



## ICT Decision 2015-1

Grand Cayman, 9 July 2015

### Decision for the FLLRIC FTR and Transit Rate Review

#### Overview

*The ICT regulatory regime in the Cayman Islands requires that Cable & Wireless (Cayman Islands) Ltd. ('LIME') adopt a Forward-looking Long-run Incremental Costing ('FLLRIC') methodology when it performs cost studies for regulatory purposes. FLLRIC costs are calculated using the least cost technology currently available and ignores historical costs or technologies.*

*In this decision, the Authority makes determinations on the FLLRIC model for the purpose of calculating the Fixed Termination Rate ('FTR') and the Transit Rate.*

*This decision results from the follow-up process initiated by the Authority's ICT Decision 2012-2 (the FLLRIC Follow-Up Proceeding). Prior to that, the Authority had published ICT Decision 2011-3 (the FLLRIC Phase III implementation decision) and ICT Decision 2010-5 (decision in Digicel Determination Request related to Digicel/LIME Interconnection Agreement Dispute). The reader may find it beneficial to review all three previous decisions for more background information, links to which are contained within this decision.*

*In this decision, the Authority determines that the changes LIME has made to the "Fixed Module" of the FLLRIC model in most parts comply with the directions and comments made by the Authority in the course of this proceeding. However, the Authority has identified some errors and flaws still present in the model, which prevent the Authority from making its final determination on the appropriate cost-oriented FTR and Transit Rate.*

*The Authority therefore: (1) directs LIME to use the current results from the Fixed Module for determining cost-oriented interim rates for fixed termination and transit services; (2) directs the parties to apply such interim rates retroactively in accordance with ICT Decision 2010-5; and, (3) specifies the follow-up process related to the further review of the FLLRIC model with the objective to determine the final cost-oriented rates for fixed termination and transit services.*

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## BACKGROUND

1. In summary, the Information and Communications Technology Authority (the '**Authority**') has used a three phase process for the development of a Forward-looking Long-run Incremental Costing ('**FLLRIC**') model by Cable and Wireless (Cayman) Limited ('**LIME**'):
  - Phase I - establish model foundation;
  - Phase II - evaluate model implementation; and
  - Phase III - final model implementation and use.
2. The FLLRIC development process was prompted by the terms set out in LIME's Licence in which it was required to build a FLLRIC model.<sup>1</sup>
3. On 10 September 2003, LIME submitted its proposal on FLLRIC principals and parameters, and on 7 November 2003, LIME submitted its follow-up proposal for FLLRIC costing modelling.

### *Phase I and Phase II of the development of FLLRIC model*

4. Phase I of the FLLRIC costing modelling review was initiated by a public consultation on 24 May 2004 (*Ref: CD(2004) 1*).<sup>2</sup> The Phase I proceeding dealt with the economic and regulatory costing principles and parameters for a FLLRIC model.
5. On 22 July 2005, the Authority concluded the Phase I proceeding with the issuance of a decision entitled "*ICT Decision 2005-4 - Decision for the Forward-looking Long-run Incremental Costing Consultation (CD 2004-1)*" ('**ICT Decision 2005-4**').<sup>3</sup>
6. On 27 October 2005,<sup>4</sup> after receiving input from interested parties concerning the process for the Phase II proceeding, the Authority launched the Phase II proceeding by issuing a public consultation on a costing manual to be used by LIME to develop FLLRIC for its services. Phase II was concluded with the issuance of an Authority decision on 31 July 2008 entitled "*ICT Decision 2008-2 - Decision for the Costing Manual Consultation (CD 2005-1)*" ('**ICT Decision 2008-2**').<sup>5</sup>

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<sup>1</sup> Part 4 of Annex 5 to Information and Communications Technology Authority Licence to Cable and Wireless (Cayman Islands) Limited - <http://www.icta.ky/cable-and-wireless-ci-ltd-ta-lime#document>

<sup>2</sup> <http://www.icta.ky/upimages/commonfiles/1417423547FLLRICConsultativeProcess.pdf>

<sup>3</sup> <http://www.icta.ky/forward-looking-long-run-incremental-costing-llric>

<sup>4</sup> The following referenced proceeding can be found at - <http://www.icta.ky/llric-phase-ii-consultation>

<sup>5</sup> <http://www.icta.ky/upimages/commonfiles/1417265512ICTDecision2008-2FLLRIC.pdf>

### *Phase III of the development of FLLRIC model<sup>6</sup>*

7. On 15 January 2009, the Authority launched the Phase III proceeding by issuing a public consultation on the revised FLLRIC model and the Mobile Termination rate ('MTR') cost studies to be developed by LIME.
8. On 11 December 2009, Digicel (Cayman) Limited ('Digicel') submitted a determination request under the ICTA (Dispute Resolution) Regulations, 2003 (the '**Dispute Regulations**'), referring to the Authority, amongst other things, a dispute over what Fixed Termination Rates ('FTR') should be charged by LIME for set up and per minute fees and how should they be determined ('**Dispute No.4**') and a dispute 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 should they be determined ('**Dispute No.5**'), (the '**Determination Request**').
9. On 24 December 2009, the Authority issued a determination specifying the MTR, the FTR and the Transit Rate for interconnection traffic between Digicel and LIME as interim interconnection rates effective from 27 December 2009.
10. On 7 January 2010, Digicel submitted a reconsideration request to the Authority regarding the Authority's determination of 24 December 2009, mainly in relation to the determination on MTR.
11. On 12 January 2010, LIME submitted its response to Digicel's Determination Request of 11 December 2009. In relation to Dispute No. 4, LIME submitted, amongst other things, that: (1) the FTR "*should remain unchanged*"; (2) "*the current FTR is cost-oriented as determined by the C&W Adjusted Fully Allocated Cost Model, per Regulation 10(2) of the Interconnection Regulations*"; and, (3) "*It would be inappropriate to apply a different rate until a determination is made in FLLRIC proceedings*". In relation to Dispute No. 5, LIME submitted, amongst other things, that: (1) "*the current charge for the transit service should remain unchanged*"; (2) "*this charge is based on genuine cost incurred in the provision of the transit service and, as such, is consistent with the Law and Regulations*"; and, (3) "*The transit charge is not a part of the MTR and should not be considered as such. It has long been recognized that transit is a separate service offered by which calls from one network are passed across another to arrive at a destination network. Where this occurs, the party over whose network a call is passed is entitled to charge a transit fee for that service.*"
12. On 29 April 2010, the Authority issued a decision on Digicel's Determination Request of 11 December 2009 ('**ICT Decision 2010-5**'), in which: (1) the Authority anticipated that completing the FLLRIC model and then having a follow-up proceeding on the FTR would likely take considerable time; (2) as the Authority did not have satisfactory information on which to make a final determination on an appropriate cost-oriented rate, the Authority issued an interim order setting the interim rates for fixed termination and transit service; (3) the Authority determined that LIME and Digicel must keep detailed records of the quantities and rates used to bill for each of those interconnection services to enable any adjustments to be

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<sup>6</sup> The following referenced proceeding and documents can be found at - <http://www.icta.ky/fllic-phase-iii-implementation> and <http://www.icta.ky/determination-requests>

applied retroactively to the date of this decision; and, (4) the Authority noted that the parties might be reluctant to have interim rates and might prefer to have final rates with no potential retroactive adjustments, and if, after receipt of the decision, the parties were able to agree on rates, the Authority would have removed the requirement for interim rates.<sup>7</sup>

13. On 13 May 2010, Digicel submitted a reconsideration request to the Authority regarding ICT Decision 2010-5 claiming that, amongst other things, the Authority had failed to exercise its duty to the parties to make a final determination on the appropriate level of the FTR and transit rates.
14. On 28 May 2010, LIME submitted its comments on Digicel's reconsideration request of 13 May 2010. LIME submitted that, contrary to Digicel's allegation, the Authority did not leave the issue open ended, and that the Authority explicitly noted in paragraphs 96 and 111 of the ICT Decision 2010-5 that it would make a determination in follow up proceedings on the fixed termination and transit rates. LIME further noted that the Authority also left open the possibility, in paragraphs 95 and 110 of the ICT Decision 2010-5, for the parties to reach an agreement on the level of the fixed termination and transit rates, which would obviate the need for a follow up proceeding. LIME concluded that both of these determinations were reasonable and not flawed.
15. On 10 June 2010, the Authority issued a decision ('**ICT Decision 2010-6**') in which the Authority: (1) confirmed the determinations it made in ICT Decision 2010-5; and, (2) denied Digicel's reconsideration request of 13 May 2010.<sup>8</sup>
16. On 22 December 2011, in conclusion of a process that began on 15 January 2009, the Authority issued its Phase III decision - "*ICT Decision 2011-3 Decision for the FLLRIC Implementation Consultation (CD 2009-1)*" ('**ICT Decision 2011-3**').<sup>9</sup> In that decision, a thorough analysis of the FLLRIC model was conducted and a number of directions to LIME were provided relating to the finalisation of the FLLRIC model, primarily for the purpose of calculating a cost oriented MTR. The Authority determined that, subject to those revisions, it was satisfied with the FLLRIC costing methodology proposed by LIME for the purpose of costing the MTR and that the Authority was also generally satisfied with the overall costing methodology for the fixed network. However, the Authority also noted that the potential use of the FLLRIC model for both fixed and mobile costing might require further review of the inputs and methodology assumptions.

#### *Phase III Follow-Up Process and Review of the MTR<sup>10</sup>*

17. On 7 February 2012, LIME submitted a revised version of the FLLRIC model with the documentation detailing each required change to the FLLRIC model, as set

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<sup>7</sup> <http://www.icta.ky/upimages/commonfiles/141726093620100429ICTADecision2010-5Interconnectiondispute.pdf>

<sup>8</sup> <http://www.icta.ky/upimages/commonfiles/141831902120100610ICTADecision2010-6ReconsiderationofDigicelLIMEinterconnectiondispute.pdf>

<sup>9</sup> <http://www.icta.ky/upimages/commonfiles/1417260120ICTDecision2011-3FLLRICPhaseIII.pdf>

<sup>10</sup> The following referenced documents can be found at - <http://www.icta.ky/fllic-phase-iii-follow-up-proceeding-public-record>

forth in ICT Decision 2011-3. LIME's submission consisted of three separate modules (Fixed Module, 2G Module and 3G Module) of the revised FLLRIC model.

18. On 17 May 2012, the Authority issued determinations on the implementation of directions given in Decision 2011-3, including a FLLRIC based MTR, and it provided directions on how the final costing model might be used in the future ('**ICT Decision 2012-2**'). In addition, two follow-up processes were specified in the decision: 1) to implement the MTR; and, 2) to determine if a proceeding to review a cost oriented FTR and a cost oriented Transit Rate was necessary.
19. On 31 May 2012, Digicel submitted its comments in response to ICT Decision 2012-2, stating that Digicel and LIME had not reached agreement on the FTR and the Transit Rate, and requesting that the Authority should conduct a proceeding to review the FTR and Transit Rate and implement the rates, subsequently determined, retroactively to the date of the Authority's interim FTR and transit rates determination on 24 December 2009.
20. On 6 June 2012, LIME submitted its comments in response to ICT Decision 2012-2, stating that: (1) the presently-interim FTR and Transit Rate in its Interconnection Agreement with Digicel should be made permanent; and, (2) the Authority should continue to review the fixed module of the FLLRIC model (the '**Fixed Module**'), with a view to establishing new FTR and Transit Rates on a prospective basis.

#### *Review of the FTR and the Transit Rate<sup>11</sup>*

21. The Authority noted in ICT Decision 2012-2 that: (1) its acceptance of the FLLRIC model for the purposes of calculating the cost of the MTR does not mean that the model has been accepted for costing of other services or that certain parts or calculations in the model may be used directly to support future submissions without further scrutiny; and, (2) depending on the nature of any future proceeding, the Authority may conduct a further review of source of data, methodology assumptions, and calculations in the submitted module(s).
22. Accordingly, on 4 September 2012, the Authority initiated a public consultation ('**CD 2012-1**') seeking input from all interested parties on an appropriate cost-oriented FTR and on an appropriate cost-oriented Transit Rate.<sup>12</sup> The Authority noted that, since it had concluded an initial review of the FLLRIC model, it was then in a position to have that model used in a review of the FTR and the Transit Rate.
23. The Authority, therefore, followed the same four stage process it used for the FLLRIC process whereby parties were: (1) given an opportunity to file evidence; (2) permitted to ask interrogatories regarding the evidence of other parties; (3) allowed to file Final Comments summarizing their position in relation to the information on the record of the proceeding; and, (4) permitted to file Reply Comments to items raised in the Final Comments of other parties.

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<sup>11</sup> The following referenced documents can be found at - <http://www.icta.ky/fllric-fr-and-transit-rate-review-public-record>

<sup>12</sup> [http://www.icta.ky/upimages/publicrecord/2012\\_09\\_04\\_ICTA\\_CD2012-1\\_FTR\\_and\\_Transit\\_Rate\\_review\\_1417515706.pdf](http://www.icta.ky/upimages/publicrecord/2012_09_04_ICTA_CD2012-1_FTR_and_Transit_Rate_review_1417515706.pdf)

24. The Authority further clarified that LIME was required to file its proposed rates along with the supporting documentation and calculations, other parties were allowed to suggest any proposed changes to the assumptions and calculations proposed by LIME, and parties including LIME were allowed to address interrogatories to other parties who make submissions in the proceeding.
25. On 2 October 2012, in accordance with the directions set out in the public consultation CD 2012-1, LIME submitted its proposed FTR and Transit Rate derived from the revised FLLRIC model, and it filed a confidential and a redacted version of the Fixed Module of the FLLRIC model.<sup>13</sup>
26. On 4 January 2013, in response to the Disclosure Determination issued by the Authority on 13 December 2012, LIME filed confidential and redacted versions of the attachments directly linked to the Fixed Module of the FLLRIC model.<sup>14</sup> Accordingly, LIME's full submission of the relevant workbooks used in the FLLRIC model for the purpose of determining cost-oriented FTR and Transit Rate, consisted of the following Excel files:
  - a. '2013 01 04 CYM fixed – Conf.xls' (confidential version) and '2013 01 04 CYM fixed – Public.xls' (redacted version);
  - b. 'Appendix III Fixed Assets Revaluation\_20-09-09 Conf.xls' (confidential version) and 'Appendix III Fixed Assets Revaluation\_20-09-09 Public.xls' (redacted version);
  - c. 'Appendix IV-FAC-TD Values 10\_09\_01\_rev – Conf.xls' (confidential version) and 'Appendix IV-FAC-TD Values 10\_09\_01\_rev – Public.xls' (redacted version); and,
  - d. 'Appendix V-TD LRIC Input\_10\_06\_30 Conf.xls' (confidential version) and 'Appendix V-TD LRIC Input\_10\_06\_30 Public.xls' (redacted version).
27. On 15 January 2013, LIME submitted a revised version<sup>15</sup> of its submission of 4 January 2013, noting that “[u]pon further review of the thousands of cells in the FLLRIC materials that are subject of the Authority's masking and disclosure rules, it has come to LIME's attention that a few items ought to have been disclosed”, consisted of the following Excel files:
  - a. '2013 01 15 CYM fixed – Conf.xls' (confidential version) and '2013 01 15 CYM fixed – Public.xls' (redacted version);
  - b. 'Appendix III Fixed Assets Revaluation\_20-09-09 Conf.xls' (confidential version) and 'Appendix III Fixed Assets Revaluation\_20-09-09 Public.xls' (redacted version);

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[http://www.icta.ky/upimages/publicrecord/2012\\_10\\_02\\_LIME\\_submission\\_FTR\\_and\\_Transit\\_Rate\\_1417515650.pdf](http://www.icta.ky/upimages/publicrecord/2012_10_02_LIME_submission_FTR_and_Transit_Rate_1417515650.pdf)

<sup>14</sup>

[http://www.icta.ky/upimages/publicrecord/2013\\_01\\_04\\_LIME\\_submission\\_FTR\\_and\\_Transit\\_Rate\\_1417517461.pdf](http://www.icta.ky/upimages/publicrecord/2013_01_04_LIME_submission_FTR_and_Transit_Rate_1417517461.pdf)

<sup>15</sup>

[http://www.icta.ky/upimages/publicrecord/2013\\_01\\_15\\_LIME\\_ICTA\\_Letter\\_LIME\\_submission\\_1417517297.pdf](http://www.icta.ky/upimages/publicrecord/2013_01_15_LIME_ICTA_Letter_LIME_submission_1417517297.pdf)

- c. 'Appendix IV-FAC-TD Values 10\_09\_01\_rev2 – Conf.xls' (confidential version) and 'Appendix IV-FAC-TD Values 10\_09\_01\_rev2 – Public.xls' (redacted version); and,
  - d. 'Appendix V-TD LRIC Input\_10\_06\_30 Conf.xls' (confidential version) and 'Appendix V-TD LRIC Input\_10\_06\_30 Public.xls' (redacted version).
28. In a letter to the Authority dated 31 January 2013, Digicel submitted that it “*has the suggested changes below for the LIME model for fixed termination rates and transit rates*”,<sup>16</sup> referring to and discussing the following:
- Model Discrepancies;
  - Material concerns with the model;
  - The routing factor table appears to have errors;
  - Call-sensitive costs seem too high;
  - Overhead costs are well above efficient levels;
  - The conversion of demand between data and voice is unrealistic;
  - Interconnect billing system costs are too high; and
  - Bad debt costs do not belong to wholesale services.
29. On 14 February 2013, the Authority issued the first round of interrogatories (the ‘**First Round Interrogatories**’) relating to the review of the FLLRIC cost model and materials submitted by LIME on 4 January 2013.<sup>17</sup>
30. On 6 May 2013, LIME submitted another revised version<sup>18</sup> of the relevant workbooks used in the FLLRIC model for the purpose of determining cost-oriented FTR and Transit Rate, which consisted of the following Excel files:
- a. '2013 05 06 CYM fixed – Conf.xls' (confidential version) and '2013 05 06 CYM fixed – Public.xls' (redacted version);
  - b. 'Appendix III Fixed Assets Revaluation\_20-09-09 Conf.xls' (confidential version) and 'Appendix III Fixed Assets Revaluation\_20-09-09 Public.xls' (redacted version);

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<sup>16</sup>

[http://www.icta.ky/upimages/publicrecord/2013\\_01\\_31\\_Digicel\\_re\\_Corrections\\_to\\_FLLRIC\\_model\\_1417517146.pdf](http://www.icta.ky/upimages/publicrecord/2013_01_31_Digicel_re_Corrections_to_FLLRIC_model_1417517146.pdf)

<sup>17</sup>

[http://www.icta.ky/upimages/publicrecord/2013\\_02\\_14\\_ICTA\\_interrogatories\\_to\\_LIME\\_redacted\\_1417517016.pdf](http://www.icta.ky/upimages/publicrecord/2013_02_14_ICTA_interrogatories_to_LIME_redacted_1417517016.pdf)

and

[http://www.icta.ky/upimages/publicrecord/2013\\_02\\_14\\_ICTA\\_interrogatories\\_to\\_Digicel\\_1417516990.pdf](http://www.icta.ky/upimages/publicrecord/2013_02_14_ICTA_interrogatories_to_Digicel_1417516990.pdf)

<sup>18</sup>

[http://www.icta.ky/upimages/publicrecord/2013\\_05\\_06\\_LIME\\_Letter\\_revised\\_fixed\\_model\\_1417516182.pdf](http://www.icta.ky/upimages/publicrecord/2013_05_06_LIME_Letter_revised_fixed_model_1417516182.pdf)

- c. 'Appendix IV-FAC-TD Values 10\_09\_01\_rev3 – Conf.xls' (confidential version) and 'Appendix IV-FAC-TD Values 10\_09\_01\_rev3 – Public.xls' (redacted version); and,
  - d. 'Appendix V-TD LRIC Input\_10\_06\_30 Conf.xls' (confidential version) and 'Appendix V-TD LRIC Input\_10\_06\_30 Public.xls' (redacted version).
31. On 23 January 2014, the Authority issued a disclosure determination directing LIME to provide the relevant information identified during the First Round Interrogatories.<sup>19</sup>
32. On 17 April 2014, the Authority issued the second round of interrogatories (the '**Second Round Interrogatories**') relating to the review of the FLLRIC cost model and materials submitted by LIME.<sup>20</sup>
33. On 15 August 2014, LIME provided its response to the Second Round Interrogatories,<sup>21</sup> and it submitted a revised version of the relevant workbooks used in the FLLRIC model for the purpose of determining cost-oriented FTR and Transit Rate, which consisted of the following Excel files:
- e. '2014 08 15 CYM fixed – Conf.xls' (confidential version) and '2014 08 15 CYM fixed – Public.xls' (redacted version);
  - f. 'Appendix III Fixed Assets Revaluation\_20-09-09 Conf.xls' (confidential version) and 'Appendix III Fixed Assets Revaluation\_20-09-09 Public.xls' (redacted version);
  - g. 'Appendix IV-FAC-TD Values 10\_09\_01\_rev4 – Conf.xls' (confidential version) and 'Appendix IV-FAC-TD Values 10\_09\_01\_rev4 – Public.xls' (redacted version); and,
  - h. 'Appendix V-TD LRIC Input\_10\_06\_30\_v3 Conf.xls' (confidential version) and 'Appendix V-TD LRIC Input\_10\_06\_30\_v3 Public.xls' (redacted version).
34. On 9 September 2014, after two (2) rounds of interrogatories conducted during the proceeding, as well as several disclosure requests and extension requests, the Authority notified the parties to the proceeding that the interrogatory phase was completed, and it set the dates for Final Comments and Reply Comments.<sup>22</sup>

<sup>19</sup> [http://www.icta.ky/upimages/publicrecord/2014\\_01\\_23\\_ICTA\\_disclosure\\_determination\\_1417518404.pdf](http://www.icta.ky/upimages/publicrecord/2014_01_23_ICTA_disclosure_determination_1417518404.pdf)

<sup>20</sup> [http://www.icta.ky/upimages/publicrecord/2014\\_04\\_17\\_ICTA\\_second\\_round\\_interrogatories\\_to\\_LIME\\_1417518358.pdf](http://www.icta.ky/upimages/publicrecord/2014_04_17_ICTA_second_round_interrogatories_to_LIME_1417518358.pdf)

and

[http://www.icta.ky/upimages/publicrecord/2014\\_04\\_17\\_ICTA\\_second\\_round\\_interrogatories\\_to\\_Digicel\\_1417518310.pdf](http://www.icta.ky/upimages/publicrecord/2014_04_17_ICTA_second_round_interrogatories_to_Digicel_1417518310.pdf)

<sup>21</sup>

[http://www.icta.ky/upimages/publicrecord/2014\\_08\\_15\\_LIME\\_responses\\_to\\_ICTA\\_2nd\\_round\\_interrogs\\_1417518092.pdf](http://www.icta.ky/upimages/publicrecord/2014_08_15_LIME_responses_to_ICTA_2nd_round_interrogs_1417518092.pdf)

<sup>22</sup>

[http://www.icta.ky/upimages/publicrecord/2014\\_09\\_09\\_ICTA\\_Final\\_steps\\_in\\_FTR\\_TR\\_proceeding\\_1417517976.pdf](http://www.icta.ky/upimages/publicrecord/2014_09_09_ICTA_Final_steps_in_FTR_TR_proceeding_1417517976.pdf)

35. On 30 September 2014, LIME<sup>23</sup> and Digicel<sup>24</sup> submitted their respective Final Comments on public consultation on FTR and Transit Rate.
36. On 21 October 2014, LIME<sup>25</sup> and Digicel<sup>26</sup> submitted their respective Reply Comments on public consultation on FTR and Transit Rate.

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<sup>23</sup> [http://www.icta.ky/upimages/publicrecord/2014\\_09\\_30\\_LIME\\_Final\\_comments\\_1435593478.pdf](http://www.icta.ky/upimages/publicrecord/2014_09_30_LIME_Final_comments_1435593478.pdf)

<sup>24</sup> [http://www.icta.ky/upimages/publicrecord/2014\\_09\\_30\\_Digicel\\_Final\\_comments\\_1435593408.pdf](http://www.icta.ky/upimages/publicrecord/2014_09_30_Digicel_Final_comments_1435593408.pdf)

<sup>25</sup> [http://www.icta.ky/upimages/publicrecord/2014\\_10\\_21\\_LIME\\_Reply\\_comments\\_1435593628.pdf](http://www.icta.ky/upimages/publicrecord/2014_10_21_LIME_Reply_comments_1435593628.pdf)

<sup>26</sup> [http://www.icta.ky/upimages/publicrecord/2014\\_10\\_21\\_Digicel\\_Reply\\_comments\\_1435593553.pdf](http://www.icta.ky/upimages/publicrecord/2014_10_21_Digicel_Reply_comments_1435593553.pdf)

## LEGAL FRAMEWORK

In particular:

37. Section 68 of the Information and Communications Technology Authority Law (2011 Revision) (the '**Law**') states the following:<sup>27</sup>

*(1) The cost of making any interconnection to the ICT network of another licensee shall be borne by the licensee requesting the interconnection.*

...

*(3) The cost referred to in subsection (1) shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting the interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.*

38. Regulation 9 of the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003 (the '**Interconnection Regulations**') states the following:<sup>28</sup>

*The rates offered by the responder to the requestor shall clearly identify all charges for interconnection or infrastructure sharing.*

Regulation 10 of the Interconnection Regulations specifies the following:

- (1) A responder's charges for interconnection or infrastructure sharing shall be-*
- (a) determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;*
  - (b) non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides to itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;*
  - (c) reciprocal for the same service in order that the responder and requestor pay the same rate for providing each other the same services, except for any applicable contribution towards an access deficit that may be approved by the Authority;*
  - (d) preferably such that non-recurring costs shall be recovered through non-recurring charges and recurring costs shall be recovered through recurring charges;*

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<sup>27</sup> <http://www.icta.ky/upimages/commonfiles/1417276690ICTALaw2011Rev.pdf>

<sup>28</sup> <http://www.icta.ky/upimages/commonfiles/1417277060ICTAInterconnectionInfrastructureRegulations.pdf>

- (e) *such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and*
- (f) *based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.*

39. Regulation 8 of the Dispute Regulations states the following:<sup>29</sup>

*Upon receipt of a determination request, the Authority may take one or more of the following actions:*

- (a) *request such other information from any person as may be affected by the dispute as it may deem necessary;*
- (b) *direct the parties to commence or continue reasonable efforts to resolve the dispute;*
- ...
- (h) *such other course of action as it considers necessary to resolve the dispute.*

Regulation 11 of the Dispute Regulations states the following:

*In determining a dispute, the Authority shall act expeditiously, and in doing so may have regard to-*

- (a) *the subject matter of the dispute;*
- (b) *the need to inquire into and investigate the dispute;*
- (c) *the objectives and functions of the Authority; and*
- (d) *all matters affecting the merits, and fair settlement of the dispute.*

40. Part 4 of Annex 5 to LIME's Licence states the following:

**Part 4 – FLLRIC Model**

(48) *C&W commits to building a forward-looking long-run incremental cost (FLLRIC) model within an agreed time frame...*

(49) *Once built, the FLLRIC model shall be used for:*

- (a) *Interconnection Rates*

...

(50) *Process:*

- (a) *Two (2) months following the Effective Date, C&W shall submit a proposal on FLLRIC principles and parameters, the length of time*

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<sup>29</sup> <http://www.icta.ky/upimages/commonfiles/1417277080ICTA-DisputeResolutionRegulations.pdf>

*and estimated costs to implement the proposed FLLRIC methodology.*

- (b) The Authority shall have ten (10) months thereafter to run a proceeding and make a decision (the period can be extended or shortened at the Authority's discretion).*
- (c) The Authority shall determine the type of FLLRIC model (and the level of granularity to be required) to be built taking into account the benefits to be derived as compared to the expense associated with achieving that level of detail.*
- (d) As part of its decision regarding the nature of the costing model to be implemented, the Authority shall provide a reasonable time frame within which C&W shall implement the Authority's determinations. It is estimated, at present, that it will take C&W one (1) year to implement a FLLRIC model.*
- (e) The Authority reserves the right to conduct, from time to time, additional processes that are required to determine the reasonableness of the results, and where necessary, to require adjustments to the model.*

## LIME'S FINAL COMMENTS, 30 SEPTEMBER 2014

41. LIME submitted that this consultation *"is the culmination of two long and complex proceedings, one seeking to determine cost oriented interconnection rates, and the other to resolve a dispute regarding interconnection rates."*
42. LIME then submitted its comments in relation to LIME's view on the way the dispute resolution process has been conducted by the Authority in this case, its perception of the process involving the review of LIME's FLLRIC model during the proceeding, its view as to whether the retroactivity of the determination on prices should be applicable in this case or not, and its view as to what solutions the Authority should consider as a result of this proceeding, as they are summarised below.

### *Dispute Resolution Process*

43. LIME submitted that the public consultation CD 2012-1 *"is in part the culmination of a dispute determination request filed by Digicel on 16 December 2009"* and it further noted that the Regulation 11 of the Dispute Resolutions requires the Authority to act *"expeditiously"*.
44. LIME submitted that *"the need to act and resolve the dispute expeditiously takes precedence and cannot be limited by any other requirement"*. LIME further submitted that:
  - a. *"This makes eminent public policy sense, as regulatory certainty is critical to all ICT licensees in the Cayman Islands."*
  - b. *"Having dispute determination requests unresolved for long periods of time materially impairs the ability of licensees to plan."*
  - c. *"Unresolved disputes involving rates, such as this one, also make it more difficult for licensees to determine whether they will make a reasonable return on their investment."*
45. LIME therefore submitted that *"[b]y any definition of the word, it is impossible to say the Authority acted "expeditiously" in this case."*
46. LIME further submitted that
  - a. *"While the Authority issued Decision 2010-5 approximately four and half months after Digicel filed its dispute determination request, it did not actually determine the dispute."*
  - b. *"Instead, the Authority deferred any decision until the FLLRIC modeling process was complete."*
  - c. *"The Authority compounded this problem by making the fixed and transit rates, but not the mobile termination rates, interim."*
  - d. *"When the Authority issued Decision 2012-2 and finalised the FLLRIC model approximately 2 years later, it was still possible but already stretching the boundaries of credibility to say the Authority had been acting "expeditiously". While Decision 2012-2 established an MTR, it should be*

*noted that, at that point, the MTR was no longer in dispute (having been “determined” and made final by Decision 2010-5). Decision 2012-2 did nothing to resolve the still-outstanding dispute involving fixed rates.”*

- e. *“It was still possible in 2012 for the Authority to try to satisfy its duty to act expeditiously in determining disputes, as it had all the tools necessary to set final FTR and transit rates, namely, an approved and final FLLRIC model. Unfortunately, the Authority chose instead to undertake a time-consuming and expensive two-year process to revise and update the fixed module of the FLLRIC model.”*
- f. *“Today, almost 5 years after Digicel first filed its dispute determination request, it is impossible for the Authority or indeed any parties to argue successfully that the Authority has satisfied its duty to determine the dispute “expeditiously”.”*

47. LIME therefore concluded that the Authority is *“in breach of the Dispute Regulations”*.

#### *FLLRIC Model*

48. LIME submitted that

- a. *“...five months after Decision 2011-3, the Authority issued Decision 2012-2, indicating (1) its satisfaction with the mandated changes to the model as implemented by LIME and (2) approval the FLLRIC model.”*
- b. *“When this proceeding started (initiated by CD 2012-1), the Authority had a single, approved and final FLLRIC model, consistent with the Agreement, Licence and the Interconnection Regulations.”*
- c. *“However, contrary to all legitimate expectations, and without any explanation or notice to interested parties, the Authority immediately set about making material changes to one part of the FLLRIC model.”*
- d. *“While the process followed by the Authority in the years leading up to Decision 2012-2 involved making changes to both the fixed and mobile modules of the FLLRIC model, the sixty-four interrogatories posed by the Authority on 17 February 2013 and the further sixty-one posed on 2 May 2014 have involved significant changes only to the fixed module. The changes, made in isolation and without considering the impact on the mobile module, have put the fixed module out of sync with the mobile module.”*

49. LIME submitted that *“both fixed interconnection costs and mobile interconnection costs should be determined from the fixed and mobile modules, respectively, of the same FLLRIC model using equivalent assumptions and constructs, and inputs of the same vintage.”*

50. LIME, therefore, concluded that *“the Authority must not use the partially-revised FLLRIC model coming out of this proceeding to implement interconnection prices because the rates produced from the fixed module are based on inputs and calculations inconsistent with those used in the mobile module.”*

51. LIME further suggested a number of changes to the Fixed Module noting that *“none of these proposed changes significantly impact the cost basis of the FTR or fixed transit service”* but rather LIME make *“these suggestions for the achievement of completeness of the model, not because they alter the results in any material or consequential way.”*

### *Retroactivity*

52. LIME submitted that
- a. *“A regulatory strategy of making existing rates interim and applying new rates retroactively can be effective in some circumstances.”*
  - b. *“...however,[...] these circumstances do not exist in this case as the period of retroactivity has been far too long and as the alternative “new” rates were not known at the outset of the period of retroactivity.”*
  - c. *“In the absence of these preconditions, retroactive application of rates is unfair and harmful to operators and the market.”*
53. LIME further submitted that
- a. *“FTR and transit rates have experienced two periods of “retroactivity”. In 2009, the Authority made all interconnection rates interim pending a determination of the various disputes between LIME and Digicel. On 7 January 2010, Digicel requested that the Authority reverse or “clarify” this decision, on several grounds, including that LIME and Digicel already had agreements that addressed the application of new rates and that retroactive application of new rates would be harmful to consumers.”*
  - b. *“In its 11 January 2010 reply comments, LIME argued that there was no reason to change the FTR or transit rates at that time, strongly supported the need for an expeditious ruling on the matter, and noted that an absence of retroactive application of new cost-oriented MTRs was necessary to ensure Digicel had the appropriate incentive not to delay the process.”*
  - c. *“After receipt of extensive reply comments by Digicel on 22 January 2010, the Authority issued Decision 2010-1, which denied inter alia Digicel’s request to reverse the “retroactivity” ruling. The authority subsequently issued Decision 2010-5 in April 2010 which, as noted earlier, made all of these interim rates “final”.”*
  - d. *“Notwithstanding this, the Authority proceeded in the same Decision 2010-5 to make the FTR and transit rates “interim” once again, but not the MTR, even though as noted earlier, all three rates would be determined in the future by the FLLRIC model and the Authority had no reason to believe any of the rates were contrary to the Interconnection Regulation.”*
54. LIME then submitted that
- a. *“This significant delay since the issuance of Decision 2010-5 has introduced unacceptable levels of regulatory uncertainty. For more than*

*four (4) years now, the relevant FTR and transit rate have been unknown to any parties in the Cayman Islands.”*

- b. *“While a company might have been able to absorb the uncertainty and financial shock over a short period of time measured in months, the present delay in reaching a determination on FTRs and transit rates is unacceptably long.”*
- c. *“...the effect of this regulatory uncertainty is to discourage foreign investment in the Cayman Islands, whether in telecommunications or other sectors.”*
- d. *“A review of regulatory practices in other countries also suggests that the proposal to apply the new rates retroactively is unprecedented and inconsistent with international best practice.”*

### *Solutions proposed by LIME*

55. LIME submitted that

- a. *“...the Authority should determine not to apply any new FTR or transit rates retroactively. Rather, the current “interim” rates should be made final, and should continue to apply as such until such time as new FTR and transit rates are determined, which would in turn apply on a forward-looking basis only.”*
- b. *“Given that the Authority chose in 2010 not to make the MTR of the time “interim” pending finalisation of the FLLRIC model, the Authority must now apply the same approach and not require retroactive adjustments of the FTR and transit rates, as if they had not been made interim in 2010.”*
- c. *“...the Authority should apply the FLLRIC model as approved by Decision 2012-2 to determine FTR and transit rates. This would ensure the use of a consistent and coherent cost model to set all interconnection rates in this market.”*
- d. *“...in the event that the Authority considers that the FLLRIC model should in fact be updated to reflect more current volumes and more current design assumptions than included in the 2012 approved FLLRIC model, then the Authority should review and update both modules of the FLLRIC model at the same time.”*
- e. *“LIME notes that the FLLRIC model that was approved in 2012 was designed with a three-year forward-looking time horizon. It is therefore not unreasonable to review it to ensure it remains forward-looking. However, as noted above and for the avoidance of any doubt, the Authority must take care to review the entire FLLRIC model on a holistic basis and to apply any new MTR, FTR and transit rates that might flow from that review, on the same date and on a prospective basis only.”*

## DIGICEL'S FINAL COMMENTS, 30 SEPTEMBER 2014

56. In its submission, Digicel referred to the Authority's Second Round Interrogatories in which the Authority referred to the requirement whereby main switching components in the Fixed Module would need to be reduced from two (2) to one (1), and to LIME's response to this interrogatory stating that it strongly disagrees with such a requirement.<sup>30</sup>
57. Digicel submitted that *"when LIME were considering Mobile Termination rates, LIME built in to its cost model for ECTEL countries the fact that LIME uses one mobile switch for all 5 ECTEL regulated countries (and in fact the single switch is used for Barbados also so it may have spread costs over 6 countries)"*, and it concluded that *"there is much less basis for LIME to argue that one switch (of any kind) cannot be used for the Cayman Islands alone, than there is to argue that one switch (of any kind) can be used for 6 countries"* and that *"LIME should therefore be required to model costs for the Cayman Islands based on a single NGN switch"*.

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<sup>30</sup> See the Second Round Interrogatory 45, pages 65-66, in [http://www.icta.ky/upimages/publicrecord/2014\\_08\\_15\\_LIME\\_responses\\_to\\_ICTA\\_2nd\\_round\\_interrogs\\_1417518092.pdf](http://www.icta.ky/upimages/publicrecord/2014_08_15_LIME_responses_to_ICTA_2nd_round_interrogs_1417518092.pdf)

## LIME's REPLY COMMENTS, 21 OCTOBER 2014

58. LIME submitted that it *“disagrees with Digicel’s assertion that an optimized, forward-looking fixed network operating in the Cayman Islands is appropriately modelled using a single NGN switch”* and it further elaborated that
- a. *“First of all, LIME’s fixed network in operation in the Cayman Islands today employs three switches – an NGN switch at One Technology Square in downtown George Town, a second NGN switch at the company’s High Rock location in the East End district, and a third circuit-based switch at its Bodden Town central office. Consistent with the FLLRIC model’s forward-looking optimization requirements, the circuit-based switch in Bodden Town is discarded, and the fixed network is specified to operate on the two NGN switches located at the opposite ends of Grand Cayman.”*
  - b. *“Second, the risk of network failure is a realistic concern, especially in an island environment, subject to recurring, extreme weather patterns. The need to reduce this risk to a level that is appropriate for the country is why LIME’s fixed network operates today using multiple switches. Were LIME to operate using a single fixed NGN switch and that switch were to malfunction, LIME would lose all telecommunications connectivity to the outside world.”*
  - c. *“Finally, the requirement to use two fixed-network switches has already been considered and evaluated. It is identified in the FLLRIC model’s costing manual and was determined by the Authority to be “a reasonable assumption” in its 2008 Phase 2 decision in this proceeding. It would be inappropriate for the Authority to change fundamental assumptions at this late stage in the FLLRIC model development process.”*

## DIGICEL'S REPLY COMMENTS, 21 OCTOBER 2014

59. Digicel submitted that its "...*understanding is that at the time of the [29 April 2010] Determination the Authority had yet to analyse the LIME model sufficiently, or at all, in respect of LIME's claimed fixed and transit rates. An analysis was therefore necessary before the Authority could make a Decision in that respect [emphasis added].*"
60. Digicel further referred to the Authority's 29 April 2010 Determination in which the Authority stated that "*LIME and Digicel are to keep detailed records of the quantities and rates used to bill each of those interconnection services to enable any adjustments to be applied retroactively to the date of this decision...*"
61. Digicel therefore submitted that
  - a. "*The Parties have therefore all been aware of the need to provide in their accounts for a final Decision of the Authority in this respect.*"
  - b. "*This is the first time that LIME has objected to the best of our knowledge.*"
  - c. "*We also note that LIME argued strongly for retroactivity, and against Digicel, in respect of a previous Decision of the Authority in December 2009.*"
  - d. "*Although somewhat perplexingly LIME then quotes Digicel at length in its response, rather than restating LIME's arguments at the time in favour of retroactivity.*"
  - e. "*LIME's claim that there will be an unacceptable inconsistency between the way in which mobile and fixed and transit rates are being calculated is nonsense. There is no need to have a model which calculates all rates or none. LIME's objections are a transparent attempt to benefit LIME commercially with high fixed and transit rates, the latter of which in our view should no longer even exist.*"
  - f. "*Digicel for its part strongly underlines the need for the Authority to abide by its Determination of 29<sup>th</sup> April 2010 in respect of its retrospective applicability.*"

## AUTHORITY'S ANALYSIS

62. The Authority has reviewed LIME's response to the Authority's Second Round Interrogatories to LIME and the results of the revised model submitted by LIME on 15 August 2014.
63. The Authority has also reviewed the Final Comments and Reply Comments received from Digicel and LIME in response to the public consultation CD 2012-1 on FTR and Transit Rate, as summarised above.
64. The Authority's analysis of the arguments, evidence and comments presented by the parties during this proceeding is summarised below.

### *Dispute Resolution Process*

65. With regard to LIME's comment that the Authority must act expeditiously in resolving dispute determination requests, the Authority notes that it did, in fact, act expeditiously by issuing ICT Decision 2010-5 on 29 April 2010, in which the Authority
  - a. Issued an interim order setting the interim rates for fixed termination and transit service effective from the date of the decision and until the Authority makes a determination on the FTR and Transit Rate in a follow-up proceeding after the FLLRIC model is approved.
  - b. Determined that LIME and Digicel must 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.
  - c. Allowed parties to agree on different rates set on commercial terms should the parties be reluctant to have interim rates and prefer to have final rates with no potential retroactive adjustments.
66. The Authority also provided regulatory certainty with ICT Decision 2010-5 since the parties have been provided with a transparent and detailed representation of the Authority's view as to how this dispute determination request should be resolved, given the regulatory requirement to set interconnection prices based on FLLRIC model in accordance with Part 4 in Annex 5 of LIME's Licence.
67. The Authority notes that LIME had submitted on 28 May 2010 the following comments on Digicel's reconsideration request regarding ICT Decision 2010-5:
  - a. *"The Dispute Regulations permit the Authority to take a number of actions in response to a determination request. While one of them is, as Digicel pointed out, to request of the parties further information, Regulation 8(h) gives the Authority a wide discretion to adopt such other approach as would resolve the dispute. In this case, 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 fixed termination and 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, this approach is reasonable and lawful, and does not disclose any flaw.”*

- b. *“Contrary to Digicel’s allegation, the Authority did not leave the issue open-ended. The Authority explicitly noted in paragraphs 96 and 111 of the Determination that it would make a determination in follow up proceedings on the fixed termination and transit rates. However, the Authority also left open the possibility, in paragraphs 95 and 110 of the Determination, for the parties to reach an agreement on the level of the fixed termination and transit rates, which would obviate the need for a follow up proceeding. Both of these determinations are reasonable and not flawed.”*

- 68. LIME therefore appears to contradict itself when it now states that the Authority: (1) is *“in breach of the Dispute Regulations”*; (2) it has not acted *“expeditiously”*; and, (3) it *“chose to undertake a time-consuming and expensive two-year process to revise and update the fixed module of the FLLRIC model”*.
- 69. As noted by Digicel in its Reply Comments of 21 October 2014, following the Authority’s determinations in ICT Decision 2010-5, an analysis was necessary before the Authority could make a decision in respect of FTR and Transit Rate. In addition, as specified in paragraph 50(e) in Annex 5 of LIME’s Licence, the Authority *“reserves the right to conduct, from time to time, additional processes that are required to determine the reasonableness of the results, and where necessary, to require adjustments to the model”*.
- 70. As evidenced by the Interrogatories requested of LIME, the Authority was of the view that the workbooks submitted by LIME on 4 January 2013 as part of the Fixed Module of the FLLRIC model, for the purpose of determining cost-oriented FTR and Transit Rate (see paragraph 26 above), contained numerous errors and conceptual flaws that needed to be addressed before any decision could be made by the Authority.

### *FLLRIC Model*

- 71. LIME claims that the Authority has chosen to undertake a time-consuming and expensive two-year process to revise and update the fixed module of the FLLRIC model. However, LIME does not note that the Authority has dedicated considerable resources in analysing LIME’s own FLLRIC model, which has proven in the Authority’s view to consist of numerous errors and flaws for which responsibility lies with LIME. In this regard, the Authority reminds LIME that there are more than 200,000 active cells in LIME’s FLLRIC model completed with values and/or formulas, many of them making reference to different spreadsheets and/or files of the FLLRIC model, which makes any proper review of the model a highly time and resource consuming task.
- 72. The Authority considers that, in such circumstances, LIME bears the ultimate responsibility in ensuring that any errors in formulas and/or values in its model are detected before submission of LIME’s proposed FLLRIC model to the Authority for further review. Such form of due diligence in relation to the accuracy and reliability of its own costing modelling is expected from LIME; failing to perform such due diligence has resulted in inevitable delays in the process.

73. The Authority lists below some examples of the errors in the Fixed Module as previously identified and discussed by the Authority in its Second Round Interrogatories,<sup>31</sup> which should have been corrected on time by LIME before submitting its FLLRIC model:
- a. In the Second Round Interrogatory 10, the Authority identified a number of formulas which appeared to refer to incorrect cells. LIME subsequently corrected the formulas as indicated by the Authority;<sup>32</sup>
  - b. In the Second Round Interrogatory 16, the Authority identified a number of cells where LIME double counted the values of cost inputs. LIME subsequently corrected the formulas in these cells as indicated by the Authority;<sup>33</sup>
  - c. In the Second Round Interrogatory 28, the Authority identified a number of formulas where LIME double counted the number of items required. LIME subsequently corrected the formulas as indicated by the Authority;<sup>34</sup>
  - d. In the Second Round Interrogatories 40 and 41, the Authority questioned the mismatch between the selected operating expenses shown in different sheets in the Fixed Module and LIME provided its response justifying such mismatch.<sup>35</sup> The Authority, however, does not agree with LIME's response to the interrogatories 40 and 41, simply because LIME inadvertently applied the formulas to allocate operating expenses across relevant network components by using GRV and GRC values at the same time, thus creating the mismatch between the values in two different sheets, as noted by the Authority in the interrogatories 40 and 41. This is therefore another example of LIME's oversight in making sure that appropriate formulas are used across its FLLRIC model, which in this case resulted in the mismatch between the selected operating expenses shown in different sheets in the Fixed Module, as identified by the Authority in its interrogatories.

### *Retroactivity*

74. With regard to LIME's statement in paragraph 35 of its comments on CD 2012-1 (see paragraph 53b above), the Authority notes that this statement misinterprets LIME's response to Digicel's Determination Request, submitted on 12 January 2010.<sup>36</sup> In paragraph 7 of LIME's response to Digicel's Determination Request, LIME submitted the following:

*"LIME respectfully submits that any interim solution which serves to delay the implementation of more cost oriented rates is not in the best interests of*

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<sup>31</sup> See

[http://www.icta.ky/upimages/publicrecord/2014\\_08\\_15\\_LIME\\_responses\\_to\\_ICTA\\_2nd\\_round\\_interrogs\\_1417518092.pdf](http://www.icta.ky/upimages/publicrecord/2014_08_15_LIME_responses_to_ICTA_2nd_round_interrogs_1417518092.pdf)

<sup>32</sup> See pages 14-15

<sup>33</sup> See pages 21-24

<sup>34</sup> See pages 43-44

<sup>35</sup> See pages 62-63

<sup>36</sup> <http://www.icta.ky/upimages/commonfiles/141742358420100112LIMEcorrectedResponsetoDigicelDeterminationRequestredacted.pdf>

*Cayman’s consumers and defeats the objectives of liberalization. It is in Digicel’s interest to postpone mobile termination rate reductions for the longest possible period. Consequently, retention of the existing rates and terms and conditions for the duration of the Authority’s consideration of the dispute without the possibility of retroactive implementation of new rates potentially would have the impact of facilitating such delay [emphasis added].*”

75. Furthermore, in another letter, dated 18 January 2010, LIME submitted the following:<sup>37</sup>

*“Without the possibility of retroactivity, there is an incentive for Digicel to prolong the resolution process and to foster delay in order to maintain the MTR at its current rate for the longest period.*

...

*As regards the possible financial impact of retroactivity, the threat of an increase in Digicel’s retail rates is a product of its failure to plan effectively, and evidence of its anti-competitive behaviour.*

...

*Lime submits that Digicel’s application for reconsideration has not demonstrated that the Authority’s interim determination is incorrect, inconsistent with law, or should not, for any other reason, be upheld.”*

76. The Authority considers that LIME’s statement in paragraph 35 of its comments on CD 2012-1 (see paragraph 54), is particularly unhelpful for achieving a positive outcome for all the interested parties in this proceeding. The Authority reminds LIME that this proceeding has been conducted in a transparent and fair manner whereby all the interested parties have had the opportunity to consult and comment on the results of the Fixed Module at each step of the review of FTR and Transit Rate, subject to the Authority’s Confidentiality Regulations, 2003.<sup>38</sup>
77. The example below for the FTR shows the cost modelling results in each revised public version of the Fixed Module submitted by LIME:
- a. LIME’s submission of the public version of the Fixed Module on 2 October 2012 results in an FTR at CI\$ 0.0230.<sup>39</sup>
  - b. LIME’s submission of the public version of the Fixed Module on 4 January 2013 results in an FTR at CI\$ 0.0220.<sup>40</sup>
  - c. LIME’s submission of the public version of the Fixed Module on 15 January 2013 results in an FTR at CI\$ 0.0218.<sup>41</sup>

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<http://www.icta.ky/upimages/commonfiles/141742376720100118LIMECommentsOnDigicelReconsiderationRequest.pdf>

<sup>38</sup> <http://www.icta.ky/upimages/commonfiles/1417277099ICTA-ConfidentialityRegulations.pdf>

<sup>39</sup> The confidential version of the Fixed Module shows the FTR at CI\$ 0.0217

<sup>40</sup> The confidential version of the Fixed Module shows the FTR at CI\$ 0.0217

<sup>41</sup> The confidential version of the Fixed Module shows the FTR at CI\$ 0.0217

- d. LIME's submission of the public version of the Fixed Module on 6 May 2013 results in an FTR at CI\$ 0.0232.<sup>42</sup>
  - e. LIME's submission of the public version of the Fixed Module on 15 August 2014 results in an FTR at CI\$ 0.0076.<sup>43</sup>
78. Accordingly, all the interested parties have been informed about the relevant level of cost-oriented rates at each individual step of the review of FTR and Transit Rate.
79. The Authority notes that the significant decrease in the value of FTR in the latest version of the Fixed Module, dated 15 August 2014, when compared to the previous versions, is a direct result of a further in-depth analysis of LIME's cost modelling assumptions and a revision of certain errors and other inconsistencies within the Fixed Module, as identified by the Authority in its Second Round Interrogatories of 17 April 2014.
80. With regard to LIME's comments on the application of retroactivity, the Authority notes that the notion of retroactivity or backdating of interconnection/access prices has been a matter of consideration in various disputes in other jurisdictions.
81. For example, section 190(2)(d) of the telecommunications law of the United Kingdom (the '**Communications Act 2003**') provides that OFCOM (the telecom regulator in the United Kingdom) has the power to backdate any determination involving a dispute referred to them:

*"190 Resolution of referred disputes*

*(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.*

*(2) Their main power (...) is to do one or more of the following-*

*(a) to make a declaration setting out the rights and obligations of the parties to the dispute;*

*(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;*

*(c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and*

*(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment [emphasis added]."*

<sup>42</sup> The confidential version of the Fixed Module shows the FTR at CI\$ 0.0230

<sup>43</sup> The confidential version of the Fixed Module shows the FTR at CI\$ 0.0086

82. The Competition Appeal Tribunal of the United Kingdom in its judgement on the Rates in Dispute (Court Case Numbers 1089/3/3/07, 1090/3/3/07, 1091/3/3/07 and 1092/3/3/07)<sup>44</sup> directed OFCOM “to make an order under section 190(2)(d) to ensure that the rates which are set pursuant to the Tribunal’s decisions apply for the appropriate period and that the parties are ordered to make such payments or repayments as result from that backdating”. The Tribunal further stated that:

“Clearly there is a substantial arithmetical task ahead to work out what sums of money would have fallen due if the rates had been set as the Tribunal has now determined and to compare those with the amounts in fact paid over the period. The parties are in a better position than OFCOM to carry out these calculations. The Tribunal therefore encourages the parties to negotiate with each other as to the payments which need to be made so that this places as small a burden on OFCOM’s resources as possible.”

83. As it relates to the dispute between LIME and Digicel in relation to the interconnection rates, the Authority notes that in Decision 2010-5 the Authority determined that “LIME and Digicel must 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”. Accordingly, from the onset the Authority has specified the rules regarding the compensation for overpayment or underpayment so that there is a minimum burden on the parties to work out the sum of money that need to be compensated by one or the other party to the dispute, as a result of retroactivity of determination on cost-oriented rates.

84. Further, the Court of Appeal in New Zealand also expressed its view on backdating of prices in the court case “Telecom New Zealand Limited v Commerce Commission and Telstra Limited”.<sup>45</sup> The Court of Appeal noted the following:

“[41] Telecom submitted that the s 18 purpose was not promoted by backdating. The consequence of the sequential nature of s 27 and s 51 determinations would be that any backdating over the “initial” period will merely transfer wealth between the provider and the user of a service. We find the argument unpersuasive. If the reviewed price is lower than the initial price the end users will have paid an inefficiently excessive price for the service. But if it is higher the end users would have paid an inefficiently inadequate price for the service. Absent the possibility of the consequences being passed on to the end users in some way, the potential for inefficiencies in relation to end users is unavoidable on either the Telecom position or the respondent’s position. What can be achieved, however, is the establishment of the most efficient price as between the access provider and the access seeker.

[42] Telecom reiterated the argument that the contingent nature of price determinations which may become subject to review determinations that relate back creates inefficiencies in respect of annual financial statements.

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<sup>44</sup> [www.catribunal.org.uk/files/1.Jdg\\_TRD\\_1089\\_1090\\_1091\\_1092\\_150808.pdf](http://www.catribunal.org.uk/files/1.Jdg_TRD_1089_1090_1091_1092_150808.pdf)

<sup>45</sup> <https://forms.justice.govt.nz/search/Documents/pdf/jdo/31/alfresco/service/api/node/content/workspace/SpacesStore/967afeae-cd81-4b88-966e-53556e413b78/967afeae-cd81-4b88-966e-53556e413b78.pdf>

*But as we have already mentioned, contingencies are a commonplace of commercial activity and financial reporting. Even the possibility of an initial price determination is a contingency, as is the existence of any potential or actual litigation.*

*[43] Finally, Telecom raised the prospect and risk of delays as an indication against a relating back of the review price. It is the case that the review process is lengthy, complex and no doubt expensive, but arguments about efficiency do not point in only one direction. On the one hand, there may be efficiencies of certainty for a long period, but on the other hand there will be inefficiencies implicit in the lengthy operation of a less efficient price.*

*[44] In our view Harrison J was right to uphold the contention by the Commission and TelstraClear that a price review determination relates back to the date of the initial determination. That is consistent with the substitutionary nature of reviewing or appellate decisions which vary an original decision. The alternative view implies a potential for negating the efficacy of the review process which the Act has established in order to serve the s 18 purpose. Moreover, the obvious function of the price determination regime is to fix the price for a period of time relevant to the application, not to fix the price for part of that time and another price for another part. We consider that the s 18 purpose is better served by substituting the revised price for the initial price ab initio rather than only after a period of relatively less efficient pricing. None of the arguments advanced on behalf of Telecom has persuaded us to the contrary."*

85. Accordingly, the Authority is of the view that backdating of initial (or interim) prices is commonly accepted in other jurisdictions, specifically when such backdating follows from a review process that produces more efficient prices, no matter if such new (or reviewed) prices are lower or higher than the initial (or interim) prices.

### *Conclusion*

86. The Authority has reviewed LIME's revised Fixed Module submitted on 15 August 2014 and it is mostly satisfied that LIME has implemented the various directions set out by the Authority.
87. The Authority notes LIME's comment that "[w]ithout prejudice to its views on the internal inconsistency of the FLLRIC model, LIME suggests a number of changes to the fixed module" and that "[n]one of these suggested changes significantly impact the cost basis of the fixed termination or transit services; however, the changes will improve the completeness of the model."<sup>46</sup>
88. The Authority agrees with LIME's comment that further changes to the Fixed Module are required in order to achieve completeness of the FLLRIC model.
89. In addition, the Authority has identified some other changes that are required in the current version of the Fixed Module (for example, see paragraph 94 *et. seq* below) albeit it is difficult to estimate the materiality of the aggregated changes at this

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<sup>46</sup> See paragraph 5 - [http://www.icta.ky/upimages/publicrecord/2014\\_09\\_30\\_LIME\\_Final\\_comments\\_1435593478.pdf](http://www.icta.ky/upimages/publicrecord/2014_09_30_LIME_Final_comments_1435593478.pdf)

time, some of which may move the costs upwards and some may move the costs downwards.

90. The Authority also noted LIME's comment that the changes in the Fixed Module "*made in isolation and without considering the impact on the mobile module, have put the fixed module out of sync with the mobile module*",<sup>47</sup> albeit the Authority notes that the extent of such impact is yet to be established and may not be material.
91. Accordingly, a further review of the Mobile Module may need to be conducted after the resolution of this process as a result of changes in the Fixed Module in order to determine a revised MTR.

### ***Authority's Decision on FTR***

92. Based on an evaluation of the directed changes to the FLLRIC model, the revised FTR, derived from the Fixed Module submitted by LIME on 15 August 2014, better reflects cost-oriented rates which might be viewed as reasonable and arrived at in a transparent manner, in accordance with section 68(3) of the Law.
93. However, the Authority is of the view that a further review of the FLLRIC model is necessary before the Authority determines the final FTR.
94. The Authority has identified a number of values reported in the Fixed Module that would need to be further reviewed, noting that it is difficult to estimate the materiality of any corrections to the calculations of FTR, which may be implemented as a result of any such further review.
95. For example:
  - The Authority notes that what LIME identified as asset expense factors related to 'Mobile Network' in cells F3:F8 in the 'Asset Expense Factors' sheet of the file named 'Appendix IV-FAC-TD Values 10\_09\_01\_rev4 – Conf.xls', appear to be associated with LIME's Mobile Retail business area, as it is specified in cells AR50:AR51 in the 'Asset Expense Factors' sheet;
  - The authority notes that the items and their corresponding values in rows 50:687 in the 'Asset Expense Factors' sheet of the file named 'Appendix IV-FAC-TD Values 10\_09\_01\_rev4 – Conf.xls', are taken from the 'Assumptions and Drivers' sheet of the file named 'Appendix III Fixed assets revaluation\_20-09-09 Conf.xls', however it appears that LIME has omitted certain items and their corresponding values from the latter;<sup>48</sup> or
  - In its response to the Second Round Interrogatory 42, LIME has referred to the charges reported within the activity group 'INTER-Region Recharges IN (3304195) – Area Office North', and it stated that "[a]s noted on page 74 of the Background Document to the Draft Costing Manual submitted 10 March

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<sup>47</sup> See paragraph 19 -

[http://www.icta.ky/upimages/publicrecord/2014\\_09\\_30\\_LIME\\_Final\\_comments\\_1435593478.pdf](http://www.icta.ky/upimages/publicrecord/2014_09_30_LIME_Final_comments_1435593478.pdf)

<sup>48</sup> For example, data from rows 273-320 and 349-555 in the 'Assumptions and Drivers' sheet of the file named 'Appendix III Fixed assets revaluation\_20-09-09 Conf.xls' are not listed in the 'Asset Expense Factors' sheet of the file named 'Appendix IV-FAC-TD Values 10\_09\_01\_rev4 – Conf.xls'.

2006, these charges are those associated to the provision of management service shared by operating companies in the region”, noting that (1) “[t]he “North” refers to the C&W Caribbean grouping within which the Cayman business found itself at the time of the fully-allocated costing”, (2) “[t]he North’s Area Office expenses were shared among the Cayman Islands, Anguilla, Turks & Caicos Islands, British Virgin Islands and Montserrat”, and (3) “[t]hese expenses were proportionately allocated to the Cayman Islands and the other businesses in the North”. However, the Authority notes that the fully-allocated costing and the Draft Costing Manual, to which LIME makes reference, are dated prior to the separation of Cable & Wireless Plc into Cable & Wireless Communications and Cable & Wireless Worldwide. It is therefore necessary to reconsider whether such charges are relevant for the calculation of the FTR post-demergers of Cable & Wireless Plc.

96. In addition, the response provided by LIME to the Authority’s Second Round Interrogatory 33 in reference to the STP functionality, which the Authority understands has been migrated from the Cayman Islands to Jamaica, is likely to need further review by the Authority and clarification by LIME.
97. Further, as previously mentioned, in its final comments submitted on 30 September 2014 LIME suggested a number of changes to the Fixed Module “for the achievement of completeness of the model”, albeit noting that “none of the proposed changes significantly impact the cost basis of the FTR or fixed transit service.”<sup>49</sup>
98. Accordingly, the Authority makes the following determinations:
  - a. the Authority shall conduct a follow-up proceeding in order to determine the final FTR.
  - b. The FTR obtained as a result of the public consultation CD2012-1 is made interim for interconnection traffic between Digicel and LIME, applied retroactively to 29 April 2010 (as per ICT Decision 2010-5) and effective until the date when the Authority makes a final determination on the FTR in the follow-up proceeding.
  - c. The interim FTR specified above is based on the revised Fixed Module submitted by LIME on 15 August 2014, and is set at **CI\$0.0086** per minute.<sup>50</sup>
  - d. LIME and Digicel to continue keeping detailed records of the quantities and rates used to bill for such interconnection services to enable any adjustments to be applied retroactively from the date when the Authority makes a final determination on the FTR to 29 April 2010 (as per ICT Decision 2010-5).

Further, the Authority notes that interconnection and infrastructure charges should be non-discriminatory and reciprocal for the same service.<sup>51</sup> Therefore, the above

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<sup>49</sup> See paragraphs 50-51 in LIME’s Final Comments -

[http://www.icta.ky/upimages/publicrecord/2014\\_09\\_30\\_LIME\\_Final\\_comments\\_1435593478.pdf](http://www.icta.ky/upimages/publicrecord/2014_09_30_LIME_Final_comments_1435593478.pdf)

<sup>50</sup> The public version of the Fixed Module shows an FTR at CI\$ 0.0076

set interim FTR also applies for interconnection traffic between other Licensees (other than Digicel) and LIME as from the date of this decision and until the date when the Authority makes a final determination on the FTR.

99. The Authority notes that LIME and Digicel may be reluctant to have an interim FTR and may prefer to have a final rate with no potential for retroactive adjustments. If, after receipt of this Decision, those parties are able to agree on an appropriate FTR, the Authority would remove the requirement for an interim rate as specified in paragraph 98b above and the requirement for a follow-up proceeding to determine the final FTR as specified in paragraph 98a.

### ***Authority's Decision on Transit Rate***

100. Based on an evaluation of the directed changes to the FLLRIC model the Authority is satisfied that LIME has made the necessary adjustments.
101. As a result of those adjustments, the Authority is satisfied that the revised Transit Rate, derived from the Fixed Module submitted by LIME on 15 August 2014, better reflect cost-oriented rates which might be viewed as reasonable and arrived at in a transparent manner, in accordance with section 68(3) of the Law.
102. However, the Authority is of the view that a further review of the FLLRIC model is necessary before the Authority's determines the final Transit Rate.
103. As explained in paragraphs 94 and 96 above, the Authority has identified a number of issues in the Fixed Module that may require further review by the Authority, noting that it is difficult to estimate the materiality of any corrections to the calculations of the Transit Rate, which may be implemented as a result of any such further review.
104. Accordingly, the Authority makes the following determinations:
- a. the Authority shall conduct a follow-up proceeding in order to determine the final Transit Rate.
  - b. The Transit Rate obtained as a result of the public consultation CD2012-1 is made interim for interconnection traffic between Digicel and LIME, applied retroactively to 29 April 2010 (as per ICT Decision 2010-5) and effective until the date when the Authority makes a final determination on the Transit Rate in the follow-up proceeding.
  - c. The interim Transit Rate specified above is based on the revised Fixed Module submitted by LIME on 15 August 2014, and is set at **CI\$0.0116** per minute.<sup>51</sup>
  - d. LIME and Digicel to continue keeping detailed records of the quantities and rates used to bill for such interconnection services to enable any adjustments to be applied retroactively from the date when the Authority makes a final determination on the Transit Rate to 29 April 2010 (as per ICT Decision 2010-5).

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<sup>51</sup> See, for example, Regulation 10 of the Interconnection Regulations.

<sup>52</sup> The public version of the Fixed Module shows a Transit Rate at CI\$ 0.0110

Further, the Authority notes that interconnection and infrastructure charges should be non-discriminatory and reciprocal for the same service.<sup>53</sup> Therefore, the above set interim Transit Rate also applies for interconnection traffic between other Licensees (other than Digicel) and LIME as from the date of this decision and until the date when the Authority makes a final determination on the Transit Rate.

105. The Authority notes that LIME and Digicel may be reluctant to have an interim Transit Rate and may prefer to have a final rate with no potential for retroactive adjustments. If, after receipt of this decision, those parties are able to agree on an appropriate Transit Rate, the Authority would remove the requirement for an interim rate as specified in paragraph 104b above and the requirement for a follow-up proceeding to determine the final Transit Rate as specified in paragraph 104a.

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<sup>53</sup> See, for example, Regulation 10 of the Interconnection Regulations.

## GUIDELINES FOR FUTURE USE OF THE FLLRIC MODEL

106. Regarding the future use of the FLLRIC model the Authority directs that:
- No changes are allowed to be made without the Authority's approval.
  - When using the model data for service filing or cost study purposes, LIME must submit the relevant fully working modules to the Authority, identifying any changes to the modules. This includes any appendices or spreadsheets that are directly linked to the main cost modules. All proposed changes must be documented by listing the Excel file name, the spreadsheet name, the specific cell references, a description of the changes that were made and a rationale for each such change. All supporting spreadsheets must contain a description of the overall purpose of the spreadsheet, a description of each tab and list the main information sources.
  - Where LIME is required to submit a public version of the model, this must be a working copy of the model with any confidential information noted and replaced with dummy data. The replacement of confidential data with dummy data must, at a minimum, be made in accordance with the Authority's determinations in CD 2009-1 proceeding. All formulas and calculations and non-confidential data are to be left intact. For greater certainty, the above is not meant to indicate that the Authority will not require any further disclosure in any future proceedings. Disclosure requests in any future proceedings will be dealt with in accordance with the process stipulated in the Authority's Confidentiality Regulations, 2003.<sup>54</sup>
  - In submissions (such as imputation tests) where LIME is using the model as a source of input data, LIME should clearly indicate which data from the model are used to support its submission by providing specific file name, work sheet name, and cell references for any referenced data.
107. The Authority stresses that its acceptance of the results obtained in the current version of the FLLRIC model for the purposes of calculating the cost of the FTR and the Transit Rate does not mean that the model has been accepted for costing of other services or that certain parts or calculations in the model may be used directly to support future submissions without further scrutiny. Depending on the nature of any future proceeding, the Authority may conduct further review of source data, methodology assumptions, and calculations in the submitted module(s).

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<sup>54</sup> <http://www.icta.ky/upimages/commonfiles/1417277099ICTA-ConfidentialityRegulations.pdf>