REQUEST FOR RECONSIDERATION – ICT DECISION 2010-5

TO: **THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY**

Address : **P.O. BOX 2502**
3rd FLOOR ALISSTA TOWERS
GRAND CAYMAN KY1-1104

ATTENTION : **THE MANAGING DIRECTOR**
Mr. David Archbolds

IN the Matter of Section 78(3) of the Information and Communications Technology Authority Act 2006 (the Law).

AND

1. The Information & Communication & Technology Authority (ICTA) on April 29th 2010 handed down ICT Decision 2010-5 in relation to a Determination Request filed by Digicel (Cayman) Limited on December 9th 2009. This Determination Request (DR) required the ICTA to settle six outstanding issues in the negotiation between Digicel (Cayman) Limited and Cable & Wireless (Cayman Islands) Limited trading as LIME for a new Interconnection Agreement to replace the Interconnect Agreement of January 29th 2004.

2. For completeness we summarize the six disputes below:

3. **IN the Matter** of a dispute (No. 1) over whether any rates and implementation method of new rates agreed under The Imputation Agreement dated July 27th 2004 between C&W,

Wireless Ventures and Digicel (Cayman) Limited continues to apply to any new Interconnect Agreement between C&W and Digicel (Cayman) Limited or if it does not, whether a new Glide Path should apply to any subsequent interconnection rates agreed by or imposed on C&W and Digicel (Cayman) Limited under the Law.

4. **IN the Matter** of a dispute (No. 2) over a) whether C&W is required under the Law to provide a Direct Mobile to Mobile Interconnection with Digicel (Cayman) Limited as requested by Digicel (Cayman) Limited from as early as January 2009 before the expiration of the Interconnection Agreement dated January 2004 and b) on what terms and c) whether C&W is entitled to levy a charge (the transit fee) for Digicel calls to traverse C&W's PSTN network until such time as direct mobile to mobile interconnect is provided and if so how should such transit fee be determined.

5. **IN the Matter** of a dispute (No. 3) over whether Digicel (Cayman) Limited being a non dominant operator has an absolute obligation to offer C&W any underlying interconnect service necessary to provide any <u>new</u> retail services it introduces in the market. This obligation arises in part from Clause 42 of the old ICA and Part 6 Wholesale Services - Annex 5 sections 64-70 of C&W's License dated July 10th 2003.

6. **IN the Matter** of a dispute (No. 4) over what Fixed Termination Rates should be charged by C&W for set up and per minute fees and how should they be determined.

7. **IN the Matter** of a dispute (No. 5) over what Transit Rates should be charged by C&W when transiting a call via its fixed network to a 3rd party operator or its own mobile network for set up and per minute fees and how should they be determined.

8. **IN the Matter** of a dispute (No. 6) over whether C&W is entitled under the Law to charge different Fixed to Mobile retail rates to the its fixed subscribers in the Cayman Islands market and whether those rates can differ from the rates C&W charges to terminate fixed calls on its own mobile network.

9. The ICTA has in respect of Dispute No. 1 ruled that the Imputation Agreement (referred to as the Amending Agreement, IA or AA), amends the January 2004 ICA and where the ICA expires, the AA also expires. Digicel does not agree but even if the Imputation Agreement is indeed an Amending Agreement of the ICA and expires with the ICA, the Imputation Agreement speaks to a glide path which is to be applied to the MTR fixed by the FLLRIC model or by agreement between the parties. It follows that if the ICTA finds that the parties have an agreed MTR pending execution of the new ICA, or the finalization of the FLLRIC model, then the AA would apply to this rate at the date the MTR was agreed if at the date of the MTR is agreed, (or fixed) the ICA had not yet expired. Whilst it is our position that the ICA continues until a new one is executed, a position the ICTA agrees with (para 41). Our position is that the MTR rate which the parties have discussed as a rate to include in the new ICA where it is settled, was agreed without prejudice in 2009, prior to the date that and Cable and Wireless claimed that the

ICA had expired. This MTR, can only be deemed to be agreed if having satisfied the ICTA's qualification for agreement, we can ascertain a clear date of its agreement and having determined the date, by the ICTA's own reasoning, it is only for us to determine, what if any ICA was in place at that exact time. Further, at paragraph 35 of the Decision, the ICTA ruled essentially that where the ICA is in effect so too must be the Imputation Agreement and its glide path.

10. The ICTA has said in this Decision that C& W could not terminate the ICA and impose unilateral rates (Para 36). It opines at paragraph 38 that "Under the ICTA Law and Interconnection Regulations, parties are required to negotiate the terms and conditions for interconnection and where there are disputes, parties are able to request a dispute resolution determination from the Authority." The ICTA buttresses this position by reference to Clause 2.2 of the Legal Framework and firmly rules that C&W is not permitted to terminate the ICA and impose unilateral terms. The ICTA then rules that the terms of the ICA are to continue in effect after December 27th 2009, until a final determination of the disputes. By its own analysis, the MTR would be agreed at a date either before December 2009 (when C&W says the ICA expired) or after that date when the ICTA declares the ICA to remain in place. In either case the Imputation Agreement would form a part of the ICA and the MTR be subject to the agreed Glide Path.

11. We cannot therefore accept that the ICTA can extend the ICA beyond the date when C&W claims it had expired, without similarly extending the Imputation Agreement, if the ICTA is to be consistent in the view that the ICA and the Imputation Agreement co-exist.

In any event, if the ICTA is to find that the parties had agreed a new MTR of CI$0.08965/min this agreement would have to pre-date December 29th 2009 and would have fallen within a period where the ICA **WAS** unquestionably in effect and therefore subject to the Imputation Agreement. This was the basic ground on the dispute between C&W and Digicel. We argued that any MTR whether an agreed CI$0.08965/min or not, automatically would be subject to the Glide Path as the ICA is currently in effect and C&W disagreed. It is illogical on the face of the ICTA's Decision to find that

(i) the Imputation Agreement and the ICA are one,

(ii) the rate of CI$0.08965/min was agreed,

(iii) the ICA (and by implication the IA) extends to the end of this dispute,

but then to find that the IA and its Glide Path mechanism mysteriously did not exist and was of no effect at the time the rate was agreed.

12. We note further anomaly in the ICTA's reasoning at paragraph 40 where it disagrees with Digicel on the alleged agreement at the December 17th 2009 meeting. The ICTA has ruled that even if C&W had not reneged on the verbal agreement, the Law does not contemplate that an agreement arose, outside of a written and presumably signed interconnection agreement. Our view that the parties may properly agree individual terms en route to a comprehensive interconnection agreement to eventually be executed and filed with the Authority, is clearly pragmatic, as we were of the view that in the process towards execution, some items ought to be taken as agreed and beyond dispute, while outstanding matters could then be sent to the ICTA. Any other interpretation would mean

that where the parties have selected (as they have in this case) six disputed matters for the Authority's resolution, one (or both parties) could subsequently say, after these matters are resolved, that the OTHER hitherto 'settled matters' are not agreed and should now be sent to ICTA. In other words, nothing could be deemed agreed until there is a signed interconnection agreement and as soon as issues are resolved in negotiations, AT EVERY STAGE OF RESOLUTION, a document should be produced on these items and a partial interconnection agreement signed and filed. This approach defies logic.

13. However, if the ICTA is correct that any item resolved could only qualify as a binding agreement, if signed and filed with the Authority pursuant to section 66(1) of the ICTA Law, then there is certainly no legal grounds for the ICTA to claim as they have through-out the Decision that the parties have agreed an MTR of CI$0.08965/min. Nowhere has it been said, nor any evidence offered by any party that there was a binding agreement on the MTR within the meaning set forth by ICTA. In fact, in all the submissions, the clear inference is that the MTR was discussed and settled in the exact same terms as the glide path at the December 17th 2009 meeting. The Authority simply cannot maintain such obviously inconsistent positions and should be well aware that where a tribunal has made a decision or a ruling, presuming facts which were not in evidence, this may constitute an error of law on which the decision can be judicially reviewed. This we submit is a fatal error by the Authority, as critical to the Decision that the Glide Path does not exist is the ruling that an agreed MTR, which is cost-oriented, also exists. We believe that on the

Authority's reasoning, it is an arbitrary, unsubstantiated determination, incapable of curing other than by a overturning of Decision No. 1.

14. In addressing Digicel's Economic rationale for the Glide Path we submit that the ICTA has misunderstood the primary reasons advanced by Digicel and accepted by regulators in jurisdictions where a glide path is introduced. It is not reasoned on outright losses due to an abrupt and steep reduction in the MTR but rather it is considered to impose losses on relevant subsets of services and contracts. They have the potential to tip operators into insolvency or losses, but whether it does so or not is not the primary rationale for the use of a glide path. What it will cause, is an abrupt correction in Digicel's profitability going forward. It is a cornerstone of good regulatory practice, recognized globally, that regulators should avoid imposing abrupt corrections on the value of companies in other words, to avoid regulatory opportunism. The very fact of the recognition of the waterbed effect in the Cayman Islands is a case for the Glide path to prevent the abrupt corrections in the value of the company, even where the correction is small. Once again we draw the ICTA's attention to the UK where in a mature market; Ofcom imposed a glide path to prevent such windfall corrections. ICTA is obliged by the very fact of the acceptance of the waterbed effect to explore further what corrections may arise from the MTR adjustments and then to make a reasoned decision on the Glide Path.

15. On the issue of the cost oriented nature of a MTR, we accept that the Law requires the rate (whether agreed or fixed) to be cost oriented. In this regard all that the Authority has

said in paragraphs 51 -54 of its Decision can be supported by Digicel. This is not to say that a mechanism to adjust the current non-cost oriented rate OVER TIME to comply with the statutorily mandated cost oriented rate is illegal or unsupportable by the Law. We believe we have ample evidence in wide ranging industry global best regulatory practice to indicate that the approach urged by Digicel is certainly not impractical. Nothing in the ICTA's Decision has indicated the grounds for ruling that a cost oriented MTR when determined MUST be instituted IMMEDIATELY in order to comply with the Law. What we have is a mountain of data presented by Digicel proving that this is not so in many other jurisdictions. To therefore conclude that a Glide Path in a cost oriented regime does not comply with the legislation is therefore in our view patently erroneous in law.

16. Even C&W's submission that the Authority in the alternative should consider the approach taken by ECTEL in the Eastern Caribbean is a clear acceptance of the Digicel argument that a glide path can operate legally within a cost oriented MTR regime. ICTA we submit can take judicial note of the regulatory regime in these jurisdictions where MTR is cost oriented yet a glide path was implemented. In the face of the evidence of best regulatory practice and the use of a glide path, the Authority's only response at paragraph 49 is that it is not convinced. With the greatest of respect, it is not sufficient for the Authority to simply say it has viewed the evidence of best practices but in the absence of contradicting evidence, is not convinced because "…the Authority considers that the situation facing the Authority is different." The Authority has to make a decision on the

submission on best practices and does not discharge its statutory duty to do so by giving as an unsubstantiated and unreasoned response that the situation in the Cayman Islands is "different".

17. Finally the dispute concerned the applicability of a Glide Path to any new rates to be agreed under the interconnection agreement being negotiated and, "if it does not, whether a new glide path should apply to any subsequent interconnect rates agreed by or imposed on C&W and Digicel under the ICTA Law'. Since it is evident that no new interconnect agreement has yet been concluded, the question to be answered by the Authority really is "should the rates IF SUBSEQUENTLY identified (i) by agreement OR (ii) determined by the Authority, attract a Glide Path?". In none of those two cases could ICTA decree that an IMMEDIATE implementation take place, no rate having yet being agreed and no rate having yet being fixed by the FLLRIC process. This decision is therefore totally untenable and erroneous in law and fact. As indicated at paragraph 12 above, based on the arguments by the ICTA, the absence of a MTR would have to be fatal to the Decision and it is submitted that even in this Decision, the Authority could not itself determine a MTR or even adopt the rate of CI$0.08965/min since to comply with the Law the rate must be cost oriented. Unfortunately for the Authority there was no evidence presented by EITHER party as to the cost-oriented nature of rate and the Authority has made it clear that it did not have sufficient data available to it at the time of the Determination Request to determine this rate.

18. We therefore ask that the Authority reconsider its Decision on Dispute No. 1 that the MTR of CI$0.08965/min should be implemented immediately without a Glide Path as same is inconsistent with a ruling that the terms and conditions of the Imputation Agreement are part and parcel of the January 2004 ICA and that the terms and conditions of the said ICA are extended to govern the parties until a new Interconnect Agreement is signed and filed with the Authority. Further we ask for a reconsideration on the basis that if the reasoning is correct that no agreement on the interconnect terms exist outside of a written and filed document, then there is no agreement between the parties with respect to the MTR or any other part of the interconnection and no ability of the Authority to declare e.g. a MTR, which can be enforced or implemented immediately by the Authority.

19. The ICTA has in respect of Dispute No. 2 ruled that it will not make a ruling on this grievance at this time as the parties have not exhausted their statutory duty to "…in good faith, attempt to resolve such grievance within 30 days of receipt of the notice …." The Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003. Our records indicate that this matter was first raised in January of 2009, C&W's records indicate March 3rd 2009. It is fair to assume that there was ongoing discussions between the parties from at the very latest March 2009 as admitted by C&W however the fact that this March 3rd e mail emanated from C&W and not from the party wanting M2M connection raises the more likely presumption that there was some request from Digicel PRIOR to March 3rd 2009 and corroborates the claim by Digicel that they

had made a request in January of that same year. The Authority can appreciate that the parties both have unclear documented records on the request for M2M and the initial discussions and must rely on the limited data to draw inferences. What is clear however is that there was a March 3rd correspondence which suggests that some other correspondence pre-dated it, perhaps (as we say in January 2009). Although no "formal" request as outlined in the regulations might possibly have been made, the discussions were sufficiently advanced as to prod C&W to waive its rights to the formal request and necessary data therein and to request a "formal" forecast in early September. The necessity of the data, in the circumstances is highly questionable to say the least. This is not a matter where a new operator is to interconnect. The minutes that would be exchanged over the direct mobile to mobile interconnection **already exists** and any necessary forecasting for this traffic is already made. Both operators know exactly to the very minute what traffic volumes are involved. To, as C&W did at that time, request a formal forecast for traffic which they clearly knew the volumes of, is nothing but a way of delay the interconnection proceeding. It should also be clear that the relevant traffic is sent on separate trunk groups so there cannot possibly be any doubt of what volumes would be applicable. In addition it took C&W 41 days, as opposed to the 30 days permitted in the legislation, to submit an offer once they had got the requested data upon which a proposal was ultimately made October 26th 2009. They cannot at the date of the Determination Request take the point that the formal request and the data was critical to the process, having clearly waived their rights to it and never subsequently objecting to

the absence of a formal submission. The circumstantial evidence points undeniably to a process of discussions between the parties.

20. The question therefore is, was this discussion in good faith for a minimum of 30 days after issue was joined between Digicel and C&W? We submit that C&W cannot claim there were no good faith discussions between January/March to the filing of the Determination Request on December 9th 2009, nearly one year later. Where we have demanded to their knowledge M2M on every occasion (and they have never denied that Digicel has been in constant pursuit of M2M) and they have taken a total of seven months from March 2009 to October 26th 2009, to submit a proposal, it is not for them to say no negotiations took place thereafter or that Digicel has failed to conduct good faith discussions. In fact where they have refused to offer direct M2M they cannot claim there is no good faith discussion on the matter when they C&W have not presented a proposal on which good faith discussions can take place. If this was allowed, then all they would have to do to prevent this matter from going before the Authority would be to delay making a proposal to Digicel and as soon as a dispute is filed, make a proposal and by so doing entitle themselves to a further 30 days. This is an abuse of the Regulations.

21. This abuse becomes more obvious when the proposal is reviewed. The proposal we submit was clear to us and there was no misunderstanding of its contents as the ICTA suggested. We were familiar with same as we had in our many discussions on M2M disputed the principles therein. We did it in relation to Digicel interconnection in the

Cayman Islands and had done so in respect of the other jurisdictions where the parties had separate operating entities but the same negotiating officers. We were au fait with the proposal and nothing therein was dissimilar, nor was C&W's position any different therein. The pattern was consistent with what we had encountered before and we had no reason to believe protracted discussions would yield any different results. Our position of rejection of the basic principles of the offer was not subject to alteration.

22. Further, C&W had submitted an October 26th 2009 proposal which they were well aware offered terms for M2M which was financially more disadvantageous than the current arrangement which Digicel was resisting. By the proposal C&W was requesting Digicel to pay MORE to C&W than it was paying at the time of the proposal. The proposal on the very face of it required Digicel to pay more than CI$130,000.00 additional PER YEAR for M2M plus an upfront payment of CI$153k. It is obvious for anyone that Digicel would never accept such offer and in particular for C&W since such discussions has been going on both in relation to Cayman and most of the other Caribbean jurisdictions where the parties operate. As such it is easy to conclude that the parties will not agree on how the costs should be dealt with in relation to direct mobile to mobile interconnection. As far as Digicel is aware C&W has not made any direct interconnect to its mobile network in any Caribbean jurisdiction and based on our different discussions across the region have no intention to do so in order to protect its exorbitant transit revenues. We ask that the ICTA take note of the fact that these are two large operations, skilled in the art of negotiations, and between whom there has been many long and

arduous legal battles. We should be taken to know which issues can be agreed amicably and which cannot. Where we have engaged in fierce debate on an interconnection proposal for the Cayman Islands, it is reasonable to assume we will canvass all the material issues over the period January 2009 to December 9th 2009 with care and diligence and only ask for a determination when we are genuinely unable to agree. Where one party seeks to take technical points in the regulations to prevent a resolution of a dispute by an impartial tribunal, we ask that this action be examined for good faith and the ICTA refer the parties back to talks only if it reasonably believes there will be a genuine attempt for good faith resolution. We submit that the evidence and behavior of C&W indicates otherwise and that the ICTA by taking this position in fact "rewards" C&W for their obvious delay tactics.

23. Our view therefore is that there is no basis on which the ICTA can rationally send the parties back to negotiate on M2M, when the records raise the irrefutable presumption that there was discussions on this issue for MONTHS before the proposal, and that the proposal when it was finally submitted, was based on figures which made it more costly than the current offering, and was derived from principles of cost recovery which Digicel had ALWAYS indicated was never and would never be acceptable. The 'proposal' was therefore in our view a sham and never intended to lead to good faith discussions. Where this is so, there is no practical benefit to further discussions and the ICTA is obliged to remove it from the parties and make an expeditious resolution of same.

24. With respect to Dispute No. 3 where Digicel requests a ruling from the ICTA to have the original Clause 42 of the January 2004 ICA retained in the new document, the ICTA has ruled that this should not be retained. C&W argues that the obligation to provide wholesale services to Digicel should only be on direction of the Authority and if it must be contractually obliged to provide wholesale services to Digicel, the obligation should be mutual.

25. The Authority's reasoning that C&W is already mandated by Law to provide "certain wholesale services" and hence there is no need to duplicate this requirement in the contract is flawed. The parties are currently in disagreement on this very issue and if it is the ruling of the Authority that the Law supports the inclusion of this clause in the contract, at the very least, out of an abundance of caution, the Authority is obliged to set this issue beyond further dispute by simply requiring the retention of the clause. It seems inconsistent and arbitrary to state "..in accordance with C&W's licence, it has an obligation to provide *certain* (Italics mine) wholesale services. As these requirements are adequately addressed in the ICTA Law and the Licence, the Authority sees no need that they be duplicated as conditions in the interconnection agreements." when this is the essence of the question being asked of the ICTA by Digicel. In other words, the Authority is saying, the licence and the Law supports the position you are urging, and therefore we do not need to do anything. It is precisely because the parties were at odds over what the Law and the licence meant that the Authority NEEDS to discharge its statutory obligations to make a determination and set this beyond doubt. In addition it

might be questionable if Digicel would have any actionability against C&W based on its License and the Law and the only recourse Digicel would then have is to encourage the ICTA to initiate proceedings. It would be beyond doubt that Digicel could action any breach of this issue where the Clause is explicitly in the ICA. We maintain that neither the Licence nor the Law has changed since the execution of the ICA in relation to this matter yet the clause was approved by the ICTA for inclusion therein. There is obviously a reason why the clause was in the original agreement.

26. The Authority's Decision at Number 6 must also be reconsidered based on similar arguments advanced in respect of Dispute Number 3. Digicel has asked in its Determination Request for the retention of a clause preventing C&W from setting different retail rates from its fixed network subscribers to any mobile operator's subscribers. This clause was approved for inclusion by the Authority in the Old ICA, presumably because this was agreeable to the parties being negotiated, or imposed by the Authority as supported or required by Section 40 of the Law and Annex 5 of the C&W licence. The Authority has now, only six years later, discovered that since this condition is covered by the regulatory regime of C&W's licence (not a new and intervening event), "the Authority can see no legitimate reason that an *additional* (Italics mine) condition be made part of an interconnection agreement." (paragraph 118).

27. Of course all the parties and the Authority are aware that this is NOT an additional condition being imposed on C&W. Digicel has asked for its retention on the very basis

that it was included in the first place, i.e. as a requirement of the Law. Implicit in this request to the Authority is the request to rule on whether the Law supports the inclusion of the clause and the Authority again deflects its statutory responsibility to rule on a dispute by ruling that the regulatory regime already covers this issue. That is trite. Where the Authority is agreeing with the submission by Digicel that the regulatory regime supports the position that "C&W…rates for a Fixed to Mobile Call shall be the same for Calls from C&W PSTN Subscriber Connection to any mobile Service Provider, including C&W mobile" they are required to say so in the Decision. Where they disagree they also should say so. To simply say this question is dealt with sufficiently in the regulatory regime and leave it at that is not to settle the dispute but rather to leave it to one or other of the parties needing a clear answer to this question, to seek a further declaration from the ICTA as to whether when the regulatory regime is examined, C&W able "to charge different fixed to mobile retail rates to its fixed subscribers in the Cayman Islands market and whether those rates can differ from the rates LIME charges to terminate fixed calls on its own mobile network.' (para 112).

28. Digicel therefore submits that once again the ICTA has not made a ruling in relation to Disputes 3 and 6 before it and has not carried out its obligation to settle pre-contract disputes and we ask for a proper consideration of our Determination request Nos. 3 and 6.

29. With respect to Disputes No. 4 and 5 the Authority has ruled that it does not have enough information to carry out its functions under the Law. Paragraphs 93 – 94 and 108-109 are boilerplate excuses for not providing the necessary resolution to the parties' disagreement

pursuant to its statutory obligations. We find that such an explanation for not providing a ruling, or providing a ruling that it cannot now rule is a breach of the Authority's duties. Where the tribunal is mandated to resolve pre-contract disputes under Section 67 of the Law and does not do so, failing exceptional restrictions on its ability to carry out the function, this is unreasonable, and a breach of procedural fairness.

30. Regulation 8 of The Information & Communications Technology Authority (Dispute Resolution) Regulations 2003 provides ample powers to assist the Authority in reaching a decision. Where it has not declined to hear the dispute under Regulation 10, which it has not, **and has put on record** that the Determination Request in its view is lacking information, then it can only reasonably request such other information from any other person as may be affected by the dispute as it may deem necessary. Nothing in the Law or Regulations prevents the Authority from doing the most logical and reasonable thing that a reasonably competent regulator would do, which is to **REQUEST** the missing data, either from the parties to the dispute, other affected parties or the public through a consultation. This specifically in the light that Digicel provided information showing that e.g. the fixed termination rate ("FTR") requested by C&W is **more than 320% above** the average FTR in EU and that the transit rates are **more than 450% above** the average transit rates in Scandinavia where they have been derived from cost models. This should be put in context that the rates discussed by the parties and expected from the cost model in relation to the MTR is in line with the EU average. The majority, if not all, of the rates in EU are based on cost models and there is a reasonable assumption to expect that the

FTR and MTR in Cayman would be in the same ballpark relatively speaking with the average FTR and MTR in EU. A mere look at the FTR and transit rates advocated by C&W should indicate that they are clearly exorbitant and as such now has to be subject to regulation by the ICTA. The mere fact that these rates will be applicable in the Cayman market for possibly the next 3-5 years will be an effective deterrent to any potential new operator looking to establish itself in Cayman Islands.

31. Also by not addressing the transit rates the ICTA effectively cements asymmetric rates (in fact increases the difference in amounts payable between the parties from ca. 8% to ca. 15%) in the Cayman market. This is especially bad when put in conjunction with the "refusal" to adjudicate in the direct mobile to mobile interconnection dispute.

32. Further, Regulation 8 provides for the appointment of a mediator or arbitrator who might be competent to dispose of the complex issues on behalf of the Authority. In any event, the responsibilities of the Authority to settle disputes between interconnecting parties is a grave duty imposed by the Parliament and one which Digicel is sure the Authority needs no telling, cannot be shirked lightly.
33. We accept that the Authority may, where there is a rational basis to believe this can lead to resolution of the dispute, elect to direct the parties to commence or continue reasonable efforts to resolve this dispute. (Regulation 8(b)) or take such other course of action as it considers necessary to resolve the dispute (Regulation 8(h). None of the above applies however authorizes the Authority not to decide because it 'does not have satisfactory

information on which to make a final determination on an appropriate cost-oriented rate…" where that information could be made readily available and adequately analyzed by the Authority or its appointed experts. It is our submission that to opt not to make reasonable efforts to access this information but to direct the parties to further negotiate these two disputes without reasonable grounds for thinking this can RESOLVE the dispute is in breach of the Law and is a failure by the Authority to discharge its obligations to BOTH parties.

34. It is also our submission that where the determination of a FLLRIC model is not required for the determination of disputes 4 and 5 and "one of the uses of the model *COULD* (italics mine) be a review of the costs associated with fixed termination" and "…with the transit service." it is an unreasonable decision to delay the determination of these two disputes until the settlement of this model. In the circumstances the act of not acting until the creation of this model which **MAY** assist, is not a proper discharge of the Authority's statutory mandate to resolve these pressing disputes.

35. Digicel's suggestion that the FTR should be decreased with the same percentage was a pragmatic approach (knowing that the ICTA had no cost model at hand for FTR) based on the assumption that the rates agreed between the parties when initially launching interconnection were cost oriented at that time and subsequently the costs would have decreased in a similar manner for the fixed and mobile networks. When then comparing the result of such exercise with benchmarks from e.g. EU this supported the fact that the new rates suggested by Digicel would at least not be below cost oriented rates.

36. The Authority is being pressed to reconsider this very unsettling decision on Disputes 4 and 5 particularly in light of the fact that it has not actually said in the Decision that it WILL have a follow up proceeding on the transit rates and the FTR if the parties fail to agree in subsequent discussions. Taken together with the fact that the model has been under construction for a very long time, with an indeterminate date for conclusion, there is a clear failure of the Authority to discharge its duty to the parties to Disputes 4 and 5. An undue delay in reaching a decision is sufficient in our view to request a reconsideration of this Decision, either by the Authority of by the Courts.

Conclusion

37. On Dispute No. 1 we submit the decision is erroneous in law and fact. The Authority has not given sufficient consideration to the global best practices application of and the economic rationale for glide paths in other jurisdictions. On its own reasoning, no agreement of a MTR exists between the parties and hence no implementation of the decision can take place immediately. Further, there is no explanation for the fact that having ruled that the ICA and the IA are part and parcel of the same agreement and the ICA is extended to the conclusion of the dispute, the glide path is not also still applicable to any rate determined or to be determined.
38. On Dispute No. 2 there is ample evidence circumstantial and otherwise that the parties have discussed this dispute and that there is no reasonable chance of further good faith discussions, or that further good faith discussions will advance this dispute to resolution.

39. On Dispute Nos. 3 and 6 the Authority has a duty to set this dispute beyond question and where it is of the view that the questions are already dealt with under the Law it has a duty to pronounce on these issues in this Determination request rather than leave the parties open to further disputes resolution of the questions effectively asked by the Request. This is especially so when one party is asking for the maintenance of the status quo already approved by ICTA in an existing ICA and supported by the relevant Licence and Law.

40. On Dispute Nos. 4 and 5 to recognize that there is no satisfactory information upon which to rule is in our view not an authorized response by the ICTA when it is asked to discharge its obligations to settle pre-contract disputes. The Law provides a number of legal courses of action to take and ICTA must avail itself of one or more of them. It is not a reasonable course to rule that the information is unsatisfactory and not engage the parties or other persons as provided for under the Law to procure this information.

41. For these reasons set out herein, we ask that the Information, Communications And Technology Authority reconsider ICT Decision 2010 -5 and rule in the manner requested by Digicel in its Determination Request of December 9th 2009.

DATED THE 12 DAY OF MAY 2010

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VICTOR CORCORAN
CHIEF EXECUTIVE OFFICER
DIGICEL (CAYMAN) LIMITED