



ICT Decision 2004-3

Grand Cayman, 22nd April 2004

Confidentiality Arrangements for the Access to Cable & Wireless (CI) Ltd's Fully Allocated Costing Models By Wireless Ventures (Cayman Islands) Ltd and Digicel Cayman Ltd

The Authority finds that C&W's proposed confidentiality arrangements are not sufficiently broad to meet the essential requirements of a meaningful in camera proceeding. It is essential that the in camera proceedings be substantive, meaningful and sufficient so as to permit the parties to properly understand the Cable & Wireless FAC models and make submissions which are of probative value to the Authority in adjudicating upon the Determination Requests. Accordingly the Authority has made a determination as follows:

- *C&W shall make all of its FAC models and underlying assumptions available at the hearing.*
- *The in camera hearing will be held by the Authority. Present will be representatives of C&W, Digicel and Wireless Ventures. The hearing shall be for a period of seven (7) days which may be extended. Procedures for the hearing will be made available to the parties in advance.*
- *Parties to the hearing will be provided with electronic and paper copies of the models which may not be taken out of the hearing room or reproduced in any manner.*
- *At the in camera hearing, a representative from C&W will provide an overview of the FAC models and, thereafter, operate the models in response to relevant questioning by representatives of Digicel and Wireless Ventures and provide responsive answers to all appropriate questions.*
- *C&W will provide a detailed costing manual, at least 3 days in advance of the in camera hearing, which will comprise a written detailed description of the FAC models and address underlying assumptions.*
- *The hearing will take place under the terms of a Protective Order. Representatives of Digicel and Wireless Ventures will be required to sign a Confidentiality Agreement thereby agreeing to maintain the confidentiality of the information obtained through the in camera hearing process.*
- *Permitted persons at the in camera hearing are legal counsel, which need not be outside counsel, and a regulatory and/or economic prime. These individuals shall have the ability to confer with expert costing consultants and technology personnel who sign the Confidentiality Agreement.*
- *Both Digicel and Wireless Ventures are under an obligation to ensure that the confidential information is not shared, communicated or disclosed in any manner to anyone other than individuals who have executed the Confidentiality*

Agreement. The Authority notes that, in addition to the Protective Order and the Confidentiality Agreement parties are also bound by the confidentiality Conditions in their respective Licence and section 48A of the Information and Communications Technology Authority Law, 2002, as amended.

- *Signed Confidentiality Agreements shall be circulated to C&W in sufficient time to permit it to raise appropriate objections to the presence of any representative of the parties at the hearing.*
- *The Authority issues the appended Protective Order.*

(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

1. On 22 March 2004, The Information and Communications Technology Authority (“the Authority”) issued a decision stating that Cable & Wireless (Cayman Islands) Ltd. (“C&W”) was to make its adjusted fully allocated cost models (“FAC models”) available to Digicel Cayman Limited (“Digicel”) and Wireless Ventures (Cayman Islands) Limited (“Wireless Ventures”), upon making suitable confidentiality arrangements. C&W was directed to file a proposed set of acceptable confidentiality arrangements on which to provide the FAC models to the two companies. Following a brief extension request, on 29 March 2004, C&W filed its proposed confidentiality arrangements.

Comments by Interested Parties

2. The Authority received comments from Wireless Ventures dated 1 April 2004 concerning the proposed confidentiality arrangements to which C&W provided a response 7 April 2004. The Authority also received comments from Digicel dated 23 and 31 March 2004 to which C&W provided a response 15 April 2004.

Wireless Ventures

3. Wireless Ventures notes that C&W’s confidentiality arrangements severely limits access to the model, both in terms of what will be provided, how it will be provided, and to whom it will be provided.
4. Wireless Ventures references the issue with respect to C&W’s mobile rates and its request for an Authority determination on improper cross-subsidization or below cost pricing. Wireless Ventures submits that the full cost model is a necessary aspect of this inquiry.
5. Wireless Ventures states that it must have physical access to the model, with the opportunity to test different assumptions and different methods associated with determining the accuracy of the model itself. It is of the view that an *in camera* hearing is not sufficient for this purpose and that it needs the opportunity to review the C&W cost

model in a private manner so as to test different assumptions and different methods associated with determining the accuracy of the model itself.

6. Wireless Ventures states that the proposed restriction of disclosure to ‘outside counsel’ is not appropriate. It goes on to maintain that a proper review of the C&W model requires that a party use its own financial and costing experts as their analysis is the most important. Wireless Ventures is adamant that the C&W proposal would preclude the parties from having their most qualified internal personnel from reviewing the model and that nothing precludes these employees from being bound by appropriate confidentiality provisions. Further, Wireless Ventures is of the view that the very role of outside counsel is to analyze information and then discuss implications and details of such information with clients.
7. Wireless Ventures states that as both Wireless Ventures and AT&T Wireless will take full responsibility for their employees and that individual indemnification is neither necessary nor appropriate.
8. Wireless Ventures states that there should be no prohibition on the disclosure or use of documents beyond confidentiality restrictions. Wireless Ventures submits the view that parties should be provided with a copy of the model and permitted to undertake its analysis, independent of an *in camera* hearing and subject only to the terms of a protective order which would ensure confidentiality.
9. Wireless Ventures states that C&W should not be permitted to limit the information to be produced to information focusing upon the mobile interconnection rates. Additionally, Wireless ventures maintains that it should not be precluded from reviewing all costing details associated with retail rates and interconnection rates.

C&W Response to Wireless Ventures

10. In response, C&W states that Wireless Ventures misconstrues the scope of the proceeding, ignores the purpose of the proposal and ignores the Regulations.
11. C&W states that the Authority’s correspondence clearly requested C&W to make the proposal in the specific context of the matter of the Determination Requests received by the Authority in respect of the rate for mobile termination services pursuant to interconnection agreements between C&W and Digicel, and C&W and Wireless Ventures (“Dispute”). C&W goes on to state that it is not possible to read the Authority’s determination in a manner supportive of Wireless Venture’s assertion that "the parties need access to information about all of C&W's costs, and the related retail rates that are being associated with particular costs". Furthermore, C&W maintains if it was the Authority's intention to require any disclosure of the FAC models in a context other than the Dispute, as a matter of procedural fairness C&W would first have to be provided with an opportunity to address any party's request for disclosure in that specific context. C&W states that it is clear that the Authority wishes to grant access to the Model to the parties in the specific context of the Dispute.

12. C&W states that the specific features of C&W's proposal, with which Wireless Ventures takes issue, are consistent with the high standards established by the Authority. C&W points out that the term "outside counsel" was not meant to exclude the use of outside representatives who are not lawyers. However, C&W adds that disclosure should be limited to outside representatives and kept from the eyes of persons within Digicel and Wireless Ventures. In this regard C&W points out that Wireless Ventures make no reference to erecting a "Chinese wall" to ensure that disclosure does not take place to staff involved in strategic decision making and/or retail pricing functions.
13. C&W goes on to state that in the fiercely competitive environment for mobile services in the Cayman Islands, to follow Wireless Ventures' suggestion that documents be circulated and be protected merely by virtue of being stamped "confidential" would be to invite an endless dispute regarding the source of competitive intelligence employed by Wireless Ventures and Digicel.
14. C&W notes that one of Wireless Ventures' fundamental complaints is that an *in camera* hearing is not sufficient to allow the parties to review the cost model and that this submission ignores the legal authority under which the Authority operates. In this regard C&W references paragraph 5(2)(d) of the Confidentiality Regulations stating that the Authority has chosen to require confidentiality protections to be put in place that would allow Wireless Ventures and Digicel access to the model for the specific purpose of being able to make submissions concerning the Dispute.

Digicel

15. Digicel, in correspondence dated 23 March 2004, states that it requires full details of the FAC model as adjusted including the weighted average cost of capital ("WACC") breakdown, the description of how the model works, the costs and the underlying coding/formulas for all calculations; the ability to use external cost model experts to analyse the model; sufficient time to analyse the model with access for at least 2 weeks. In subsequent correspondence of the same date Digicel goes on to state that to carry out meaningful analysis it needs access to the inputs and outputs (real data sets) to get an idea of the materiality and reasonableness of certain cost categories used and access to decent documentation on the model to understand its structural soundness and to check basic cost causality principles. In further correspondence dated 31 March 2004, Digicel states that it has considered the C&W proposal, having run it by external cost model experts, and that it views C&W's proposal as completely inadequate. Digicel goes on to reiterate its requirement for the type of access expressed in its earlier submissions.

C&W Response to Digicel

16. In response C&W states that it will provide all relevant inputs to and outputs from the model. Additionally, C&W states that they have committed to producing detailed documentation on the model in advance of the viewing in the *in camera* hearing and intend not only to give a clear description of the structural soundness of the model and

principles of cost causality, but also commentary on how the inputs were collected, on the disaggregation of costs and a full description of model outputs. C&W goes on to state that it believes that two days are adequate for reviewing the FAC model maintaining that the request for 2 weeks is excessive.

Authority's Assessment of Interested Party Comments

17. The Authority notes that Wireless Ventures submitted further additional comments 15 April 2004. The Authority further notes that there were no new arguments advanced by Wireless Ventures in this additional submission. As these comments were not provided for in the process set out by the Authority they have not formed part of the Authority's deliberations in arriving at the determination noted herein.
18. The various comments made by interested parties and the responses provided by C&W address the following main issues: whether the material made available should involve only the FAC model pertaining to mobile services and specifically mobile termination or if the exercise involves the whole of the FAC models; the class of permitted individuals who may have access to the materials; whether a copy of the FAC models should be provided and the period of time available for the *in camera* hearing; and whether the information obtained can be used for purposes other than the Determination Request at issue. The Authority also proposes to address the sufficiency of the detailed manual proposed by C&W as an aide in understanding the FAC models.
19. At the outset the Authority wishes to note that in its decision it expressed the view that access by the appropriate parties to the FAC models is in the public interest. The Authority also recognized that competitive harm may accrue to Cable & Wireless if the FAC models were shared on an unrestricted basis. On this basis the Authority concluded that the FAC models should be made available upon suitable confidentiality arrangements and Cable & Wireless was directed to file a proposal as to potential arrangements.
20. The Authority has reviewed the Cable & Wireless proposed confidentiality arrangements and its response to interested party comments. Unfortunately, these proposed confidentiality arrangements are not sufficiently broad to meet the essential requirements of a meaningful *in camera* proceeding. It is essential that the *in camera* proceedings be substantive, meaningful and sufficient so as to permit the parties to properly understand the Cable & Wireless FAC models and make submissions which are of probative value to the Authority in adjudicating upon the Determination Requests.
21. The Authority's decision of 22 March 2004 pertained to the C&W FAC models (emphasis added). As a significant portion of the underlying cost information and assumptions for the mobile model are addressed in the whole of the models it is essential for a meaningful understanding of costs that the parties have access to all models. The Authority notes that in the imputation test proceeding there was significant involvement of the overall cost models in arriving at the costs properly imputed to the mobile rates. Cable & Wireless itself referenced the overall models in arriving at the costs for its

various mobile plans. To restrict the hearing to the mobile model and only to certain information within that model would not be a substantive, meaningful or sufficient exercise. As Cable & Wireless itself stated when filing the FAC models, a redacted (i.e. a less than complete) version would be meaningless.

22. As Cable & Wireless has noted the appropriate test for the *in camera* hearing is that there be appropriate confidentiality arrangements with credible, legal assurances in place to prevent persons making retail pricing and strategy decisions from viewing or gaining knowledge of the model. The intent is to prevent a class of persons from having sight or knowledge of the FAC models i.e. those individuals making retail pricing and strategy decisions for Digicel and Wireless Ventures. The Authority is of the view that the emphasis should be on preventing this class of individual from having access to sensitive information rather than attempting to delineate who qualifies as “outside counsel”. Although Cable & Wireless references instances where only outside counsel are provided access to certain information there are numerous instances in a multitude of regulatory proceedings where legal and regulatory primes within an organization are permitted access to confidential information with access to outside resources for certain expertise, provided that the confidentiality of the information is maintained and that persons making retail pricing and strategy decisions are prevented from having sight or knowledge of the confidential information. The Authority is of the view that it is a far more acceptable and efficient exercise to have primes within each party have access to the confidential information and directing outside resources. This approach is all the more appropriate as all parties to the dispute have requested an expedited process. The Authority is also of the view that with a Protective Order and a Confidentiality Agreement in place there are sufficient and adequate safeguards in place to prevent the prohibited class from gaining access to the confidential information. Further, there is nothing to suggest that Digicel or Wireless Ventures, both licensed entities with significant investment in the Cayman Islands, would breach the terms of either the Order or the Agreement thereby compromising themselves legally as well as their licence.
23. In order to ensure that the *in camera* hearing is substantive, meaningful and sufficient to permit probative comments it is essential that parties have access to a copy of the FAC models over a sufficient period of time. To suggest that parties be provided with a description of the model and have a C&W employee operate this model in response to questions over a limited and brief period totally disregards the complex nature of the models and the amount of time and attention required to assimilate the information. The Authority is of the view that the *in camera* hearing should be an in depth overview and that parties have an opportunity to conduct a meaningful assessment and understanding of C&W’s assumptions, modelling and cost factors. This requires that parties be provided with a copy of the FAC models and have sufficient time to conduct their analyses.
24. The Authority is of the view that the disclosure of the C&W FAC models should be limited to the Dispute pertaining to the interconnection rates for mobile termination. Disclosure of the FAC models for other purposes should form part of a separate and distinct application by a party leading to a separate determination by the Authority on the merits of that application. Parties should not interpret this view by the Authority as a

precedent for all matters but rather should be cognizant of the fact that the Authority is guided in this instance by the nature of the information in the FAC models.

Determination

25. In light of the above, the Authority directs the following arrangements. In so doing the Authority is mindful of the initial arrangements proposed by C&W.
- a. C&W shall make all of its FAC models available at the hearing. C&W should be prepared to substantiate assumptions with appropriate background materials.
 - b. Representatives of Digicel and Wireless Ventures shall have sight of the FAC models at a hearing to be held *in camera*. The *in camera* hearing will be held by the Authority at a neutral location to be determined by the Authority and for which parties will bear an equal share of the reasonable costs. Present will be representatives of C&W, Digicel and Wireless Ventures. The hearing shall be for a period of seven (7) days commencing on a date acceptable to the parties. If deemed reasonable during the conduct of the hearing, the Authority may choose to shorten or extend this time frame. Procedures for the hearing will be made available to the parties in advance.
 - c. In light of the commercial sensitivity of the FAC models, and given the ease with which documents are copied and circulated electronically, parties to the hearing will be provided with an electronic and paper copies which may not be taken out of the hearing room or reproduced in any manner by Wireless Ventures or Digicel. The preference is that the parties be provided with an electronic copy on computers provided by C&W so as to ensure security of the information.
 - d. At the *in camera* hearing, a representative from C&W will provide an overview of the FAC models and, thereafter, operate the models in response to relevant questioning by representatives of Digicel and Wireless Ventures and provide responsive answers to all appropriate questions. The Authority will adjudicate, as necessary, upon any objections regarding the relevance of questions, or disputes over timely access to particular information. Representatives of Digicel and Wireless Ventures will be permitted to make notes of the evidence, to assist in their preparation of submissions regarding the Dispute, subject to the limitations of the appended Protective Order and a Confidentiality Agreement to be signed with C&W.
 - e. In order to ensure that representatives of Digicel and Wireless Ventures who are present at the hearing are able to effectively participate, C&W will provide a detailed costing manual, at least 3 days in advance of the *in camera* hearing, which will comprise a written detailed description of the FAC models and address underlying assumptions.

- f. The hearing will take place under the terms of the appended Protective Order. Prior to their attendance at the hearing, representatives of Digicel and Wireless Ventures will be required to sign a Confidentiality Agreement thereby agreeing to maintain the confidentiality of the information obtained through the *in camera* hearing process.
 - g. Digicel and Wireless Ventures are strictly prohibited from having anyone involved in making retail pricing and strategy decisions be present at the hearing or have any form of access to the information provided by C&W. Permitted persons are legal counsel, which need not be outside counsel, and a regulatory and/or economic prime. These individuals shall have the ability to confer with expert costing consultants and technology personnel who sign the Confidentiality Agreement. Both Digicel and Wireless Ventures are under an obligation to ensure that the confidential information is not shared, communicated or disclosed in any manner to anyone other than individuals who have executed the Confidentiality Agreement. The Authority notes that, in addition to the Protective Order and the Confidentiality Agreement parties are also bound by the confidentiality Conditions in their respective Licence and section 48A of the Information and Communications Technology Authority Law, 2002, as amended.
 - h. Signed Confidentiality Agreements shall be circulated to C&W in sufficient time to permit it to raise appropriate objections to the presence of any representative of the parties at the hearing.
 - i. The Authority hereby issues the appended Protective Order.
26. The Authority notes the request by C&W that it be given equivalent access to the costing information of Digicel and Wireless Ventures. As a matter of procedural fairness the Authority requests that both Digicel and Wireless Ventures submit their views with respect to the C&W request within ten (10) days of this decision.

CONFIDENTIALITY AGREEMENT AND ACKNOWLEDGEMENT

Re: Cable & Wireless – FAC Models

IN CONSIDERATION of being provided with information at an *in camera* hearing over which claims of confidentiality have been advanced, that is, the fully-allocated cost models belonging to Cable & Wireless (Cayman Islands) Limited ("Cable & Wireless") (the "Confidential Information"), I, _____ of the City of _____, agree to receive and hold all Confidential Information in the strictest confidence and to take all steps necessary to prevent the Confidential Information from being disclosed or being made public or coming by any means into the possession of a third party, and specifically, to persons making retail pricing and strategy decisions within Digicel Cayman Limited and Wireless Ventures (Cayman Islands) Limited.

I shall not copy or disclose the Confidential Information to anyone other than a person authorized pursuant to the Authority's Order of X April, 2004 (the "Order"), nor shall I use it for any purpose whatsoever other than in connection with the preparation of a submission to the Authority in connection with the Determination Requests respecting mobile termination rates proposed by Cable & Wireless.

I acknowledge that I have read the Order, a copy of which is attached to this agreement, and agree to be bound by it. I acknowledge that any breach of this agreement by me will be considered to be a breach of that Order. I further acknowledge and agree that Cable & Wireless, and/or its designated representatives who supplied the information, may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this agreement are not performed in accordance with its specific terms or is otherwise breached. Accordingly, I agree that Cable & Wireless shall be entitled to injunctive relief to prevent breaches of this agreement and to specifically enforce its terms and provisions, in addition to any other remedy to which they may be entitled at law or in equity.

I undertake to indemnify and keep Cable & Wireless at all times fully indemnified from and against any loss or disclosure of the Confidential Information and from all actions, proceedings, claims, demands, costs (including without prejudice to the generality of the foregoing, our legal fees on an attorney and own client basis) awards and damages howsoever arising directly or indirectly as a result of any breach or non-performance by me of my obligations under this agreement.

Upon completion of the proceedings, including appeals, relating to the Determination Requests, I agree that I will destroy all documents relating to the Confidential Information, including any part of my notes or submissions to the Authority dealing with or including any Confidential Information. I agree that I will retain no copies of notes from the *in camera* proceeding, nor will I attempt to make notes thereafter to replicate the Confidential Information. I will not disclose any of the Confidential Information, in any fashion or any form whatsoever, to any person not authorized by the Order.

I hereby certify that _____ (name of firm or employer) has in place internal procedures to protect against the improper disclosure of the Confidential Information.

I hereby submit to the jurisdiction of the Authority, and, alternatively, to a court of competent jurisdiction, for the purposes of this Order and agreement. This agreement shall be governed by and be construed in accordance with the laws of the Cayman Islands.

PLEASE PRINT:

Full Name: _____

Title/Capacity:

Telephone No. (day): _____

Fax No. or e-mail address:

Employer:

Employer's Address: _____

Name of party with whom I am associated:

Signed, sealed and delivered before a witness this day of March, 2004.

(Witness)

(Signature)

THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY

In the Matter of the Information and Communications Technology Authority Law, 2002

And In the Matter of The Information and Communications Technology Authority (Confidentiality) Regulations, 2003 (the "Regulations").

And In the Matter of an *In Camera* Hearing to Consider Certain Determination Requests in Respect of the Mobile Termination Rate (the "Dispute")

PROTECTIVE ORDER

WHEREAS Cable & Wireless ("C&W") has submitted its Fully Allocated Cost Models ("FAC Models") in confidence pursuant to the Regulations; and

WHEREAS Digicel Cayman Limited ("Digicel") and Wireless Ventures (Cayman Islands) Limited ("AT&T") (jointly, the "Competitors") have requested disclosure of the FAC Modes in order to critically evaluate C&W's proposed mobile termination rates; and

WHEREAS the Authority has determined that it is in the public interest to provide appropriate parties from Digicel and AT&T with access to the requested information while affording necessary protection to C&W's confidential information;

THE ICTA HEREBY MAKES THE FOLLOWING ORDER:

1. Designation of Information. C&W has designated as confidential the contents of the FAC Models which are to be the subject of an *in camera* hearing to be held at a time and date to be agreed to by the parties (the "Hearing"). The contents of the FAC Models, together with notes made pertaining to or as the result of a review of the FAC Models shall all be considered confidential information (hereinafter referred to as Confidential Information) and subject to the terms of this Order.
2. Execution of Confidentiality Agreement. Appropriate personnel and representatives of the Competitors intending to attend the Hearing (together, referred to as "Competitors' representatives"), shall execute the Confidentiality Agreement and Acknowledgement (the "Confidentiality Agreement") set out in Appendix "A" attached hereto.
3. Acknowledgement of Order. Confidential Information shall not be disclosed to any person who has not signed the Agreement. The Confidentiality Agreement shall require the person to whom disclosure is to be made at the *in camera* proceeding to read a copy of this Order and to certify in writing that he or she has reviewed the same and has consented to be bound by its terms. The Confidentiality Agreement shall contain the signatory's full name, title, and employer, and the name of the party with whom the signatory is associated.

4. Objections. Copies of executed Confidentiality Agreements must be delivered to C&W, five clear working days before the Hearing. C&W may, within that period, object to the disclosure of Confidential Information to a person who has executed a Confidentiality Agreement. If an objection for cause is made, no Confidential Information shall be disclosed to the person until the Authority has ruled on the objection.
5. Attendance at *in camera* hearing. Only those persons who have executed an Agreement and who have been authorized to have access to the Confidential Information under this Order may attend the Hearing.
6. Availability of Documentation. The Confidential Information shall be disclosed through the provision of one copy of the FAC models, in electronic or paper format, which is to remain at all times in the hearing room. The Competitors' representatives at the Hearing may make notes regarding the Confidential Information for reference purposes to be used during the Hearing or in making submissions to the Authority respecting the Dispute only. Such notes shall not contain a verbatim or substantive transcript of the Confidential Information.
7. Preservation of Confidentiality. Competitors' representatives who are afforded access to the Confidential Information pursuant to this Order shall not:
 - a. use the Confidential Information for purposes of business or competition or any other purpose other than that referenced in paragraph 8, below; or
 - b. disclose the Confidential Information for purposes of business or competition or any other purpose to any person who has not been duly authorized to receive that information pursuant to the terms of this Order.
8. Use of Information in Submissions. The Confidential Information shall be used solely for the purposes of preparing a submission by each of the Competitors respecting C&W's mobile interconnection rates to the Authority (the "Submissions"). Where reference to the Confidential Information is required in the Submissions, it shall, where possible, be by citation of title or other non-confidential description. Any further use of or substantive references to Confidential Information shall be placed in a separate section of the Submission and submitted to the Authority in confidence. All of the protections afforded in this Order apply to materials prepared and distributed under this paragraph.
9. Segregation of Files. Those parts of any writing, questions and answers thereto, or other written references to Confidential Information in the course of the Hearing, if filed with the Authority, will be withheld from inspection by any person not bound by the terms of this Order, unless the Confidential Information is released from the restrictions of this Order either through agreement of the parties or, after notice to the parties and hearing, pursuant to the final order.

DATED AT Grand Cayman, Cayman Islands, this X day of April, 2004.

David A. Archbold, Managing Director