

**Before the
INFORMATION & COMMUNICATIONS TECHNOLOGY AUTHORITY
Grand Cayman
Cayman Islands**

**Public Consultation
On Dispute Resolution Rules**

Ref: R (2003) 4a

Comments of CaymanTel

These comments are submitted in the above-captioned public consultation on behalf of CaymanTel Limited (“CaymanTel”). CaymanTel, a company formed under the laws of the Cayman Islands, intends to apply for license(s) pursuant to the Information and Communications Technology Authority Law, 2002 (“ICTA Law”) for the construction and operation of ICT Networks and provision of ICT Services throughout the Cayman Islands. CaymanTel commends the ICT Authority for initiating this consultation on Dispute Resolution Rules. The assurance of transparent, reliable and efficient procedures for the prompt resolution of disputes is crucial to the success of the industry reforms being implemented in the Cayman Islands.

General Considerations

As described in more detail in comments previously submitted to the ICT Authority, CaymanTel, through the senior management of its corporate parent Trans-World Telecom Caribbean Limited (“TWTC”), has had extensive experience with the development of competition and new regulatory frameworks in emerging telecommunications markets, including in the Caribbean region. On the basis of this experience, CaymanTel anticipates that, as competition is implemented here, disputes inevitably will arise between carriers, especially between new competitors and the incumbent carrier, Cable & Wireless (“C&W”). Such disputes

certainly can be expected to occur over interconnection issues, but will likely arise over a range of other issues.

This pattern has been apparent in virtually every market in the world that has made the transition from monopoly to competition, including across North America and in Europe. In fact, the effectiveness of the resolution of disputes between incumbent and competitive carriers is still very much a critical concern even in markets with relatively mature competition, such as the United States.¹

In every such case, a key determining factor in the resolution of disputes is the recognition of the fact that incumbent carriers and competitive carriers do not have equal bargaining power. Incumbent carriers have a dominant position in the market that gives them significant opportunities and incentives to resist the loss of customers and market share to new entrants. In this regard, time is on the incumbent's side. Delaying tactics, especially in the conduct of interconnection negotiations and in the failure to provide interconnection arrangements pursuant to negotiated agreements, are among the most common techniques used by incumbents to hobble competition. In addition to using delay to its own advantage, an incumbent can create significant difficulties by denying new competitors sufficient time to resolve problems. For example, incumbents have been known to cut off interconnection services for non-payment of disputed interconnection charges without allowing sufficient time to resolve the disputes. Incumbents have many other advantages, including control over facilities as well as over network and customer information, which they can exploit to their own benefit.

These issues are of particular concern in the Cayman Islands precisely because C&W is the incumbent carrier. As the ICT Authority is well aware, C&W has a strong regional and

See, e.g., "Promoting Swift and Stringent Enforcement," remarks by FCC Commissioner Kathleen Abernathy, Federal Communications Bar Association, Washington D.C., April 28, 2003
<<http://www.fcc.gov/commissioners/abernathy/speeches2003.html>>.

global presence. C&W been entrenched for decades as a monopoly carrier, not only in the Cayman Islands, but in dozens of countries around the world. It can draw upon immense global resources and expertise to find both subtle and overt ways to preserve as many advantages for itself as possible in a particular market. In fact, for the past twelve months TWTC, a fixed and wireless service licensee in Grenada, has been engaged in an extremely frustrating exercise in that country trying to achieve a reciprocal and fair interconnection agreement with C&W, which is also the incumbent carrier there.

In these circumstances, it can be predicted that any new competitor in the Cayman Islands, even TWTC with its own international experience, will be at a bargaining disadvantage. Consequently, no matter how diligently the parties appear to be negotiating in “good faith,” strong and swift regulatory intervention will be required to avoid undue delay and to resolve resource-consuming disputes in a timely fashion.

To achieve this, the ICT Authority must have a wide range of dispute resolution and enforcement tools at its disposal. Most importantly, however, it must have the means to step in quickly and promote a prompt resolution to avoid delays that may actually prevent the implementation of competition for the benefit of consumers in the Cayman Islands. The comments below reflect these overriding concerns.

Responses to Specific Questions Posed In Consultation Document

1 CaymanTel believes that, in general, the draft Dispute Resolution Rules provide a sound framework for the resolution of disputes in the Cayman Islands. The rules as proposed will assure both carriers and customers of fair and transparent mechanisms for the resolution of disputes, while allowing the ICTA significant flexibility to resolve disputes in the most

appropriate manner under the circumstances. However, CaymanTel is also concerned that to the extent that the proposed Rules do not assure prompt regulatory intervention when necessary to redress the imbalance of bargaining power between the incumbent and competitors, the Rules suffer from a fundamental flaw. A potential solution to this is proposed in Section III, below.

2. CaymanTel believes the Rules provide adequately for the treatment of complaints submitted by the general public.

3. It does not appear that matters other than those already listed in the Rules need to be required to be included in a Determination Request.

4. CaymanTel agrees that the ICT Authority should require that an officer of a licensee to sign a Rule 6(e) affidavit.

5. CaymanTel does not believe that there are instances when the Authority should decline to entertain a Determination Request other than those stipulated in Rule 11. In fact, as discussed in Section III, below, CaymanTel believes that some of the instances enumerated should be eliminated or clarified.

6. CaymanTel recognizes that, particularly in the early stages of the establishment of the new regulatory framework in the Cayman Islands and the refinement of approaches to new policy issues, the ICT Authority may need to rely upon various technical and/or economic experts. If the use of experts is necessary in the resolution of disputes because of the complexity or novelty of the issues, a portion of the cost of such experts (e.g., the amounts over a pre-determined threshold such as CI\$ 1,000 for individuals and CI\$10,000 for enterprises) equitably may be imposed on the parties. If experts are required because of the novelty of issues, both parties may fairly bear the expense. If one party is deemed a wrongdoer, however, that party should bear the expense. In any event, the Referring Party should be apprised of the ICT

Authority's intention to refer the matter to an expert, should be advised of the estimated cost of such a referral, and should be given the opportunity to withdraw the dispute. However, neither party should be required to pay for the costs of outside consultants or advisors who may be hired by the ICT Authority because of lack of adequate resources or when the major focus of the expert's work is on the development of a general policy rather than the resolution of a specific dispute between two or more parties.

7. The ICT Authority should contemplate a public hearing in any case where the public has or will be affected and/or public advocates can contribute a consumer's perspective to the dispute. However, formal public hearings can be time-consuming. Thus, in each individual case the ICT Authority must determine the appropriate balance between the benefits of a public hearing and the need for swift resolution. In any event, CaymanTel recommends that the records of all disputes between carriers, other than material pertaining to commercial, competitive or other confidential matters, be kept open and available for public inspection. This is important not only for the consuming public, but also for other competitive carriers which may benefit from the resolution of disputes between third parties. In general, public proceedings will accelerate progress toward the implementation of effective competition.

8. The further comments below address other matters pertaining to the Dispute Resolution Rules that CaymanTel believes the ICT Authority should consider.

Other Comments on Draft Rules

Timing (Rules 4, 7 and 9)

The timeframes set forth in this rule are too short for some purposes and too long for others. The five (5) days allowed for response to a Notice of Grievance is very short,

particularly if the Grievance is very complex. This problem would be ameliorated if the Rules specify either that the Respondent has five (5) business days or a total of ten (10) calendar days to provide a response.

On the other hand, the normal schedule set forth in this Rule requires that at least sixty (60) days pass before the ICT Authority can begin to get involved. For new competitors, such a length of time may be commercially very critical. During such a period, competitors may be cut off from interconnection services, or may suffer inadequate service and lose customers. To solve this problem, CaymanTel recommends that the ICT Authority amend its Rules to provide for some sort of interim and/or expedited relief in cases where the customers of one party or the other may be adversely affected by the delays inherent in the normal procedure. Such amended Rules should provide that a Referring Party may submit a Request for Interim And/or Expedited Relief along with a Determination Request:

- A Request for Interim Relief

(i) Such a request should describe with particularity the relief requested (e.g., a temporary restraint against the termination of service or against the imposition of disputed charges), and the harm that would be suffered, to the carrier and/or its customers, if the interim relief is not granted.

(ii) The ICT Authority should commit to acting on a Request for Interim Relief with significant speed. CaymanTel recommends that the ICT Authority hold a hearing on the request within three (3) business days, offering both the Referring and Responding Parties an opportunity to present their positions on the request. A decision to grant or deny the request should be made within twenty-four (24) hours after the close of the hearing.

A Request for Expedited Relief

- (i) Such a request should similarly include a description of the harm that would be incurred if the dispute is not finally resolved on an expedited basis. The request should be granted if the requesting party has demonstrated that, in the absence of expedited relief, customers would be harmed from the interruption or preclusion of service.
- (ii) The Rules should specify that the Responding Party should have an opportunity to respond to the Request for Expedited Relief within five (5) business days, and that the ICT Authority should rule on the request within ten (10) business days.
- (iii) If the ICT Authority grants the request, a settlement between the parties should be achieved, or a final decision in an arbitration or adjudication proceeding should be reached, within no more than sixty (60) days from the date of the filing of the Determination Request.

Orders for Further Negotiations (Rules 4(1) and 9(b))

The Rule 4(1) requires good faith negotiations for thirty (30) days after a grievance is filed and before a Determination Request is filed with the ICT Authority. Rule 9(b) allows the ICT Authority to direct the parties to continue negotiations. In CaymanTel's experience, including with C&W, parties are generally inclined to resolve disputes through negotiation, and the referral of a dispute to a regulatory authority indicates that the parties have reached an impasse. A provision allowing the ICT Authority to order additional negotiations is unlikely to be effective, and creates the risk that one or the other of the parties may use the dispute resolution procedures simply to cause further delay. If a dispute is referred to the ICT Authority,

the Authority should commit to using its good offices to facilitating a resolution as swiftly as possible.

Dismissal of Disputes (Rules 11 (h) and (i))

The provision in Rule 11 (h) allowing the ICT Authority to dismiss a dispute filing if it is not “of significant social and/or economic importance,” is very broad and subjective, and easily could be misapplied. Other provisions of Rule 11 appear to contain sufficient protections against abuse of the ICT Authority’s processes. CaymanTel recommends that Rule 11(h) be deleted.

Rule 11(i) allows dismissal of a dispute if the ICT Authority determines that the subject matter should continue to be governed by the terms and conditions of an existing contract between the parties. This provision will be completely ineffective if the parties have a dispute over the interpretation of an agreement. The Rule should allow the ICT Authority to interpret and enforce the provisions of such an agreement to resolve a dispute.

Appeals (Rule 19(2))

This Rule should make clear that, to the extent permitted by law, parties may appeal any determination by the ICT Authority in response to a Determination Request, including a decision to dismiss the request pursuant to Rule 11

Additionally, the Rule should specify the remedies available to parties in the event of a lack of determination by the ICT Authority, specifically any failure by the ICT Authority to act within specified timeframes.

Conclusion

Overall, CaymanTel believes the ICT Authority has proposed fair and workable Dispute Resolution Rules. CaymanTel appreciates the opportunity to submit these Comments, and hopes that the observations and suggestions set forth herein are helpful to the process.

Respectfully submitted,

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