noted that the current penalty for the early termination of subscriber contracts is \$150 per telephone number. It also provided a full breakdown of when each contract is due to terminate. Lastly, Cingular detailed the accounting steps and amounts used to calculate WVICI's Quarterly Turnover and Quarterly Revenue in each of twenty-four different roaming scenarios presented by the Authority.

Cingular – Second Interrogatories

46. In its first response to the Authority, Cingular's calculations of Quarterly Turnover and Quarterly Revenue disclosed a difference between the results obtained for a Cingular US customer roaming in the Cayman Islands and those for a roaming partner's customer roaming in the Cayman Islands. In addition, there is a disparity

between the cost to a Cingular US customer for a roaming call made from the Cayman Islands and the associated revenue earned by Wireless Ventures. Cingular was requested to provide additional information on these items.

47. In the responses to the second round of Authority interrogatories, Cingular indicated that certain of the information provided in the responses to the first round was incorrect and Cingular provided updated information. Cingular also provided an explanation of the accounting treatment of the roaming revenue associated with calls made by Cingular US customers.

Authority Analysis

The Sale

48. As previously noted, the Law does not detail the criteria that the Authority should use when determining whether or not to approve a sale. It does, however, provide that the consent of the Authority to the transaction "shall not be unreasonably withheld". As Digicel is already a licensee in the Cayman Islands, its performance as a licensee should be examined.
49. During the initial licensing process, Digital placed great emphasis upon its intent to compete in both the mobile and fixed markets. As it had never before operated fixed networks in any jurisdiction, the company was questioned closely on the issue and the Authority received repeated assurances that Digicel was committed to providing a comprehensive fixed service to both business and residential customers. This commitment was subsequently incorporated into its licence, with a roll-out date of 1 September 2004.
50. Although Digicel commenced a limited fixed service to businesses on 1 January 2005, full commercial launch did not take place until October 2005 for businesses and will not occur until the second quarter of 2006 for residential customers. Digicel cites technical problems, market disruption caused by the anti-competitive actions of C&W, and the impact of Hurricane Ivan as the reasons for this delay. It has also re-emphasised its commitment to the provision of these services, has already completed tests of the equipment it plans to use, and has provided a letter of support from its technology supplier.
51. The Authority has carefully considered the timelines that Digicel requested and independently verified with the equipment manufacturer the commercial release dates of the equipment selected by Digicel. The Authority notes that Digicel has in progress a roll-out to business customers ahead of its own timetable. Residential customers are to be offered service within three months of the commercial launch of the relevant hardware, an ambitious goal. Finally, the Authority also notes that other licensees have been granted extensions to their roll-out dates in similar circumstances.

52. The Authority has concluded that consent to the sale should be granted, subject to a number of significant conditions.
53. The Authority has already required the first key step in this process. That step was the submission by Digicel, and approval by the Authority, of an application to amend the Digicel licence to revise the roll-out dates for fixed wireless services for business and residential customers. The Authority notes that failure to meet these roll-out dates would make Digicel liable to administrative fines by the Authority under the provisions of section 58 of the Law. Furthermore, the terms of the amendment itself explicitly state as follows: "[a] breach of this Condition will constitute a breach of the Licence for which the Licence may be revoked".

The Transition Services Agreement

54. The Authority agrees with C&W that many customers may have chosen WVICI as their service provider based on factors other than price. The Authority would not wish such customers to be locked into a provider which no longer provided the services for which the customer contracted. On the other hand, the Authority views favourably the arguments advanced by Digicel that a purchase price that includes a premium for the customer base should not automatically be viewed as inappropriate. The Transition Services Agreement therefore has been thoroughly examined by the Authority and detailed questions have been asked of both Digicel and Cingular. The Authority is of the view that during the transition period, WVICI subscribers will very likely continue to receive the services for which they contracted, and that, accordingly, there are no grounds for a general ruling that all customers may automatically opt out of their existing contracts without penalty.
55. However, it is important to the Authority that WVICI customers with an ongoing post paid contract be protected from any adverse consequences of the sale. The Authority has concluded that any such customer who receives a materially inferior or reduced service may terminate their contract without penalty. The Authority therefore will require that Digicel accept the following conditions:
1. *Digicel undertakes that if Wireless Ventures post-paid contract customers, during the term of their existing contract, receive a materially inferior or reduced service functionality following the sale to Digicel in comparison to that received from Wireless Ventures prior to the sale, Digicel shall waive any penalty, any claim for liquidated damages and any early termination fee payable by that contract customer. In the event that a dispute arises between the customer and Digicel concerning these matters, the Authority may intervene and make a final and binding decision.*
 2. *Within seven days of the closing of the sale, Digicel undertakes to notify in writing all current Wireless Ventures' customers of the new ownership of Wireless Ventures, and, in the case of post-paid contract customers, of the undertaking it has given in paragraph (1) above. In addition, within two*

days of migrating a post-paid contract customer from the Wireless Ventures' platform (i.e. a blue SIM) to the Digicel platform (i.e. a red SIM), Digicel shall again notify such customers in writing of the undertaking it has given in paragraph (1) above. Digicel is required to obtain from the Authority prior approval of the text of each of these communications.

3. *The Authority has accepted Digicel's amended roll-out dates for its fixed wireless networks and services. These now form part of the conditions of Digicel's ICT Licence, and accordingly failure to meet these roll-out dates would make Digicel liable to an administrative fine by the Authority under the provisions of section 58 of the ICT Authority Law. Commencing 31st January 2006, Digicel shall submit to the Authority monthly reports of its progress with the implementation of its residential fixed wireless service. These reports shall include a comparison between actual progress and the project milestones it has filed with the Authority.*

Unlocking of Handsets

56. The Authority has considered C&W's view that Digicel should be required to unlock the handsets of all WVCI customers. The Authority has concluded that there are no grounds for imposing such a requirement at this time, and for WVCI customers alone. The Authority notes that the locking of any handsets by any service provider may inhibit competition as it is an impediment to customers changing service providers. On the other hand, it may be argued that handset prices would rise if unlocking were to be mandated as subsidies might have to be removed. Alternatively, a jurisdiction which permits service providers to choose whether or not to lock handsets, as is currently the case in Cayman, may be viewed as according to customers a greater freedom of choice and hence a more competitive regime. The Authority currently has insufficient information to assess where the best interests of the consumer lie. According, it will shortly initiate a public consultation on the subject, prior to making a determination.

Degree of Competition

57. The Authority does not accept the contention that a decrease in the number of active mobile operators in Cayman from three to two automatically signals a reduction in the degree of competition and hence the need to reject the transaction. Rather, the Authority is of the view that the future number of active operators in the market also needs to be considered, as well as the likelihood, based upon present relationships, of any material lessening in the degree of competition between the two potential remaining operators as a result of the approval of the transaction.
58. Two other providers are licensed to provide mobile services and intend to launch their services in the near future. Moreover, the Authority has the mandate and the ability

to intervene should it believe that either C&W or Digicel are engaging in anti-competitive conduct.

59. Concerning the appropriateness of a lower level of regulatory scrutiny for C&W mobile services, this matter has already been dealt with outside the four corners of the present proceeding.

Potential Investors

60. The Authority has carefully considered the detailed submissions of the potential investors and Cingular. The Authority has determined that further public process on the issue of local investment would not be of material assistance to the Authority. The Authority has concluded that a genuine offer was made by Cingular, and therefore finds that Cingular has met its regulatory requirements in this respect.
61. The Authority favourably notes the offer by Cingular to reimburse any remaining out-of-pocket expenses of the potential investors.

WestTel Application in accordance with Section 41 of the Law

62. The WestTel application raises the issue, for the first time, of what considerations the Authority should properly take into account in exercising its authority pursuant to section 25(1) of the Law.
63. The Authority finds without merit the argument of Digicel that the considerations inherent in sections 36 (agreements distorting competition) and 40 (abuse of dominant position) may not apply to an application for a transfer of shares. At the same time, the Authority finds equally untenable the submission by WestTel that a separate investigation, outside the four corners of the current proceeding, needs to be commenced in order to consider the substance of the infringements addressed in these sections of the Law.
64. Rather, the Authority is of the view that any adverse effect on trade in Cayman and any abuse of dominant position should properly form key elements to this, and indeed, to all applications for a transfer of shares pursuant to section 25(1). In fact, the record of this proceeding has produced significant interrogatory responses and comments of substance from interested parties on these very issues. It is difficult to envisage a meaningful process to enable the Authority to render its decision on this proposed transaction without addressing fully each of these dimensions to the regulatory regime in Cayman.
65. What remains to be disposed of inherent in the Application by WestTel is the question of whether there is a need at this stage to supplement the record with further information concerning possible infringements of the prohibitions set out in sections 36 and 40 of the Law.

66. In rendering its decision concerning the need for further public process, the Authority has considered in turn each of the six propositions enumerated by WestTel set out in full above. As to the first, the Authority has elsewhere noted in this decision that a reduction to two active mobile operators in Cayman is a temporary phenomenon: it is anticipated that a third operator will enter full service in the near future and further applications are not discouraged by the Authority. Indeed, a further application for mobile service is under consideration at the present time.
67. Concerning the second proposition, there is no evidence to suggest that Digicel has no long term vested interest in Cayman. Furthermore, a plan to build up a business with a view to selling a healthy going concern in future years is not inconsistent with a healthy marketplace in Cayman. Certainly, such a long term strategy, even if true, does not distort competition within the meaning of section 36 and does not suggest an abuse of dominant position, prohibited in section 40. This proposition, therefore, is not only unsupported by evidence but is irrelevant to the case at hand.
68. As to the third proposition, any potential for cross-subsidization from one category of service offerings to another can be policed vigorously by the Authority, should such be undertaken in an effort to drive other players from the market. A potential breach in the future does not constitute a meaningful reason to decline to approve a transfer of shares today.
69. In response to the fourth proposition, the Authority notes that the question of the return of spectrum is indeed an important dimension to the determination of the Authority in the present case. However, there is no need, in the view of the Authority, to establish further public process to permit an appropriate decision on this matter. In addition, this proposition fails to raise any issue in relation to either section 36 or section 40 of the Law.
70. Regarding the fifth proposition, the creation of a higher value for the Digicel licensee is identical to proposition two, discussed and dismissed above.
71. Concerning the sixth and final proposition, the creation of a larger player as a result of a purchase of shares is axiomatic. Once again, however, this proposition fails to raise any justifiable issue in relation to either section of the law.
72. In addition to considering each of these factors individually, the Authority has assessed their merits taken together. The Authority is unable to see that any consideration is raised in these six propositions that has not already been fully explored in the current proceeding by the Authority.
73. In the view of the Authority, the prohibition in section 36 cannot properly relate to every agreement that may affect trade in Cayman, for, strictly speaking, any and all agreements of substance by or between licensees would thereby be prohibited. Rather, in context, the prohibition clearly relates to an appreciable restriction in trade. Absent a determination by the Authority that an appreciable distortion of competition

is, at first blush, a potential outcome to the transaction, the Authority need not engage in the exercise of contemplating the granting of an exemption under section 37 of the Law.

74. The Authority has, accordingly, determined that WestTel has, on its own proposed test, wholly failed to make out the prima facie case that it alleges. It follows that the Authority has come to the view that no further process is required concerning this proposed transaction.
75. It likewise follows, since there is nothing on the record to suggest an appreciable adverse effect on trade in Cayman as a result of the agreement for a transfer of shares, that no exemption to section 36 as contemplated by section 37 need be applied for, or granted by the Authority.

Resources

76. The Authority notes that Digicel will cease using the Cingular HNI once the Transition Services Agreement is terminated. The Authority is not persuaded that there is any reason to reverse its previous decision permitting Digicel to utilize its Jamaican HNI.
77. The 345 area code contains a possible ten million numbers that can be allocated in blocks to licensees, but the Authority will work with Digicel to ensure that it retains only blocks that it requires for its immediate use and for reasonable forward planning.
78. The Authority notes that Digicel will try to merge with and reuse most of the WVCi communications towers and to come off the sites where Digicel currently leases space from other companies. It also notes that Digicel will honour the Master Lease Agreements that had been signed by WVCi with TeleCayman and Blue Sky Communications. The Authority understands that planning approval for one WVCi tower is still in contention. WVCi and Digicel are strongly encouraged to resolve this matter as expeditiously as possible and prior to any further equipment being installed on the tower in question. The Authority's firm policy is to minimise the impact of communication towers on the environment by encouraging the sharing of facilities wherever possible. The Authority will work with the Central Planning Authority and Digicel to ensure that it retains only the towers that are essential for its operation. This work will to an extent be dependant upon the final decisions with respect to spectrum.
79. The Authority agrees with commenting parties that the return of some allocated frequencies should be made a condition of the approval of this transaction. Equally, the interests of existing WVCi customers must be protected. Accordingly, Digicel shall be required to accept the following two conditions:
 1. *Immediately upon the closing of the acquisition, Digicel shall relinquish the entire GSM1900 spectrum which was originally allocated to Digicel*

by the Authority, i.e. 1905 to 1909.8 MHz paired with 1985 to 1989.9 MHz.

2. *Upon written request from the Authority, Digicel shall implement the re-tuning of the Wireless Ventures' current GSM850 spectrum (841 to 848 MHz paired with 886 to 893 MHz) to 836.1 to 843 MHz paired with 881.1 to 888 MHz, in a time scale to be determined by the Authority. Should the Authority require such re-tuning, Digicel shall be responsible for its own costs.*

Cingular Roaming Revenues

80. The information provided by Cingular in the second round interrogatory responses demonstrates that Cingular roaming revenue accounting treatment is consistent with its current licence revenue reporting requirements. Therefore, the Authority finds that Cingular has satisfactorily addressed this issue.

Conclusions

81. The Authority has determined that it is unnecessary to allow further public process concerning this proposed transaction. In the Authority's view, neither interrogatories asked among the commenting persons, as proposed by C&W, nor an oral public hearing, as suggested by the potential investors, nor a further investigation as contemplated by sections 36 or 40 of the Law are required to permit the Authority to render a decision in this matter.
82. Pursuant to section 25(1) of the Law, the Authority grants its consent to the proposed purchase in the form of the letter constituting Attachment 1 to this decision.



Attachment 1

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Information & Communications Technology Authority

ICTA/140/155/01

8th November 2005

Mr. J. R. Wilson
Director, Strategy and Development
Cingular Wireless International
16661 NE 72nd Way
Redmond, WA 98052
USA

Mr. J. D. Buckley
Chief Executive Officer
Digicel Cayman Limited
PO Box 700 GT
Grand Cayman
Cayman Islands

Gentlemen,

Application for Disposition of Shares

Mr. Wilson's letter of 12 July 2005 informed the Authority that Cingular Wireless LLC ("Cingular") had agreed, subject to regulatory approval, to sell its equity interest in Wireless Ventures (Cayman) Ltd., a company holding an ICT Licence in the Cayman Islands, to Digicel Limited. Implicit in this correspondence is a request in accordance with section 25 of the Information and Communications Technology Authority Law (2004 Revision) ("the ICTA Law") for the Authority to grant its written consent to the transaction.

The Authority hereby grants its consent to the transaction, subject only to the written acceptance by Digicel Cayman Limited ("Digicel") of the following conditions:

1. Immediately upon the closing of the acquisition, Digicel shall relinquish the entire GSM1900 spectrum which was originally allocated to Digicel by the Authority, i.e. 1905 to 1909.8 MHz paired with 1985 to 1989.9 MHz.

2. Upon written request from the Authority, Digicel shall implement the retuning of the Wireless Ventures' current GSM850 spectrum (841 to 848 MHz paired with 886 to 893 MHz) to 836.1 to 843 MHz paired with 881.1 to 888 MHz, in a time scale to be determined by the Authority. Should the Authority require such retuning, Digicel shall be responsible for its own costs.
3. Digicel undertakes that if Wireless Ventures post-paid contract customers, during the term of their existing contract, receive a materially inferior or reduced service functionality following the sale to Digicel in comparison to that received from Wireless Ventures prior to the sale, Digicel shall waive any penalty, any claim for liquidated damages and any early termination fee payable by that contract customer. In the event that a dispute arises between the customer and Digicel concerning these matters, the Authority may intervene and make a final and binding decision.
4. Within seven days of the closing of the sale, Digicel undertakes to notify in writing all current Wireless Ventures' customers of the new ownership of Wireless Ventures, and, in the case of post-paid contract customers, of the undertaking it has given in paragraph (3) above. In addition, within two days of migrating a post-paid contract customer from the Wireless Ventures' platform (i.e. a blue SIM) to the Digicel platform (i.e. a red SIM), Digicel shall again notify such customers in writing of the undertaking it has given in paragraph (3) above. Digicel is required to obtain from the Authority prior approval of the text of each of these communications.
5. The Authority has accepted Digicel's amended roll-out dates for its fixed wireless networks and services. These now form part of the conditions of Digicel's ICT Licence, and accordingly failure to meet these roll-out dates would make Digicel liable to an administrative fine by the Authority under the provisions of section 58 of the ICT Authority Law. Commencing 31st January 2006, Digicel shall submit to the Authority monthly reports of its progress with the implementation of its residential fixed wireless service. These reports shall include a comparison between actual progress and the project milestones it has filed with the Authority.

In regard to personnel matters, the Authority welcomes Digicel's statement that it does not anticipate imposing any involuntary redundancies as a consequence of this transaction. Digicel is also reminded of its obligations under the Immigration legislation to give preference to Caymanian staff over similarly qualified expatriate staff.

The approval in this letter refers only to the transaction addressed in the Cingular letter of 12 July 2005. Nonetheless, the Authority notes, that, in the longer term, it is intended that an application be made to the Authority to consolidate the rights and

obligations of these two ICT licensees through amending the licence of Digicel and surrendering the licence of Wireless Ventures (Cayman) Ltd.

Within seven days of the date of this letter, the Authority will place on the public record an ICT Decision covering the matters raised in the public comment and interrogatory processes in this proceeding, its analysis of the issues, and the reasons for its findings.

Yours sincerely,

David Archbold
Managing Director