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# LIME

Our ref: GRRCR/GR 15.19

4<sup>th</sup> February 2010

Mr. David Archbold,  
Managing Director,  
Information and Communication Technology Authority,  
3rd Floor Alissta Towers,  
P.O. Box 2502GT,  
Grand Cayman. KY1-1104

Dear Mr. Archbold,

## **Re: Public Consultation on a Policy for Deep Packet Inspection (DPI) and Similar Technologies**

### **Application to Reconsider**

1. Cable and Wireless (Cayman Islands) Limited ("**LIME**") hereby applies for the review and reconsideration of the Determination by the Information & Communications Technology Authority ("**ICTA**") or ("**the Authority**") dated January 14, 2010 on the Public Consultation on a Policy for Deep Packet Inspection (DPI) and Similar Technologies ("**the Consultation**"). The remedy being sought by LIME from the process of review and reconsideration is for the Authority to remove its "embargo on the installation of new DPI systems prior to the final determination in these proceedings" and allow LIME to immediately proceed to install DPI.
2. LIME applies for the review and reconsideration pursuant to the inherent jurisdiction of the Authority under the Information and Communications Technology Law (2006 Revision) ("**the Law**") to reconsider a decision or determination which is made under an error of law or fact. LIME argues that the Determination is made under both errors of law and fact.

### **The Determination**

3. The Authority's Determination outlines in part the chronology of the relevant activities which preceded the Determination and will not be repeated here. In summary, the Authority launched the Consultation" on July 28, 2009. As part of the Consultation, service providers were asked whether they currently employ or plan to employ DPI or similar technologies on their network. Digicel (Cayman) Limited

("Digicel") and WestTel Limited ("WestTel") advised in their response that each was using DPI. LIME advised that it was not. Subsequently, LIME requested permission to proceed with the installation of DPI on its network. In response to LIME's request and submissions from Digicel and WestTel on their respective use of DPI, the Authority made the following Determination:

*After careful consideration, the Authority acknowledges that its Directive may well create a temporary competitive imbalance between LIME and its competitors. However, given the lack of empirical evidence that this competitive imbalance will harm LIME or its customers, the Authority considers that consequences of that imbalance are outweighed by the public interest in maintaining the embargo upon the installation of new DPI systems prior to the final determination in these proceedings.*

***The Authority is also of the view that requiring Digicel and WestTel to cease using DPI pending a final determination in this proceeding is likely to be disruptive for Digicel and WestTel's networks and customers. Moreover, requiring these licensees to pay for replacement equipment and network redesign for what might be a very short time (depending upon the final determination) is also undesirable. On balance, therefore, the Authority has determined that the status quo should be maintained. To minimize the duration of the resulting imbalance, the Authority will make every effort to issue a final ruling in the main proceeding by no later than 1 March 2010.***

***The Authority would like to stress that this determination is intended as an interim measure only and is without prejudice to its final ruling. In particular, the Authority emphasizes that it has not made any determination on the matter.***

#### **Error of Fact**

4. LIME submits that the Authority has erred in fact in its Determination. Specifically the Determination states: "*However, given the lack of empirical evidence that this competitive imbalance will harm LIME or its customers, the Authority considers that consequences of that imbalance are outweighed by the public interest in maintaining the embargo upon the installation of new DPI systems prior to the final determination in these proceedings.*"
5. There is no debate, and cannot be any debate, that the market for broadband Internet services in the Cayman Islands is competitive. It is, in fact sufficiently competitive that the Authority determined in December 2007 to de-regulate LIME's residential broadband Internet services.
6. LIME submits that in the circumstances where two of LIME's competitors Digicel and WestTel currently employ DPI, and as players in a competitive industry would only do so where it is of benefit to their respective businesses, and LIME is being prevented from using similar technology in its business, there is by implication evidence of the competitive imbalance being suffered by LIME and the financial harm being caused to LIME's business by not being able to implement DPI on its network. LIME is of the opinion that this fact, by itself should suffice as evidence of the harm it has suffered and continues to suffer.
7. Notwithstanding, if the ICTA remains insistent on receiving further evidence, LIME projects a cost savings, in terms of capacity that would not otherwise be required, of an initial investment of ###. The benefit from the cost savings currently cannot be passed on to consumers in the form of improved quality of service or prices, as would normally otherwise happen in a competitive environment.

8. LIME requests confidential treatment of the cost information in the paragraph above, and requests that the Authority does not disclose the cost information to the public in any publication of this letter.

## **Error of Law**

9. LIME submits that the Authority has erred in law in its Determination based on two grounds: (i) the decision was irrational or unreasonable and (ii) the decision gives the appearance of bias by the Authority.

## **Irrationality**

10. A decision of an administrative body such as the Authority can be reviewed based on irrationality or unreasonableness. The often cited definition of irrationality or unreasonableness by the UK House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*<sup>1</sup>, refers to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. The gravamen of LIME's argument against the prohibition of its installation of DPI is twofold. First, the Authority has not made a decision on the legality of DPI. Paragraphs 1 and 2 of the Consultation reads:

1. *The Authority recently became aware that a licensee was planning the introduction of Deep Packet Inspection (DPI) technology on its network. The use of DPI and similar technologies in other jurisdictions such as the European Union, Canada and the United States has raised concerns about privacy and quite separately, traffic tiering. These concerns have resulted in a number of regulatory investigations and determinations.*
2. *As the Authority had not had the opportunity to examine the implications for the Cayman Islands of the introduction of technology which has been controversial on other jurisdictions, it issued a directive to all telephony licensees on 10 July 2009 prohibiting the installation or implementation of DPI or similar technologies until such time as it could conduct a public consultation and make a determination on the matter.*

11. LIME, as well as other Service Providers, has maintained that DPI is not prohibited under the Act. LIME's argument was set out in LIME's "Second Response to the ICTA's Consultation" dated September 28, 2009, inter alia:

*Do you consider that the use of DPI and similar technologies is permissible under the provisions of sections 73 and 75 of the Law? Please supply rationale.*

## **LIME's Response**

*Yes. The use of DPI is permissible under sections 73 and 75 of the Law.*

*LIME agrees with the comments filed by Walkers on 28 August 2009 that section 73 is not particularly germane here. Section 73 appears to address a refusal to provide service or a decision to discontinue or interrupt the provision of service to a particular customer. Nevertheless, section 73 allows a licensee to discontinue or to interrupt a service in accordance with terms of the contract with the customer. DPI can be one of the tools used by licensees to enforce the terms of their retail contracts.*

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<sup>1</sup> [1984] AC 347

*It is clear that the intent of section 75 of the Law is to protect the privacy of customers' information. Within that context, however, it is recognized that there may be legitimate reasons for intercepting, replicating, monitoring or interrupting a message.*

*Inter alia, the Law holds LIME blameless of an offence where:*

- 75 (2) (e) the message is intercepted, monitored or interrupted by the ICT network provider or ICT service provider over whose network or service the message is being transmitted for the purposes of-*
- (i) providing or billing for that ICT network or ICT service.*
  - (ii) preventing the illegal use of the ICT network or ICT service; or*
  - (iii) preserving the technical integrity of an ICT network or ICT service.*

12. The second basis for LIME's argument that the Determination is irrational and unreasonable, is that the Authority has maintained its embargo against the use of DPI by LIME, even after it became aware that two other Service Providers are using DPI. Having issued a prohibition against the use of DPI, in paragraphs 1 and 2 of the Consultation, the ICTA proceeds, at paragraph 25 of the said Consultation to seek responses from Service Providers to the following questions: *(a) Do you currently employ, or do you plan to employ, DPI or similar technologies on your networks?" (b) If the answer to (a) is yes, describe in detail the use you make, or plan to make, of these technologies."* As stated earlier, it is in response to these questions that the ICTA became aware, or perhaps received confirmation, that other Service Providers were using DPI on their network. LIME therefore submits, that in the circumstances where a determination has not been made on the legality of DPI, and that competitors of LIME are enjoying the competitive advantage from the use of DPI on their network, the response of the rational and reasonable regulator, should be to take immediate action to redress the competitive imbalances in the market created by its decision, and to allow the Service Provider which is not using DPI, to install and use DPI on its network, if it so chooses.

13. By the time the ICTA found out on August 28, 2009, that other providers were using DPI, it had already issued an extension to September 28, 2009, for the second part of the response to the DPI consultation. However, it was unreasonable for the ICTA not to have made a Determination forthwith on receipt of the responses of September 28, 2009, or at the very least rescinded its letter of July 10, 2009 in which it directed all licensees not to install or implement DPI. The ICTA should have made this rescission immediately, even in the absence of a complaint from LIME, as by then the Authority was aware of all the benefits accruing from the use of DPI, and was fully aware that LIME had invested in the required equipment and prepared to implement DPI, but for the ICTA's directive not to proceed. Unfortunately, it is now February 2010 and the Authority has permitted the inequitable situation to persist.

## Bias

14. LIME further submits that the embargo on LIME's activities by the ICTA gives the appearance of bias in carrying out its administrative function.<sup>2</sup> While LIME would never seek to impugn the proceedings of the ICTA, or make spurious allegations of bias, we are concerned about the appearance of bias, and the fact that as the ICTA exercises its quasi-judicial authority, justice must not only be done, but must be seen to be done.

15. Another reason for reviewing the decision of an administrative body is commonly referred to as procedural impropriety or failure to observe the rules of natural justice or failure to act with procedural

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<sup>2</sup> LIME notes that its concern is with the appearance of bias, and that there is no clear evidence of bias by ICTA.

fairness towards the person who will be affected by the decision. The relevant rule of natural justice which concerns this submission is the rule against bias. While this rule commonly speaks to the bias of a tribunal in a hearing, LIME notes that the procedure governing the issuing of a consultation and responses – providing the ICTA with the authority to ask questions, receive submissions and make responses – is not unlike a hearing. LIME’s argument is that the behaviour of the ICTA in relation to this Consultation could be seen as being biased against LIME.

16. LIME is relying on the test of bias as reformulated by the UK House of Lords in *Magill v. Porter*<sup>3</sup> which is “[t]he court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”<sup>4</sup>
17. LIME considers the following facts as salient.
18. First, LIME believes it is the licensee being referred to in Paragraph 1 of the Consultation: “[t]he Authority recently became aware that a licensee was planning the introduction of Deep Packet Inspection (DPI) technology on its network.” After becoming aware of LIME’s intention, the ICTA issued the Consultation which includes questions on Service Providers use of DPI: “(a) Do you currently employ, or do you plan to employ, DPI or similar technologies on your networks?” (b) If the answer to (a) is yes, describe in detail the use you make, or plan to make, of these technologies.” The fair-minded and informed observer would query whether ICTA expected any responses in the affirmative, and what was its expected course of action, in the context that at the start of the said Consultation the Authority had issued its embargo against the use of DPI.
19. Second, having received responses from two Service Providers in the affirmative, and the subsequent request from LIME to allow it to install DPI in light of these responses, the Authority justified its continued prohibition on LIME by acknowledging the creation of a “temporary competitive imbalance between LIME and its competitors” and citing lack of empirical evidence from LIME on the harm to the company or its competitor. The fair-minded and informed observer, being aware of the highly competitive state of the telecommunications market in the Cayman Islands, and of the effect which a technological advantage can provide to one competitor over another, would query, whether the response of the regulator of the telecommunications industry would not be to immediately rectify any imbalance in the industry, rather than wait for any harm caused by the imbalance to be quantified and sent to it.
20. Third, the Authority continues in its Determination to speak to the fact that “requiring Digicel and WestTel to cease using DPI pending a final determination in this proceeding is likely to be disruptive for Digicel and WestTel’s networks and customers. Moreover, requiring these licensees to pay for replacement equipment and network redesign for what might be a very short time (depending upon the final determination) is also undesirable.” The fair-minded and informed observer may query the statements made in respect of the business operations of LIME’s competitors, and the lack of reciprocal statements made about LIME’s operations.

## Conclusion

21. LIME therefore requests that the Authority reconsiders the Determination and immediately allow LIME to install DPI.

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<sup>3</sup> [2001] UKHL 67, [2002] I All ER 465

<sup>4</sup> para 102

Please do not hesitate to contact the undersigned if you should have any questions.

Yours sincerely,

Cable & Wireless (Cayman Islands) Ltd. d.b.a LIME

'Signed'

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Anthony Ritch, Country Manager, LIME (Cayman)

c.c. Donald Austin, EVP Legal Regulatory and Corporate Affairs, LIME  
Frans Vandendries VP, Legal Regulatory and Corporate Affairs (Central)