



The Bigger, Better Network.

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January 7, 2010

**Attention: Mr. David Archbold**

The Managing Director  
The Information Communications and Technology Authority  
P.O. Box 2502  
Grand Cayman, KY1-1104  
CAYMAN ISLANDS

Dear Sirs:

**Re: RECONSIDERATION REQUEST OF ICTA INTERIM DECISION December 24<sup>th</sup>  
2009 – Digicel/LIME Interconnection Agreement Resolution**

## **BACKGROUND**

By a determination request dated December 9, 2009 (the "Determination Request"), Digicel (Cayman) Limited ("Digicel") referred six disputes with Cable & Wireless (Cayman Islands) Limited ("C&W") to the Authority for determination pursuant to the ICTA Law ("the Law") and rules set out in the ICTA (Disputes Resolution) Regulations 2003 ("the Regulations").

These disputes included Dispute No. 1 that the July 27, 2004 Imputation Agreement "...*still operates and that the MTR of 0.08965CI\$/min should be phased in to buffer the Parties in the reduction from 0.1845CI\$.*" and "...*that a Glide Path should form part of the new ICA and that such Glide path should be implemented to decrease the MTR from 0.1845CI\$/min to 0.08965CI\$/min, in a linear manner on a quarterly basis during a period of 30 months **from the date of the determination.***"

The six disputes represented the remaining issues in dispute between the parties in their attempts to conclude a new ICA (the "New ICA"), agreement having already been reached on all other issues in their negotiation to replace their existing ICA dated January 2004 (the "Old ICA").

The Determination Request was presented in urgency to the Authority in light of a notice by C&W on November 27 2009 that it would **unilaterally** impose new terms and conditions, including rates, that in more than 100 instances deviated from what was in the Old ICA (and even deviated substantially from what the parties had subsequently agreed would be contained in the New ICA). There was also an implicit threat by C&W that it would provide no interconnect services beyond December 27 2009.

**Directors:** Denis O'Brien (Chairman), Michael Alberga, Leslie Buckley, Conor O'Dea

As part of the Determination Request, we also requested certain determinations from the Authority at page 14, paragraph 19, which were intended to halt any premature action of C&W (a) to institute its own decision in relation to Dispute 1, which was now a matter properly before the Authority for determination, and, (b) to unilaterally impose a new and controversial interconnection agreement.

Given the urgency, the Authority hurriedly convened a meeting with the parties on December 17 2009 to discuss their disagreements in the presence of ICTA, as an impartial mediator, and to seek a negotiated interim solution. This was also, to the best of our understanding, intended to hasten the Authority's deliberations on our request at paragraph 19 of the Determination Request to make an expeditious determination given C&W's intention to unilaterally change the existing regime, rates, and general terms and conditions, with the threat of disconnection if not agreed to by Digicel.

All parties were represented by fully empowered agents and representatives who either had the authority to strike deals on or behalf of their principals or were afforded the opportunity to seek the necessary approval during the meeting. C&W was represented by its Vice President Frans Vandendries. Digicel was represented by its Chief Executive Officer Victor Corcoran and its General Counsel.

The parties reached an agreement in relation to the terms that would apply between them in the interim period up to the date of the Authority's final determination of the Determination Request and the consequent New ICA. This interim agreement, which was entered into by Digicel in light of C&W's threat to unilaterally impose new rates and terms and conditions, included the following terms:

- The Old ICA (including the rates in it) was to apply from December 17<sup>th</sup> 2009 to December 31, 2009, with any rates or T&C later determined by the Authority and/or in the New ICA to have no retroactive effect in this period;
- From January 1 – June 30 2010, the MTR would reduce to 16.553 CI cents/min (as part of a glidepath ultimately down to a rate of 8.965 CI cents/min) and all other rates to remain as is, again with no rates which were later agreed or determined having a retroactive effect in this period;
- From July 1 – December 31 2010, there would be a further decrease of the MTR to 14.636 CI cents/min, again not to be subject to later terms having a retroactive effect.
- the agreed rates would be applicable up to the Authority's resolution of the outstanding disputes pursuant to the Determination Request (including that the later

terms determined and becoming effective pursuant to the New ICA would not be applied retroactively). Further to C&W unjustifiably reneging on that agreement on December 20, 2009, the Authority produced its interim determination on 24 December 2009 ("the Decision").

## **THE DECISION**

Section 78 of the Law allows any party aggrieved by a decision of the Authority to ask for a reconsideration of a decision in specified circumstances.

The Decision is a decision on a pre-contract dispute pursuant to section 67(1), being one arising from the failure of the parties to settle the six remaining ICA issues required for the New ICA to be final and complete. It was made specifically on the request of Digicel at paragraph 19 of its determination request in rebuttal of charges by C&W that it was entitled to discontinue interconnect services if agreement was not reached on certain matters and to impose new rates pending a new signed agreement. It is therefore potentially subject to reconsideration under Section 78 (1) (k) as a decision in relation to a pre-contract dispute under section 67.

## **OUR OBJECTIONS.**

Numbered paragraph 4 of the Decision satisfactorily responds to paragraph 19 of Digicel's Determination Request (at least in part). No reconsideration is sought of that paragraph of the Decision.

Our objections relate to numbered paragraphs 1-3 of the Decision and it is on these items which we request a reconsideration pursuant to section 78 of the Law.

### **1. Prior Agreement by the Parties**

It is Digicel's primary contention that paragraphs 1 to 3 of the Authority's Decision are in conflict with the parties' prior agreements. To the extent that there exists any such agreement, there is clearly no need for the Authority's intervention. Indeed, it is expressly recognized in Section 67(3) of the Law that "*A decision of the Authority in relation to any pre-contract dispute shall be consistent with any agreement between the parties as to matters in dispute.*" Digicel contends that the Authority has no jurisdiction in respect of agreed matters and/or that the Authority would be acting unreasonably were it to determine an issue in a manner inconsistent with an agreement by the parties.

As set out in paragraphs (a) to (c) below, the rates to be applied between the parties pending the New ICA taking effect (and, in particular, the MTR) were already agreed. Digicel therefore contends that the Authority had no jurisdiction to impose new 'interim'

rates pending a decision by the Authority on the Determination Request and the New ICA coming into effect and/or it acted unreasonably in doing so in a manner contrary to the terms agreed and in force between the parties.

Similarly it should not have left open the possibility (as it appears to have done in numbered paragraph 3 of the Decision<sup>1</sup>) for a later determination or the New ICA to be applied retrospectively in respect of a period of time in which the parties' relationship was governed by an existing agreement. This is discussed further below ('2. Retroactivity').

**(a) December 17, 2009 Interim Agreement**

As noted in the Background section above, the parties agreed on December 17, 2009, and in the presence of senior executives in the Authority, the rates that would be applied up to the Authority's resolution of the outstanding disputes pursuant to the Determination Request and the New ICA becoming effective (including that the later terms determined and becoming effective pursuant to the New ICA would not be applied retroactively).

To repeat, at the meeting at the ICTA on December 17, 2009 an agreement was reached by C&W and Digicel in the terms set out above. Where C&W's representative was unsure of his authority to agree to those terms, he was afforded time to consult with his principals outside of the meeting and returned in due course to confirm the decision before the meeting was adjourned.

Although that agreement was not immediately put into writing, it is not unusual that at that level and in the presence of inter alia the Managing Director, General Counsel and Chief Economist of the Authority, there was no insistence by any party that there be an immediate reduction of same to writing and a signature there and then.

Indeed, it is Digicel's position that such an agreement to cover only limited aspects of the relationship between Digicel and C&W and/or for an interim period pending completion of the entire ICA, did not have to be in writing to be effective – whether for the sake of the Authority's jurisdiction to resolve disputes (including by reference to section 67(3) of the Law – which necessarily anticipates a position such as the present where some, but not all, of the terms of a new ICA have been agreed, but with the remainder having to be determined by the Authority) or with respect to the

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<sup>1</sup> It is not clear to Digicel whether the ICTA intended in its paragraph 3 that terms later determined by the Authority were to be applied retroactively to the parties dealings (with a consequent financial adjustment). The use of the word "enable" appears to Digicel to keep this issue open, for later submission and determination.

reasonableness of the Authority ignoring the parties' prior agreements when making decisions.

Whilst we acknowledge that section 66 of the Law requires interconnection agreements between the parties to be made in writing and filed with the Authority within 7 days, this clearly only applies to agreements covering the entire interconnect relationship (i.e. interconnection agreements). It should not apply to invalidate agreements made from time to time during the wider negotiation of a new ICA or to cover an interim period pending agreement of a new ICA.

Alternatively, if section 66 does apply in respect of that interim and partial agreement, the Authority having had knowledge of the agreement between the parties can and is required to take note of the same and ought to, where the parties fail to do so within seven days of the date of the agreement or a reasonable time thereafter, direct that the oral agreement be reduced to writing and filed with the Authority. It cannot be the intention of the law that the Authority should give no weight or value to an oral agreement or to go further and make a ruling in absolute contradiction of the agreement made by the parties and known to the Authority on the basis that the agreement has not yet been filed with them.

However, the Decision made no reference to the fact that by 17 December 2009 the terms and conditions giving rise to the Decision had all been resolved and proceeded to impose terms inconsistent with this.

#### **(b) The Existing Interconnection Agreement**

Alternatively, if the December 17, 2009 Interim Agreement is not binding on the parties and in respect of the Authority's decision making power, Digicel contends that the Old ICA is still in force and that it will continue to be so until the determination of the outstanding issues which are before the Authority and the New ICA replaces it. There is nowhere any legal support that an interconnect agreement can be terminated before any new interconnect agreement is effective and approved by the Authority. Consequently an approved interconnect agreement will be the governing document up until the date a new agreement has been agreed between the parties and approved by the Authority. The Authority could and should only have determined that the terms and conditions of the Old ICA (including rates) should be applicable up until the New ICA was agreed (if necessary following a dispute resolution proceeding with the Authority) and approved.

While the Authority appears to have largely done this, the potential provision for the New ICA to apply retrospectively to December 27, 2009 is inconsistent with this and we

request that this element of the Decision is reconsidered and clarified/changed (as discussed further below).

### **(c) The July 2004 Imputation Agreement**

In any event, whatever the Authority concludes in relation to the on-going applicability of the Old ICA, Digicel contends that the Imputation Agreement of July 2004 is in effect, at least as regards the MTR payable by the parties, until a new MTR has been agreed and becomes effective in the New ICA since this agreement has not been (and cannot be without mutual consent) terminated by any of the parties.

This agreement stands alone from the Old ICA. It is related to, but not an integral part of, the Old ICA. It was always the parties' agreement that the rates in that agreement would be in full effect and force until the rates were derived from the FLLRIC process (something that has not occurred to date) or otherwise changed by agreement of the parties. Although that date was anticipated to be 30 June 2006, the agreement expressly provided for this date to extend, on a day for day basis, until actual completion of the FLLRIC model. Only then would the new rate (including the glidepath to it) be applicable.

As noted in (b) above, the Decision is largely consistent with this. It includes the existing MTR until the New ICA (with its different, agreed, MTR) is in effect. However, the potential for the New ICA and its MTR to be applied retroactively is inconsistent with this (discussed further below).

## **2. Retroactivity**

As noted above, Digicel contends that the Authority's apparent reference to the potential retroactivity of the New ICA back to December 27, 2009, is inconsistent with the agreement(s) of the parties – whether the 17 December 2009 interim agreement (if effective), which the parties expressly agreed, in the presence of the Authority, would not later be overturned by giving the New ICA retroactive effect; or, the prior agreements (the Old ICA or the Imputation Agreement) which the parties clearly intended to apply until amended by them or, in the case of the Imputation Agreement, until the FLLRIC model was completed (as applicable).

A decision that the New ICA (as finalized further to the Authority's ultimate decision on the Determination Request) should be applied retroactively back to December 27, infringes section 67(3) of the Act and/or would be unreasonable given the parties' prior agreements.



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Digicel further contends that such a ruling in relation to retroactivity is/would be unreasonable given the financial impact it would have on retail customers and the licensees.

The Authority seems not to have considered the real financial impact of the Decision. Neither Digicel nor C&W would have a method of deciding what adjustments should be made to their retail rates prior to ICTA's final determination and the New ICA. Records to enable adjustments to be applied retroactively to December 27<sup>th</sup> 2009 are not records which can inform Digicel or C&W in setting its retail rates as of the date of the decision. In the case, as the Authority has determined, that the MTR should be carried forward at 0.1845CI\$ per minute, C&W is not expected to make and can make no adjustments in its retail rates in anticipation of a lower rate to be determined or agreed subsequently (whether 0.8965CI\$ immediately or reached pursuant to a glidepath as Digicel requests). At the time of the New ICA, whether by agreement or determination, any deviation from the interim rates set by the Authority will be to the detriment of Digicel since it is a certainty that the MTR will not increase and as such Digicel will be required to make adjustment payments to C&W which might be huge depending on what rate the Authority finally determines and it must necessarily come from Digicel's profits on one hand, and become a windfall to C&W on the other. One party – Digicel - will be unfairly penalized and the other - C&W, unjustly enriched. Nor will the customers see any benefit from this decision (which only can favor C&W where the Decision neglects to force C&W to disgorge any of the windfall to the customer). At the end of the day, the financial dislocation to Digicel cannot be supported by any letter or spirit of the Law.

In summary, Digicel's seeks the Authority's reconsideration and/or clarification (as appropriate, depending upon what paragraph 3 of the Decision was intended to convey) to the effect that, as and when the New ICA takes effect, it will not have a retroactive effect.

Yours sincerely,  
**Digicel (Cayman) Limited**

A handwritten signature in black ink, appearing to read "Victor Corcoran", followed by a long horizontal line.

Victor Corcoran  
Chief Executive Officer

Copy: Mr. Anthony Ritch  
Cable & Wireless (Cayman Islands) Limited

**Directors:** Denis O'Brien (Chairman), Michael Alberga, Leslie Buckley, Conor O'Dea