ICT Decision 2010-7

Grand Cayman, 18 June 2010

Reasons for ICT Decision 2010-6 "Decision on Digicel's application to reconsider the 29 April 2010 ICTA determinations on the Digicel/LIME Interconnection Agreement Dispute"

Introduction

On 10 June 2010, the Authority issued ICT Decision 2010-6 which confirmed the determinations it made in its 29 April 2010 ICTA decision on the Digicel/LIME Interconnection Agreement Dispute and denied Digicel's reconsideration request. This decision provides the Authority's analysis and reasons for its 10 June 2010 decision.

BACKGROUND

1. In ICT Decision 2010-5, "Decision in Digicel Determination Request related to Digicel/LIME Interconnection Agreement Dispute", the Information and Communications Technology Authority (the "Authority" or the "ICTA") made determinations on six items of dispute between Cable and Wireless (Cayman Islands) Limited ("LIME") and Digicel (Cayman) Limited ("Digicel") related to pre-contract disputes concerning the interconnection agreement between those parties.

THE APPLICATION

2. On 13 May 2010, Digicel submitted an application requesting that the Authority reconsider ICT Decision 2010-5 (the "Decision") and rule in a manner requested by Digicel in its Determination Request of 9 December 2009.

3. In its application, Digicel contended that the Decision is erroneous in law and fact with regards to Dispute No. 1. On Dispute No. 2 Digicel argued that 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. On Dispute Nos. 3 and 6 Digicel claimed that the Authority had not made a ruling in relation to the disputes before it and hence not carried out its obligation to settle pre-contract disputes. On Dispute Nos. 4 and 5 Digicel argued that the Authority's decision to impose interim rates until the conclusion of FLLRIC was unreasonable and,

instead, that the Authority should have used other regulatory options, such as the appointment of a mediator or requesting additional information from the parties.

PROCESS

4. A call for comments on Digicel's application for reconsideration was issued by the Authority on 14 May 2010. The Authority noted that, pursuant to subsection 78(4) of the ICTA Law, a decision must be rendered on the reconsideration application no later than 10 June 2010 and set dates for parties to file comments. Specifically, the Authority stated that parties other than Digicel, could file comments on the application by 24 May 2010 and that Digicel could file a reply to any comments received, by 28 May 2010.

5. On 25 May 2010 the Authority received correspondence from LIME indicating that it had not received the call for comments on Digicel's reconsideration request. Subsequently, on 26 May 2010 LIME requested an extension to the date to file comments on the application. The Authority approved the extension request from LIME and set 28 May 2010 as the deadline to provide comments on the application and extended the due date for Digicel reply comments to 3 June 2010.

6. On 28 May 2010 the Authority received comments from LIME. On 3 June 2010, Digicel filed a reply to LIME's comments.

LEGISLATIVE AND REGULATORY FRAMEWORK

7. In reaching a decision on Digicel's reconsideration request, the Authority is guided by the ICTA Law and, in particular, by section 78. The relevant portions of the ICTA Law are as follows:

> *78. (1) This section shall apply to the following decisions of the Authority -*
> *(a) a decision not to grant a licence;*
> *(b) a decision to revoke a licence;*
> *(c) a decision to modify a licence under section 31(4);*
> *(d) a decision to suspend a licence under section 32(1);*
> *(e) a decision that a section 36 prohibition has been infringed;*
> *(f) a decision that a section 40 prohibition has been infringed;*
> *(g) with regard to an individual exemption under Part IV-*
> *(i) a decision to grant or refuse an individual exemption;*
> *(ii) a decision to impose any condition or obligation and a decision on the type of condition or obligation where such a condition or obligation has been imposed;*
> *(iii) a decision of the date and duration of the individual exemption and as to the period fixed for such exemption;*
> *(iv) a decision to extend or not to extend the period for which an individual exemption has effect; or*
> *(v) a decision on the duration of the extension referred to in subparagraph (iv);*
> *(h) a decision to cancel an exemption;*

(i) a decision to impose a penalty in accordance with Part IV and a decision as to the amount of such penalty;
(j) a decision to give a direction under section 47, 48 or 50;
(k) a decision in relation to a pre-contract dispute under section 67; and
(l) such other decision as may be prescribed.

(…)

(3) Where-

(a) a licensee;
(b) an applicant for a licence;
(c) party to an agreement in respect of which the Authority has made a decision under Part IV; or
(d) a person in respect of whose conduct the Authority has made a decision under Part IV,

is aggrieved by a decision specified in subsection (1) ("the original decision"), he may, within fourteen days of the receipt of the decision and written reasons therefore, apply in the prescribed manner to the Authority for a reconsideration of that decision.

(4) The Authority shall, under subsection (3), confirm, modify or reverse the decision, or any part thereof, specified in subsection (1), and render its determination within a reasonable period of time not to exceed twenty-eight days.

(5) Where the original decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.

AUTHORITY ANALYSIS AND DETERMINATION

8. If the decision is not enumerated in subsection 78(1) of the ICTA Law, the Authority considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to a proceeding at first instance before it, it should decline to entertain an application for reconsideration of a matter that falls outside the list of subject areas enumerated in subsection 78(1).

9. In the present case, Digicel did not in its reconsideration request of 14 May 2010 directly address whether the impugned decision falls within the scope of subsection 78(1) of the ICTA Law. However, in Digicel's reply on 3 June 2010 to comments filed by LIME, Digicel stated that its Determination Request of 9 December 2009 was made pursuant to section 67 of the ICTA Law and hence that the reconsideration request was made pursuant to subsection 78(1) (k).

10. The Authority finds that the reconsideration request falls within the subsection 78(1) (k) which deals with decisions in relation to a pre-contract dispute under section 67 of the ICTA Law. Therefore the Authority is required under subsection 78(4) to confirm, modify or reverse the decision, or any part thereof.

11. In the following the Authority deals with each dispute item separately except disputes Nos. 4 and 5 that are dealt with together.

Dispute No.1

12. Dispute No. 1 was over whether any rates and implementation method of new rates agreed under the 27 July 2004 Amending Agreement (the "2004 AA") between LIME, Wireless Ventures and Digicel continues to apply to any new interconnect agreement between LIME and Digicel or if it does not, whether a new glide path should apply to any subsequent interconnection rates agreed by or imposed on LIME and Digicel under the ICTA Law.

13. The Authority determined that the rates and implementation method under the 2004 AA do not apply to any new interconnection agreement and the Authority determined that the new agreed rate should be implemented immediately with no glide path.

Digicel's Reconsideration Request

14. In Digicel's view the Authority has not given sufficient consideration to global best practices and, in particular, to the application of, and the economic rationale for, glide paths in other jurisdictions. Digicel submitted that the Authority misunderstood the primary reasons for a glide path advanced by Digicel and accepted by regulators in other jurisdictions. According to Digicel, a glide path is not reasoned on outright losses due to an abrupt and steep reduction in the MTR, but rather that the lack of a glide path will impose losses on subsets of services and contracts with the potential to tip operators into insolvency or losses. In Digicel's view, a glide path is designed to avoid an abrupt correction in profitability or value of a company, or in other words avoid regulatory opportunism.

15. Further, to conclude that a glide path in a cost oriented regime does not comply with the legislation is in Digicel's view erroneous in law. According to Digicel, the Decision contains no grounds for ruling that a cost oriented MTR must be implemented immediately in order to comply with the Law. In addition, Digicel submitted that it has provided ample evidence to indicate that it is global best regulatory practice to implement a glide path.

16. Finally, Digicel asked that the Authority reconsider that the MTR of CI$0.08965/min be implemented immediately without a glide path for the following reasons: a) no agreement on the MTR exists between the parties until a new Interconnect Agreement is signed and filed with the Authority and hence no implementation of the new agreed MTR can take place immediately, and b) immediate implementation of the new agreed rate is inconsistent with a ruling that the terms and conditions of the 2004 AA are part and parcel of the 2004 ICA and that the terms and conditions of the 2004 ICA are extended to govern the parties until a new Interconnect Agreement is signed and filed with the Authority.

Responses

17. LIME submitted that the question of the level of the MTR was never put before the Authority as a dispute as both parties had indicated in their respective submissions

that the rate was agreed. The only dispute referred to the Authority in respect of the MTR was the application or non-application of a glide path to arrive at that rate.

18. LIME submits that the Authority's determination was properly arrived at and correct in all the circumstances and concludes that the Decision in respect of Dispute 1 should not be changed.

19. In its reply comments, Digicel repeated that there was no agreement on the MTR within the meaning set out by the Authority where an agreement under the Law must be reduced to writing, signed by the parties and filed by with the Authority. According to Digicel the Authority "*in the Decision never attempted to exercise any powers to set the MTR*". There being no properly derived MTR as per the Authority's position on what constitutes an agreement, Digicel fails to see how the Authority could have declared that the MTR be implemented immediately without recourse to a glide path.

Authority's Analysis and Determination

20. The Authority rejects Digicel's view that the Authority has not given sufficient consideration to the economic rationale for glide paths. On the contrary, the Decision provided detailed discussion and rationale for the Authority's conclusion regarding the glide path and the fact that Digicel disagrees with those conclusions is not sufficient reason to change that determination.

21. With respect to experience in other jurisdictions the Authority notes that Digicel did not provide any evidence regarding the specific circumstances and the considerations in its sample jurisdictions, nor did it explain why such circumstances and considerations would be applicable to the Cayman Islands. Simple references to the use of glide paths in other jurisdictions is not, in the Authority's view, adequate evidence to support their use in the Cayman Islands. First, some jurisdictions (including ECTEL) have adopted legislation which specifically contemplates the use of glide paths. This is not the case in the Cayman Islands. Second, many European countries have well-established competition between 3, 4 or 5 competitors which is starkly different to the Cayman Islands were LIME and Digicel are the only two mobile operators. Third, Digicel's 9 December 2009 determination request highlighted the fact that the MTR is a rate that was agreed by the parties. This is different to the common experience in the European Union referred to by Digicel, where in many countries the MTRs are being adjusted toward some future target rates imposed by regulators. Fourth, Digicel makes no distinction between glide paths that are essentially implemented as trajectories of cost over time as service volumes increase and the prices of inputs change and those that are adjustments to a cost based level. The Authority notes that there may well be other differences and similarities between the Cayman Islands market and the sample jurisdictions highlighted by Digicel. However, in the absence of any evidence from Digicel on these differences and similarities and how it would influence the use of glide paths, the Authority considers that it would be inappropriate to give any significant weight to Digicel's selective international examples.

22. According to Digicel, a glide path is designed to avoid an abrupt correction in profitability or value of a company. In this regard, the Authority notes that it has been asked to settle a dispute between the parties. By the very nature of being a dispute, the outcome of the Authority's determination will likely impact the profitability or value of one or the other party. This is simply an outcome of the dispute resolution mechanism and is consistent with the powers and obligations of the Authority under the Law to resolve disputes between licensees.

23. Digicel asked the Authority to reconsider its determination that the MTR of CI$0.08965/min be implemented immediately without a glide path. The Authority considers that the dispute referred to it was the application or non-application of a glide path to arrive at the agreed rate.

24. Based on the submissions of the parties during the dispute determination proceeding, the Authority took the rate of CI$0.08965/min to be agreed as both parties referred to it as such. For example, Digicel, in paragraph 6 of its Determination Request dated 9 December 2009 and sent to the Authority on 11 December 2009, stated that "*[t]he parties have agreed new MTR (independent of origination) at the amount of 0.08965CI$/min.*". LIME, in paragraph 10 of its 11 January 2010 response stated that "*... the parties have agreed a new mobile termination rates ("MTR") under the PLMN Terminating Access Service of CI$0.08965...*" Digicel's contention in paragraph 17 of its reconsideration request that no MTR had yet been agreed between the parties is not consistent with the facts as proffered by both parties.

25. Digicel, in paragraph 18 of it reconsideration request contends that "*if the [Authority's] 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.*" Again, Digicel's own Determination Request submission demonstrates that this is not so. In paragraph 5, Digicel stated that "*[o]ther than Disputes 1-6 to be determined herein, the parties have agreement on all other issues and the determination of these disputes by the Authority will effectively bring negotiation to an end and culminate in the parties signing a new ICA.*" LIME, in paragraph 9 of its 11 January 2010 response to Digicel's Determination Request, also identified that "*only the issues mentioned in paragraph 3 above [a subset of the six disputes that excludes the mobile to mobile interconnection] remain unresolved in respect to the conclusion of negotiation of the terms of the Interconnection Agreement.*"

26. The Authority notes that it is a normal practice in complex negotiations that issues are resolved between parties during negotiations and then formalized and given effect in a signed agreement. The Authority, in its Decision, made determinations on the only six remaining issues, and the parties should then have signed a written agreement incorporating those determinations and filed it with the Authority in compliance with the ICTA Law.

27. In its reconsideration request, Digicel attempts to use the Authority's conclusion that the requirement in the Law (that interconnection agreements between licensees shall be in writing, and copies of each agreement shall be submitted to the

Authority) in relation to the 17 December 2009 discussion as somehow preventing the Authority from giving weight to the submissions of the parties during the proceeding. The Authority finds no merit in Digicel's position. The Law clearly requires interconnection agreements to be in writing and submitted to the Authority. In the Authority's view, if the 17 December 2009 discussions had been successfully concluded they would have resulted in an amending agreement to the ICA which would have been effective 27 December 2009. This would not have been, as alleged by Digicel, one of the "*individual terms en route to a comprehensive interconnection agreement to eventually be executed and filed with the Authority.*" That "*comprehensive interconnection agreement*", as correctly identified by Digicel in its determination request, would be signed upon the determination of the six disputes by the Authority and the effective date of that agreement would have been some time after 27 December 2009.

28. Digicel suggested that the 2004 AA would apply to the agreed rate by virtue of the fact that the 2004 ICA was in effect on the date on which the new MTR was agreed. The Authority finds this reasoning to be fundamentally flawed. Simply because a rate was agreed during interconnect negotiations at a time when both 2004 ICA and 2004 AA are in force does not make that rate subject to the 2004 AA. For example, while Digicel's contends in paragraph 9 of its reconsideration request that the 2004 AA speaks to a glide path which is to be applied to either the MTR fixed by the FLLRIC mode or by agreement between the parties, the Authority notes that the 2004 AA speaks solely to a glide path to a FLLRIC rate. The CI$0.08965 MTR rate is not a FLLRIC rate because the FLLRIC proceeding is not yet finished, yet the 2004 AA deals with a transition to a FLLRIC rate. The parties, as they are free to do, have agreed to a rate that doesn't fit within the terms of the 2004 AA. Clearly, the new MTR of CI$0.08965 is a new agreement and not a continuation of an old agreement. It remains the Authority's view that the expiration of the 2004 ICA leads to the expiration of the 2004 AA. The 2004 ICA expires upon the completion of a new interconnection agreement which will include the new agreed MTR, which following the Authority's determination in this dispute will be implemented without a glide path.

29. Accordingly, the Authority considers the existing decision on Dispute No. 1 be retained.

Dispute No.2

30. Dispute No. 2 was over a) whether LIME is required under the Law to provide direct mobile to mobile interconnection with Digicel as requested by Digicel as early as January 2009 before the expiration of the Interconnection Agreement dated January 2004 and b) on what terms and c) whether LIME is entitled to levy a charge (the transit fee) for Digicel calls on LIME's PSTN network until such time as direct mobile to mobile interconnect is provided and if so how a transit fee be determined.

31. The Authority directed the parties, in accordance with Regulation 8(b) of the Dispute Resolution Regulations, to continue reasonable efforts to resolve the

dispute. If, after reasonable efforts have been made, the parties are unable to resolve this issue, either party may file a dispute determination request with the Authority.

Digicel's Reconsideration Request

32. Digicel submitted that there is no basis on which the Authority can rationally send the parties back to negotiate on mobile to mobile interconnect, when the records raise the irrefutable presumption that a) there were discussions on this issue for months before a proposal was submitted by LIME, b) the proposal was based on figures which made it more costly than the current offering, and c) the proposal was derived from principles of cost recovery which Digicel had indicated would never be acceptable. In Digicel's view the proposal was a sham and never intended to lead to good faith discussions.

33. Given these circumstances, Digicel submitted that there is no practical benefit to further discussions and requested the Authority remove the requirement for discussions from the parties and make an expeditious resolution of the dispute.

Responses

34. LIME submitted that the Authority had detailed submissions before it on the discussions that had been held between the parties and that it is clear from the Decision that the Authority considered those submissions before reaching its conclusion. Further, LIME noted that the Authority is entitled under the Dispute Regulations to refer a dispute back to the parties for further discussions.

35. LIME concluded that there is no procedural or substantive flaw justifying reconsideration of the Decision in respect of Dispute 2.

36. In it reply comments Digicel submitted that where the parties have taken similar positions with respect to the same issue in many or all of its other jurisdictions and have never agreed, it is a flawed approach to direct the parties towards further discussions.

Authority's Analysis and Determination

37. The Authority notes that Digicel states that both parties have unclear documented records on the request for mobile to mobile connections. In addition, Digicel contends that discussions between LIME and itself on this issue in other jurisdictions indicate that the parties will not be able to reach an agreement.

38. In the Decision, the Authority considered the record before it and concluded that adequate negotiation was lacking. For example, the Decision noted that LIME identified that it had provided Digicel a formal proposal on 26 October 2009 but that the parties had not properly discussed its contents. The Decision also stated that Digicel disputed costs items contained in the LIME proposal which it had been unable to verify. While at paragraph 21 of its reconsideration request, Digicel now claims that the proposal was clear to it and there was no misunderstanding as

suggested in the Decision, the Authority notes that this was not the position taken by Digicel in its 11 December 2010 determination request. In paragraph 10 i) of that request, Digicel stated, in reference to the "billing upgrade" and "IT-services" costs that *"[t]hese are costs (the credibility of which we are unable to verify, and which LIME has not supported with any independent evidence)*." In addition, at the end of that same paragraph, Digicel said "*[w]e also have no evidence that the other costs claimed in the offer are correct.*" Digicel's assertion now that the proposal was clear is inconsistent with its statements in the determination request.

39. Digicel's speculation in the reconsideration request that LIME has no intention to make mobile to mobile interconnection arrangements is not, in the Authority's view, sufficient rationale to diverge from the requirements in the Law and the regulations for the parties to negotiate and it remains the Authority's view that further discussion and negotiation may allow the parties' to reach an understanding of the offer and assist them in bringing some or all of the disputed cost items to closure.

40. The Authority notes that, in response to one of Digicel's questions in Dispute No. 2, the Decision specifically identified that all licensees have an obligation to provide interconnection. With that item of dispute addressed, the Authority remains of the view that the parties should follow the process stipulated in the regulations for interconnection disputes in Cayman and if, after good faith negotiations, Digicel believes an impasse has been reached it should file a dispute determination request with the Authority and provide supporting evidence for its claims.

41. Accordingly, the Authority determines that its decision on Dispute No. 2 be retained.

Dispute No.3

42. Dispute No. 3 was over whether Digicel has an absolute obligation to offer LIME an underlying interconnect service necessary to provide any new retail services it introduces in the market.

43. The Authority determined that the content of clause 42(1) of the 2004 ICA be deleted in its entirety.

Digicel's Reconsideration Request

44. Digicel was of the view that the Authority's reasoning that LIME 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. Digicel submitted that the parties are currently in disagreement on this issue and if it is the ruling of the Authority that the Law supports the inclusion of this clause in the contract that it is obliged, out of an abundance of caution, to set this issue beyond further dispute by requiring the retention of the clause.

45. Further, Digicel maintained that neither LIME's Licence nor the Law has changed since the execution of the 2004 ICA in relation to this matter yet the clause was approved by the Authority for inclusion therein, suggesting that there is a reason why the clause was in the 2004 ICA.

46. Digicel therefore submitted that the Authority has not made a ruling in relation to Dispute 3 before it and has not carried out its obligation to a settle pre-contract dispute and asks for a proper consideration of their determination request No. 3.

Responses

47. LIME submitted that original wording of Clause 42 was inconsistent with that statutory obligation and, while LIME had submitted in the alternative that Clause 42(1) could either be modified to reflect a mutual obligation or deleted entirely, the Authority chose to require its deletion.

48. As the Authority has provided the clarification requested by the parties, LIME considers Digicel cannot now argue that there remains such a degree of ambiguity as to constitute a flaw in the Authority's reasoning.

49. Digicel provided no reply comments to Dispute No. 3.

Authority's Analysis and Determination

50. Contrary to Digicel's view, the Authority considers that deleting the clause is a proper determination in the pre-contract dispute as the purpose of the proceeding was to resolve outstanding issues related to the interconnection agreement and in the Decision on the proceeding the contract issue has been resolved. In its Determination Request Digicel requested that clause 42 remain wholly an obligation of LIME and not be made mutual. After careful consideration the Authority found that clause 42 is adequately addressed in the ICTA Law and LIME's licence. Given this there is no need to retain the clause either in a mutual form or wholly as an obligation of LIME, the Authority directed that the clause be deleted.

51. In regards to Digicel's contention that since the clause was in the original agreement, it should be maintained in the new agreement, the Authority notes that Digicel incorrectly stated that "*the clause was approved by the ICTA*." This is factually incorrect. First, the parties submitted the agreement after good faith negotiations and the Authority accepted the filing of the agreement; the Authority did not approve the agreement. The legislation expressly contemplates that an agreement stands, if not disallowed by the rejection of the filing of an agreement. Second, the Authority was not asked by either party to make any determination regarding that clause or indeed any other clause in the interconnection agreement.

52. The Authority considers Digicel's contention that if the clause was in a previous agreement it must be retained in a new agreement to be unreasonable. In the Authority's view, the fact that clause 42 was in the 2004 ICA is not in itself justification for concluding that it should be included in the new agreement. The

Authority has the ability under the Law and regulations to resolve interconnection disputes between parties. In the Authority's view, it would be unreasonable for the Authority's ability to resolve pre-contract disputes for new agreements to be restricted to the wording of previous agreements between the parties.

53. Accordingly, the Authority determines that its existing decision on Dispute No. 3 be retained.

Dispute Nos.4 and 5

54. Dispute No. 4 is over what Fixed Termination Rates ("FTR") should be charged by LIME on a set up and per minute basis and how they should be determined.

55. The Authority made the following determinations:

- the FTR for interconnection traffic between Digicel and LIME is made interim effective from the date of this decision and until the Authority makes a determination on the FTR in a follow-up proceeding after the FLLRIC model is approved,
- the interim rates for the FTR are CI$0.0125 per call in a Call Setup charge, CI$0.0091 per minute in Call Duration charge and CI$0.00086 in Interconnect-specific charge, and
- LIME and Digicel are to keep detailed records of the quantities and rates used to bill for each of those interconnection services to enable any adjustments to be applied retroactively to the date of this decision.

56. Dispute No. 5 is over what transit rates should be charged by LIME when transiting a call via its fixed network to a third party operator or its own mobile network for set up and per minute fees and how it should be determined.

57. The Authority made the following determinations:

- the transit rates for interconnection traffic between Digicel and LIME is made interim effective from the date of this decision and until the Authority makes a determination on the transit rate in a follow-up proceeding after the FLLRIC model is approved,
- the interim transit rates are CI$0.0125 per call in a Call Setup charge, CI$0.0026 per minute in Call Duration charge and CI$0.00070 in Interconnect-specific charge, and
- LIME and Digicel are to keep detailed records of the quantities and rates used to bill for each of those interconnection services to enable any adjustments to be applied retroactively to the date of the Decision.

Digicel's Reconsideration Request

58. Digicel submitted that the Authority has failed to exercise its duty to the parties to make a final determination on the appropriate level of the FTR and transit rates,

and that it should have requested the information necessary to make a determination. Digicel further submitted where a 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.

59. Digicel noted that the Law provides a number of legal courses of action to settle the dispute and refers among others to Regulation 8 which provides for the appointment of a mediator or arbitrator who might be competent to dispose of the issues on behalf of the Authority.

60. Finally, Digicel is of the view that it is unreasonable to delay the determination on Dispute No. 4 until the settlement of the FLLRIC model.

Responses

61. LIME submitted that the Dispute Regulations permit the Authority to take a number of actions in response to a determination request. In this case, LIME considers the Authority reasonably noted that a benchmarking exercise would not permit it to discharge its obligation to set cost-oriented rates and that the FLLRIC proceeding was still underway, and reasonably determined to make the transit rates interim rates and, following the conclusion of the FLLRIC proceeding, to hold a further proceeding to consider the appropriate level of those rates. Given the circumstances, LIME considers this to be a reasonable and lawful approach, and does not disclose any flaw.

62. In its reply Digicel submitted that Regulation 8(h) does not allow the Authority to exercise its discretion and adopt a procedure which is patently uncertain and does not give either party a reasonable opportunity to resolve a pending dispute. Digicel considers that the Authority has simply said that it will not make a determination because a FLLRIC process is afoot and when that is concluded, information therein might be able to assist in helping to resolve this current dispute. In Digicel's view this is unreasonable particularly when the conclusion of the FLLRIC process is strongly influenced by one of the disputing parties and there is no clarity on the time when this process will yield any information upon which the Authority can resolve the dispute.

Authority's Analysis and Determination

63. The Authority disagrees with Digicel that the Authority has failed in its mandate to settle the dispute and make a determination. Existing rates have been made interim pending a follow-up proceeding after the FLLRIC model has been approved and parties are required to keep detailed records of quantities and rates to enable any adjustments to be applied retroactively. As Digicel must be well aware as it has participated in all three proceedings of the FLLRIC process, one of the uses of the FLLRIC model will be setting rates for interconnection services and the Authority and the parties have been working towards completing that model as soon as practical.

64. With regard to the information provided by Digicel to illustrate above cost pricing by LIME, the Authority notes as it did in paragraph 91 of its Decision that a few cursory references to other jurisdictions is insufficient to substantiate this assertion. Proper benchmarking entails among other things selecting a representative sample of countries (or operators) at a similar stage of socio-economic and industry development as Cayman, gathering cost data for the service(s) under consideration in each of the sample countries and adjusting the sampled rates to account for differences between Cayman the benchmarked country including adjustments for differences in population density, degree of urbanization, cost of capital, labour costs, etc. Digicel has made no attempt to do any of this.

65. Regardless, the Authority considers that a proper benchmark exercise would be both time consuming and resource intensive. The Authority considers that the costs of a benchmarking exercise would far outweigh that of a follow-up proceeding using the FLLRIC model and the time and effort the Authority and the parties would be required to put into such an exercise would seriously detract from timely completion of the FLLRIC process. In addition, the FLLRIC process will directly model the cost of building a network in the Cayman Islands and hence reflect the particularities of the Cayman Island market. Benchmarking, on the other hand, takes cost estimates from other countries and would seek to adjust these estimates to the realities of the Cayman Island market. In the Authority's view the outcome of a properly developed FLLRIC model is therefore far superior to that achievable by benchmarking.

66. The Authority notes that in paragraph 33 of its reconsideration request, Digicel stated that the Authority chose to "*direct the parties to further negotiate these two disputes*." This statement is simply untrue. The Decision, in paragraphs 96 and 111, stated that the rates are "*made interim effective from the date of this decision and until the Authority makes a determination in a follow-up proceeding after the FLLRIC model is approved.*" In paragraphs 95 and 110 of the Decision, the Authority left open the possibility that, as the parties may be reluctant to have interim rates, they may, after receipt of the decision, be able to agree on rates. While the Authority left open the possibility that there may be no need of a further proceeding if the parties could agree on rates, in no way was this a direction to the parties to negotiate further.

67. Accordingly, the Authority determines that its existing decision on Dispute Nos. 4 and 5 be retained.

Dispute No.6

68. Dispute No. 6 is over whether LIME is entitled under the ICTA Law 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.

69. The Authority determined the clause "*C&W agrees that the retail 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" is to be excluded from the interconnection agreement.

Digicel's Reconsideration Request

70. Digicel submitted that the clause was approved for inclusion by the Authority in the 2004 ICA, presumably because this was agreeable to the parties or imposed by the Authority as supported or required by section 40 of the Law and Annex 5 of the C&W licence.

71. Digicel submitted that the Authority deflected its statutory responsibility to rule on a dispute by ruling that the regulatory regime already covers this issue. Where the Authority agrees that the regulatory regime supports the clause, Digicel submitted that the Authority is required to rule accordingly in the Decision. Conversely where the Authority disagrees it should also make this clear. By ruling that this issue is dealt with sufficiently in the regulatory regime is according to Digicel not to settle the dispute but rather to leave it to one or other of the parties needing a clear answer, to seek a further declaration from the Authority on this particular issue.

72. Digicel therefore submitted that the Authority has not made a ruling in relation to Dispute 6 before it and has not carried out its obligation to a settle pre-contract dispute and asks for a proper consideration of their determination request No. 6.

Responses

73. LIME submitted that Digicel's arguments do not identify any flaw in the reasoning applied by the Authority.

74. Further, LIME considers the effect of Digicel's position to require the Authority to retain the clause in the new Interconnection Agreement, notwithstanding any other provision in the legal and regulatory framework applicable to ICT services in the Cayman Islands, would be to fetter the Authority by forcing it to make determinations consistent with prior agreements of its Licensees. In LIME's view this is untenable, and would expose the Authority to judicial review if it were to adopt that approach.

75. Digicel provided no reply comments to LIME on Dispute No. 6.

Authority's Analysis and Determination

76. The Authority notes that the dispute is a pre-contract dispute about whether the clause should be included in a new interconnection agreement, not whether LIME more generally within the existing regulatory framework may charge different retail rates for calls originated on its fixed network to any mobile operator's network (including LIME's own mobile network).

77. As the Authority noted in paragraph 117 of the Decision, any changes to LIME's fixed originated calling services must first be approved by the Authority. Should

LIME make a submission to the Authority where it proposes different fixed originated calling rates to mobile operators the Authority would carefully evaluate the proposal within the legal framework provided by the Law.

78. In addition, for the reasons stated in paragraph 51 above, the Authority does not agree with Digicel's contention that the Authority approved the inclusion of that clause in the 2004 agreement.

79. Accordingly, the Authority disagrees with Digicel that it has not resolved the pre-contract dispute and determines that its existing decision on Dispute No. 6 be retained.

Conclusion

80. Given the above, the Authority confirmed the determinations it made in its 29 April 2010 ICTA decision on the Digicel/LIME Interconnection Agreement Dispute and denied Digicel's reconsideration request.