



ICT Decision 2010-11

Grand Cayman, 29 October 2010

Decision on LIME's Application to Reconsider Certain Aspects of ICT Decision 2010-9

Summary

The Authority denies the application by LIME to reconsider paragraphs 27 and 28 of ICT Decision 2010-9. The Authority considers that ICT Decision 2010-9 is not a decision that is subject to reconsideration under section 78(1) of the ICTA Law. The Authority also notes that LIME's application for reconsideration does not identify any substantive or procedural reason for reconsidering that determination under the Authority's residual power to reconsider decisions not covered by subsection 78(1). Further, the Authority notes that LIME's application was filed after the deadline set out in section 78(3) of the ICTA Law.

(Note: This summary is provided for the convenience of the reader and does not constitute part of the Decision. For details and reasons for the conclusions, the reader is referred to the various parts of the Decision.)

BACKGROUND

1. Between February 2009 and September 2010, the Local Number Portability Consortium ("Consortium"), which includes representatives of Digicel, LIME, TeleCayman and WestTel, held several meetings in order to coordinate the implementation of Local Number Portability ("LNP") in the Cayman Islands. While the Consortium members made progress in some areas, they were unable to agree on other matters. In particular, the parties were unable to agree on the appropriate method of allocating voting rights within the Consortium.
2. The Consortium members requested that the Authority adjudicate this matter under the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 ("Dispute Resolution Regulations"). This dispute was raised with the Authority on 3 September 2010, by way of submissions filed by all four Consortium members. Reply comments were received from Digicel and LIME on 10 September 2010.
3. In ICT Decision 2010-9, Decision in Determination Request related to Allocation of Votes in the Number Portability Consortium, the Authority determined that the Consortium members will have an equal share of the votes and that a simple majority of 50%+1 will be required to reach a decision. In the event of a tie, the

Authority determined that the Consortium should hold a second vote within 24 hours giving members an opportunity to re-assess their positions. If the second vote again results in a tie, a casting vote will be assigned randomly.

THE APPLICATION

4. In a letter dated 19 October 2010, LIME requested that the Authority reconsider certain aspects of ICT Decision 2010-9. Specifically, LIME requested that the Authority remove the requirement to resolve voting deadlocks by selecting a casting vote at random. For the avoidance of doubt, LIME noted that it was not requesting a review of any other element of ICT Decision 2010-9.
5. LIME submitted that this aspect of ICT Decision 2010-9 is irrational. In LIME's view, the Legislature established the Authority under the *Information and Communications Technology Authority Law (2006 Revision)* ("ICTA Law") as the expert on telecommunications in the Cayman Islands, and the Government enacted the Dispute Resolution Regulations specifically to give it the jurisdiction to hear and resolve disputes among operators and between operators and consumers. Having been granted this jurisdiction by both the Legislature and the Governor in Council, LIME argued that it is irrational and inappropriate for the Authority to prevent disputes from being brought to it, by having them determined by random chance instead. LIME submitted that the Authority is the only entity that has jurisdiction to address these issues in the ICT sector. In LIME's opinion, the Legislature did not give the Authority the power to delegate this jurisdiction to a random number generator website or any similar random decision-making tool.
6. In its submission, LIME also noted that the Authority did not conduct any consultation on the question of how to deal with a deadlock or tie in the Consortium. In these circumstances, LIME argued that it is a breach of the requirements of natural justice for the Authority to make a determination on this issue.

PROCESS

7. A call for comments on LIME's application for reconsideration was issued by the Authority on 20 October 2010. The Authority invited comments on the following questions:
 - Does the Authority have jurisdiction, under section 78 of the Information and Communications Technology Authority Law (2006 Revision) or otherwise, to reconsider paragraphs 27 and 28 of ICT Decision 2010-9?
 - Assuming that the Authority has jurisdiction, should paragraphs 27 and 28 of ICT Decision 2010-9 be confirmed, reversed or modified, and for what reason(s)?

8. The Authority received a late submission from Digicel on 25 October 2010. In its submission, Digicel noted that it is also asking for the reconsideration of ICT Decision 2010-9 in part by the withdrawing of paragraph 27 and the replacement thereof with another mechanism for breaking a deadlocked vote at the Consortium. In response to the first question in the call for comments, Digicel noted that this proceeding was conducted under the Dispute Resolution Regulations. Further, Digicel noted that the Authority did not decline to hear the dispute in accordance with Regulation 10 and that, under Regulation 18(2), “[n]othing in these regulations precludes a party to a dispute from appealing a determination of the Authority”.
9. Digicel also recognized that section 78 of the ICTA Law does not allow the parties to ask for a reconsideration of ICT Decision 2010-9 by the Authority. However, Digicel submitted that the Authority, in previous decisions, “ruled that it can on application by any of the parties affected by its decisions, embark on a reconsideration on much the same principles as those which govern the parties access to Judicial Review in the Courts”. Digicel was therefore of the view that the Authority “may review its own decision outside of the specific provisions of Section 78 relying on the same inherent jurisdiction that a Court has to review ICTA’s determinations where such a decision is arbitrary and unreasonable”.
10. With regards to the second question in the call for comments, Digicel noted that it agrees with LIME’s assessment that paragraphs 27 and 28 of ICT Decision 2010-9 are arbitrary, irrational and unreasonable. Digicel therefore requested that ICT Decision 2010-9 be modified to specify that all deadlocks will be referred to the Authority for adjudication and that where the parties are unable to arrive at a unanimous decision on critical issues, that those matters too be settled by the Authority.

LEGISLATIVE AND REGULATORY FRAMEWORK

11. In reaching a decision on Digicel and LIME’s reconsideration application, the Authority is guided by the ICTA Law and, in particular, by section 78 which reads:

78. (1) This section shall apply to the following decisions of the Authority –

- (a) a decision not to grant a licence;*
- (b) a decision to revoke a licence;*
- (c) a decision to modify a licence under section 31(4);*
- (d) a decision to suspend a licence under section 32(1);*
- (e) a decision that a section 36 prohibition has been infringed;*
- (f) a decision that a section 40 prohibition has been infringed;*
- (g) with regard to an individual exemption under Part IV-*
 - (i) a decision to grant or refuse an individual exemption;*
 - (ii) a decision to impose any condition or obligation and a decision on the type of condition or obligation where such a condition or obligation has been imposed;*
 - (iii) a decision of the date and duration of the individual exemption and as to the period fixed for such exemption;*

- (iv) a decision to extend or not to extend the period for which an individual exemption has effect; or*
- (v) a decision on the duration of the extension referred to in subparagraph (iv);*
- (h) a decision to cancel an exemption;*
- (i) a decision to impose a penalty in accordance with Part IV and a decision as to the amount of such penalty;*
- (j) a decision to give a direction under section 47, 48 or 50;*
- (k) a decision in relation to a pre-contract dispute under section 67; and*
- (l) such other decision as may be prescribed.*

(2) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an application does not suspend the effect of any decision under paragraph (e), (f), (g), (h) or (j) to which the appeal relates.

(3) Where-

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

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

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

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

(6) Where an application is made under subsection (2) -

- (a) the Authority may, on application by the aggrieved person, order that the decision shall not take effect until a determination is made under subsection (3); and*
- (b) the Court shall not hear an appeal under section 80 in relation to a reconsideration under subsection (3) until the Authority has made a determination under subsection (3).*

12. The Authority is also guided by the Interpretation Law (1995 Revision) and, in particular, by sections 3 and 8. The relevant portions of the Interpretation Law are as follows:

3.(1) In this Law and in all Orders in Council, Laws, proclamations, regulations, rules, bye-laws, orders, directions, notices, forms and other instruments of a public character relating to the Islands, now in force or hereafter to be made, the following words and expressions shall have the meanings hereby assigned to them

respectively, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided-

(...)

“prescribed” means prescribed by the Law in which the word occurs or by any regulations made thereunder, and, in relation to any regulations, where no other authority is empowered in that behalf in the Law, prescribed by the Governor in Council;

(...)

8. *In computing time for the purpose of any Law, unless the contrary intention appears-*

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public general holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c) when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day; and

(d) when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

AUTHORITY ANALYSIS AND DETERMINATION

13. The jurisdictional issues raised by this application, namely the scope and applicability of section 78 of the ICTA Law, have been canvassed by the Authority in a number of previous decisions, including ICT Decision 2006-2, ICT Decision 2007-2, ICT Decision 2008-3, ICT Decision 2009-1, ICT Decision 2010-2 and ICT Decision 2010-3.

14. In ICT Decision 2010-3, for example, the Authority made the following comments regarding section 78:

As a general rule, the Authority derives its powers from its enabling statutes. Further, in accordance with well-established administrative law principles, the Authority has certain residual powers which are not explicitly mentioned in its enabling statutes, but which may be regarded as incidental or consequential to its statutory powers. The courts have recognized, for example, that an administrative tribunal may, in exceptional circumstances, reconsider a decision in order to correct an accidental mistake, set aside a decision obtained by fraud, or review a decision where facts subsequently discovered have revealed a miscarriage of justice. In the absence of such special circumstances, a tribunal’s

decision is irrevocable, unless the statute in question provides otherwise.¹

(...)

In order to avail itself of the opportunity to apply for reconsideration, LIME must demonstrate that the Decision falls within the scope of subsection 78(1) of the ICTA Law. If the decision is not enumerated in subsection 78(1) of the ICTA Law, the Authority considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to a proceeding at first instance before it, it should decline to entertain an application for reconsideration of a matter that falls outside the list of subject areas enumerated in section 78(1).

15. Having reviewed the submissions filed by LIME and Digicel in the present proceeding, the Authority does not see any reason to deviate from these principles. The Authority is of the view that section 78(1) should be interpreted so as to seek finality concerning its decisions in relation to all matters not enumerated in section 78(1). The Authority, accordingly, considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to an application at first instance before it, the Authority should decline to entertain an application for reconsideration of a matter that falls outside the list of those subject areas enumerated in section 78(1).
16. The Authority wishes to clarify that Digicel's comments on the Authority's "inherent jurisdictions" to review its decisions are inaccurate. The Authority has never ruled that it can "embark on a reconsideration on much the same principles as those which govern the parties access to Judicial Review in the Courts". Indeed, the Authority believes that this approach would contradict the fundamental intent and purpose of section 78. As noted above, the Authority has ruled in the past that its power to reconsider a decision that falls outside the list of subject areas enumerated in section 78(1) is extremely limited and can only be used in exceptional circumstances, such as instances of accidental mistakes, fraud, or miscarriages of justice. In the absence of such exceptional circumstances, the Authority's decisions are irrevocable, unless the ICTA Law, or a court, provides otherwise.
17. The Authority also notes that LIME's application for reconsideration was filed after the deadline stipulated in section 78(3) of the ICTA Law. Section 78(3) states that an application for reconsideration must be filed within fourteen days of the receipt of the decision and written reasons. In the present case, ICT Decision 2010-9 was issued on 1 October 2010. Therefore, in accordance with the rules governing the computation of time set out in section 8 of the Interpretation Law, the deadline to file an application for reconsideration was 15 October 2010. LIME's application for reconsideration was filed four days later, on 19 October 2010.

¹ Sir William Wade and Christopher Forsyth, *Administrative Law*, Ninth Edition, Oxford University Press, 2004, pp. 230 and 938.

18. Lastly, the Authority would like to point out that certain statements made by LIME in its description of the tie-breaking mechanism are both inflammatory and inaccurate. For example, LIME stated that “million dollar decisions affecting consumers in the country would be decided by a throw of the dice”. LIME also submitted that “[t]he Legislature certainly did not give a random number generator website the power to determine disputes in the ICT sector”. Despite LIME’s assertions to the contrary, ICT Decision 2010-9 would not result in LNP decisions being decided at random, nor would it delegate the decision-making power to a random number generator website or any similar random decision-making tool. Instead, the decision-making power would rest with the Consortium who has the deciding vote. The Authority notes that the Consortium is made up of the operators of the networks and systems that will interface with and rely on the LNP solution. The Authority remains of the view that these are the parties that have the required expertise and knowledge and are therefore in the best position make LNP related decisions such as selecting the most appropriate LNP solution, vendor, data exchange formats and processes, etc. Although the selection of the party to cast the deciding vote would be random, the decision itself would be made by an expert with detailed knowledge of the requirements for the LNP solution.
19. The Authority also considers that providing a deciding vote mechanism is entirely reasonable, and in fact, necessary. Decision making bodies routinely have mechanisms to settle a tie vote and, in the particular circumstances of the Consortium, the need for such a mechanism is plainly evident in a body with only four members. Indeed, Digicel, in its 18 August 2010 letter to the other Consortium members (which it provided as an attachment to its submission in the proceeding leading to ICT Decision 2010-9), recognized the need to deal with the situation where there was a split vote. Given the Authority's view that the Consortium is the body responsible for the selection of the LNP solution, a deciding vote mechanism is a necessity.

CONCLUSION

20. In light of the above, the Authority determines that LIME and Digicel’s reconsideration request does not satisfy the requirements of section 78 of the ICTA Law. Further, the Authority determines that LIME and Digicel have not identified any flaw in the procedural or substantive approach used by the Authority in arriving at the Decision and therefore the Decision should not be considered under the Authority’s residual power to reconsider decisions not covered by subsection 78(1). LIME's reconsideration request is therefore denied.