

Grand Cayman, 29 April 2010

Decision in Digicel Determination Request related to Digicel/LIME Interconnection Agreement Dispute

Overview

In this decision, the Authority makes determinations on six items of dispute between LIME and Digicel related to pre-contract disputes concerning the interconnection agreement between those parties.

(Note: This overview 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.)

THE APPLICATION

1. On 11 December 2009, the Information and Communications Technology Authority (the “Authority” or the “ICTA”) received a request from Digicel (Cayman) Limited (“Digicel”) for determinations in relation to six Interconnection Agreement disputes between itself and Cable and Wireless (Cayman Islands) Limited (“LIME”). In addition to the determination request setting out the areas of dispute and Digicel’s arguments in support of its views and supporting documentation, the request contained an affidavit in support of the Determination Request dated 9 December 2009. Digicel also noted that it would supply further supporting documents and evidence to assist the Authority in making the Determination which it endeavoured to provide within ten days. On 22 December 2009 the Authority received a supplementary submission from Digicel.
2. The disputes relate to the following six matters:
 - Dispute No. 1 - whether any rates and implementation method of new rates agreed under the 27 July 2004 Agreement between LIME, Wireless Ventures and Digicel continues to apply to any new interconnection agreement between LIME and Digicel or if it does not, whether a new glide path should apply to any subsequent interconnection rates agreed by or imposed on LIME and Digicel under the ICTA Law;
 - Dispute No. 2 – a) whether LIME is required under the ICTA Law to provide direct mobile to mobile interconnection with Digicel as requested by Digicel from as early as January 2009 before the expiration of the interconnection Agreement dated January 2004 and b) on what terms and c) whether LIME is entitled to levy a charge (a transit fee) for Digicel calls on LIME’s PSTN

network until such time as direct mobile to mobile interconnection is provided and if so, how should such a transit fee be determined;

- Dispute No. 3 - whether Digicel has an obligation to offer LIME an underlying interconnect service necessary to provide any new retail services it introduces in the market;
 - Dispute No. 4 - what fixed termination rates should be charged by LIME for set up and per minute fees and how they should be determined;
 - Dispute No. 5 - 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 they should be determined; and
 - Dispute No. 6 - whether LIME is entitled under the ICTA Law to charge different fixed to mobile retail rates to its fixed subscribers in the Cayman Islands market and whether those rates can differ from the rates LIME charges to terminate fixed calls on its own mobile network.
3. The disputes arise out of the need to reach a new interconnection agreement between LIME and Digicel. An interconnection agreement was signed on 29 January 2004 and had a term of 5 years (the “2004 ICA”). The 2004 ICA allowed for a further extension of six months to permit negotiations of a new agreement after the expiration of the agreement. This extension expired in mid 2009 and was then extended by mutual agreement whilst negotiations continued.
 4. According to Digicel the parties engaged in good faith negotiations on all aspects of the proposed new interconnection agreement and have failed to settle the above six disputes. Digicel believes it has exhausted all reasonable attempts to negotiate a settlement of the six disputes stated above.
 5. In a letter dated 27 November 2009, LIME notified Digicel that it intended to terminate the 2004 ICA effective 27 December 2009 and would provide interconnection services at the rates, terms, and conditions specified by LIME without Digicel’s agreement. As a result, Digicel filed a Dispute Determination Request with the Authority.

PROCESS

Interim Determination

6. On 17 December 2009, Authority staff met with representatives of LIME and Digicel in order to see if the parties could come to an agreement on interim rates that would apply between 27 December 2009 and the date of the Authority’s final determination on the dispute request. The parties were unable to conclude a written agreement on those interim rates. Accordingly, the Authority issued an interim determination on 24 December 2009.

7. The interim determination set out interim rates to be used by the parties until a final determination was made. Further, LIME and Digicel were directed to keep detailed records of the quantities and rates used to bill for each of the relevant interconnection services to potentially enable any adjustments to be applied retroactively to 27 December 2009 until such time that a final determination was reached. Finally, the Authority required that neither party terminate the physical interconnection arrangements or prevent or interfere with the termination of interconnection traffic without the prior written approval of the Authority.
8. On 7 January 2010, Digicel submitted a request for reconsideration of the Authority's 24 December 2009 interim determination. The Authority issued a call for comments on the reconsideration request on 7 January 2010, and in response, the Authority received comments from LIME on 18 January 2010 and reply comments from Digicel on 22 January 2009. On 3 February 2010, the Authority issued ICT Decision 2010-1, denying the request for reconsideration and making the submissions by the parties in the reconsideration request proceeding part of the record of the main dispute resolution proceeding.

Request for inclusion of TeleCayman and WestTel

9. In an 8 January 2010 letter, LIME requested that TeleCayman and WestTel be treated as interested parties in the dispute, in accordance with section 13 of the Dispute Resolution Regulations. In addition, LIME requested that the Authority require TeleCayman and WestTel to file written submissions or to acknowledge in writing that they will accept the application of the Authority's determination to their interconnection agreements. LIME further requested that the Authority explicitly state that any determination on rates resulting from this proceeding will be applied to TeleCayman and WestTel.
10. On 13 January 2010, Digicel filed a letter with the Authority opposing LIME's request. Digicel argued that its determination request arose from specific circumstances, which are not applicable to TeleCayman and WestTel. Further, Digicel noted that LIME did not provide any evidence to suggest that it has tried and failed to negotiate interconnection agreements with these operators. Therefore, Digicel urged the Authority to deny LIME's request in its entirety.
11. In a letter to the parties on 14 January 2010, the Authority concluded that there was no basis for an order under section 13 of the Dispute Resolution Regulations and the Authority considered that it was not appropriate to require TeleCayman and WestTel to file submissions in this proceeding nor was it appropriate to issue a ruling stating that any determination on rates resulting from this proceeding will be applicable to TeleCayman and WestTel.
12. However, while the Authority was not convinced that any determinations in this proceeding would necessarily have a significant impact on all licensees, it did recognize that the determinations may influence current or future interconnection agreement negotiations. Therefore, the Authority considered that it was preferable to issue a non-mandatory request for information to TeleCayman and

WestTel whereby they were given the opportunity, but were not required, to submit comments on the disputes.

13. TeleCayman submitted comments on 26 January 2010 and Digicel filed a reply to those comments on 2 February 2010.

Response to Determination Request and Digicel Reply

14. On 11 January 2010 LIME submitted its response to Digicel's Determination Request and Supplemental Submission filed 22 December 2009.
15. On 12 January 2010 Authority staff contacted LIME via e-mail concerning a factual inaccuracy in its response to the Determination Request. On the same day LIME provided a revised version of its response.
16. In a letter dated 13 January 2010, Digicel requested to be given the right to respond to LIME's submission given the nature of the subject matter of the dispute and the complexity of the determination. The Authority responded to Digicel's request in an e-mail of 14 January 2009. The Authority determined that, although the Dispute Resolution Regulations do not explicitly provide a right of reply to Digicel, it was appropriate in the present case to allow such a reply. The Authority emphasized, however, that Digicel's reply must be responsive to LIME's 11 January 2010 submission and must not introduce any new evidence.
17. Digicel filed its reply to LIME's 12 January 2010 submission on 22 January 2010.

AUTHORITY'S ANALYSIS AND DECISION

Dispute No.1

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

Digicel's Determination Request

19. In the 2004 AA the parties reached agreement on, among other things, a thirty month transitional period from the initial rates agreed in the 2004 AA to Forward Looking Long Run Incremental Cost ("FLLRIC") derived mobile and fixed termination rates whereby rates would be changed on a quarterly basis to move from the 2004 AA initial rates to the FLLRIC derived rates.

20. Digicel stated that it was of the view that the 2004 AA still operates and that the agreed Mobile Termination Rate (“MTR”) of CI\$0.08965/min should be phased in over a thirty month period.
21. Digicel submitted that the glide path approach in the 2004 AA would ensure stability in the financial standing of the party which would otherwise suffer an immediate and dramatic decline in its revenues. A glide path would further offer a grandfather period over which the party suffering the drop in revenues could introduce ameliorating remedies to adjust to the fall in revenues or create alternate sources.
22. Digicel submitted that it is global best regulatory practice to impose a glide path when a country implements rates following a cost calculation exercise. It further submitted that standard procedure in the EU when imposing new rates is to implement such new rates using a 3 - 5 year glide path and that ECTEL imposed a 3 year glide path following implementation of new recommended rates.
23. In its 22 December 2010 supplementary filing, Digicel further submitted that the use of a glide path would ensure mobile users are not unduly negatively impacted by the reduction of the MTR. According to Digicel the two-sided nature of the market for mobile services makes it likely that an abrupt regulated reduction in the MTR will result in increased retail prices as operators seek to recover lost MTR revenue. This negative correlation is called the “waterbed effect”. Digicel also submitted that glide paths are understood to be an “incentive mechanism” which improves the efficiency of the mobile operator and enables gains to be shared with end-users in the form of lower prices.
24. Digicel submitted that it has been unable to arrive at an agreement on this issue with LIME and requested the Authority determine that a glide path should form part of the new interconnection agreement and that such glide path should be implemented to decrease the MTR from CI\$0.1845/min to CI\$0.08965/min in a linear manner on a quarterly basis during a period of thirty months from the date of the determination.

Responses

25. In its 11 January 2010 reply, LIME concurred that the parties had agreed a new MTR under the PLMN Terminating Access Service of CI\$0.08965/min in place of the CI\$0.1845/min currently charged. The parties disagreed on whether this rate ought to be implemented now or in thirty months.
26. LIME opposed the introduction of a glide path, and submitted that the goal of implementation of cost-oriented rates pursuant to the ICTA Law and the Regulations is not in keeping with a thirty-month delay for implementation of the agreed MTR and that such a delay is not in the best interests of customers. LIME submitted that the agreed upon rate of CI\$0.08965/min is more cost-oriented than the current MTR and therefore is in keeping with the objectives of the ICTA Law. LIME also referred to Digicel’s 10 August 2009 response to the Authority’s Public Consultation on FLLRIC Implementation (CD 2009-1) where, based on its

- own analysis and that of its external consultants, Digicel estimated the cost of mobile termination to be CI\$0.0929/min using a modified version of the 3G mobile FLLRIC module.
27. LIME submitted that Digicel should plan with sufficient flexibility to avoid any financial detriments where a MTR reduction is foreseen, or should have been foreseen. While LIME disputed the existence of the waterbed effect, it submitted that such an approach should include plans to offset any waterbed effect. In LIME's view, Digicel's suggestion of a waterbed effect and its threat of increased retail prices and other consequences are indicative of Digicel's resistance to fair competition. LIME submitted that there does not appear to be any evidence that the theory underlying the waterbed effect is reflected in reality. According to LIME, in other markets where Caribbean MTRs have been reduced, including for example, Turks & Caicos, Anguilla and the ECTEL markets, the consequences of a working waterbed effect have not materialized.
 28. Further, based on an evaluation of the impacts of the cash flows between the parties for termination of traffic in their respective mobile operations in the Cayman Islands, LIME concluded that the financial impact cannot be characterised as a windfall or that a reduction of the MTR would cause financial shock in the absence of a thirty month period of adjustment.
 29. LIME suggested that the FLLRIC rates were contemplated by the parties for implementation in 2006. In LIME's view there should be no further need to introduce ameliorating remedies, as the higher MTR from 2006 to 2009 should more than compensate for the reduction in revenue following a reduction in the MTR in 2010. Nevertheless, in the event that the Authority were to take the position that a glide path is necessary, LIME submitted that the precedent of reductions in ECTEL be followed and that an initial sharp reduction bringing the MTR into a range that is more in keeping with a target cost-oriented rate is appropriate. In LIME's view the use of glide paths in some of European jurisdictions is an inadequate basis on which to impose a glide path in the Cayman Islands considering the difference in markets and current state of affairs.
 30. LIME did not agree that glide paths improve efficiency as suggested in Digicel's supplementary submission. In LIME's view it was not the glide path itself that encouraged efficiency, but rather the cost-oriented rate. According to LIME, an MTR that remains well in excess of costs would not encourage efficiency but rather would delay efficiencies from implementing a more cost-oriented rate.
 31. LIME submitted that the 2004 AA is no longer in force. In LIME's view the agreement was not and cannot have been intended to be of perpetual effect. Further, LIME considers that as the 2004 AA was entered into in contemplation of the introduction of FLLRIC in 2006, the performance of that agreement in 2010 would be radically different from what was agreed to by the parties in 2004. LIME therefore submitted that the 2004 AA has been discharged by frustration, as the unexpected delay in the completion of the FLLRIC model goes far beyond the parties' contemplation. Even if it was not discharged by frustration, LIME

considers that the 2004 AA was inexorably linked to the 2004 ICA and should be treated on that basis as being of no further effect.

32. Digicel in its reply comments maintained that the 2004 AA is still in place and it cannot expire until the FLLRIC result is determined or a new agreement replaces the 2004 AA.
33. TeleCayman opposed the concept of a “glide path”. In its view, there exists no legislative basis for such an approach considering the ICTA Law clearly states that the rates must be cost-oriented. Acceding to Digicel’s request would, according to TeleCayman, keep mobile rates for the Cayman Islands consumer unnecessarily high for close to three years. TeleCayman submitted that it is in the best interests of the people of the Cayman Islands that mobile rates reflect cost.

Authority’s Analysis

Expiration of Amending Agreement

34. Digicel and LIME dispute whether the 2004 AA continues to apply to any new interconnection agreement between LIME and Digicel. Digicel submitted that the 2004 AA stands alone from the 2004 ICA and that the 2004 AA is related to, but not an integral part of the 2004 ICA. LIME submitted that the 2004 AA cannot properly be said to stand on its own and that the 2004 AA cannot be said to survive the expiration of the 2004 ICA.
35. In evaluating these claims, the Authority reviewed the 2004 AA and notes that the 27 July 2004 covering letter identifies that “*the final mobile termination rates to be put into place as part of the Parties’ various interconnection agreements*” (emphasis added). The first full paragraph of the 2004 AA repeats the same clause. Besides being identified by the parties as part of their various interconnection agreements, the Authority notes that section 9 of the 2004 AA identifies that the “*existing agreements between the Parties in relation to interconnection shall be deemed to have been amended so as to give full effect to the terms of this Agreement*”. In addition, the Authority notes that the termination rates content of the 2004 AA is, in fact, an amendment to one of the schedules in the interconnection agreements. The terms and conditions applicable to the provisioning of termination services are provided in other schedules of the 2004 ICA and the rates specified in the 2004 AA are dependent on those terms and conditions. Given this, the Authority cannot agree that the 2004 AA is a separate agreement. In the Authority’s view it is an integral part of the 2004 ICA.
36. It is therefore the Authority’s view that any expiration of the 2004 ICA leads to the expiration of the 2004 AA.
37. In terms of the expiration date of the 2004 ICA, LIME was of the view that it could terminate the agreement but continue to provide interconnection services at unilaterally imposed rates, while Digicel was of the view that the 2004 ICA continued in force until such time as the already agreed terms resulting from the parties ongoing discussions and the terms as determined by the Authority in the

dispute resolution were finalized and incorporated in a new interconnection agreement.

38. In evaluating these positions, the Authority reviewed the terms of the 2004 ICA, the ICTA Law and the ICTA (Interconnection and Infrastructure Sharing) Regulations ("Interconnection Regulations"). The Authority can find no basis on which one party in an interconnection dispute can unilaterally impose interconnection terms and conditions on the other party. Under the ICTA Law and Interconnection Regulations, parties are required to negotiate the terms and conditions for interconnection and where there are disputes, parties are able to request a dispute resolution determination from the Authority.
39. In addition, the Authority notes that Clause 2.2 of the Legal Framework section of the 2004 ICA states that, for renewal, the terms and conditions of the agreement shall continue in full force and effect until such time as a replacement agreement is negotiated and approved, provided that, neither party shall be obliged to continue to provide services if no agreement is reached and approved within six months of the conclusion of the term of the agreement. In its 27 November 2009 letter, LIME did not say that it would no longer provide services. Instead it stated that it would unilaterally impose terms and conditions on Digicel. From the plain reading of the agreement, the Authority concludes that LIME was not permitted to do this. In the Authority's view, instead of threatening to unilaterally impose terms and conditions on the interconnection arrangements, LIME should have filed a dispute resolution request with the Authority to resolve the dispute.
40. On a related issue, in its 7 January 2010 letter, Digicel argued that it had reached an agreement with LIME at a 17 December 2009 meeting with Authority representatives in relation to the terms that would apply between the parties in the interim period up to the date of the Authority's final determination of the Determination Request. Digicel was of the view that such an agreement to cover limited aspects of the relationship between Digicel and LIME and/or for an interim period pending completion of the entire interconnection agreement, did not have to be in writing to be effective. While the Authority has substantial concerns about LIME's behaviour of initially verbally agreeing to certain terms and then subsequently changing its position, given that the Authority has agreed with Digicel's position that the terms of the 2004 ICA continue until a dispute determination has been issued, this argument is moot in the current case. However, the parties should be aware that section 66(1) of the ICTA Law clearly states that "*interconnection agreements between licensees shall be in writing, and copies of each agreement shall be submitted to the Authority...*". Contrary to Digicel's position, the Authority considers this requirement extends to all interconnection agreements, whether they cover limited aspects of the relationship between parties or whether they are for interim periods.
41. Given the above, the Authority determines that the terms and conditions of the 2004 ICA as amended by the 2004 AA remain in place until the date of this determination on the six items of dispute between the parties.

Economic rationale for glide path

42. The Authority notes that a two-sided market exists where there are two distinct user groups that provide each other with network benefits (or network externalities). In the case of mobile services, calling parties benefit from having more people connected to a mobile network that they can call, and users benefit from being able to receive calls. In Digicel's view this two sided nature of the market means that retail prices of mobile services must be taken into account when considering a reduction in the MTR. Labelled the "waterbed effect", Digicel argued on the basis of economic theory that any reduction in mobile termination rates would lead to an increase in mobile retail prices since mobile operators will wish to maximise profits in a two-sided mobile telecommunications market where the cost of termination is being reduced.
43. Based on the evidence submitted by Digicel, the Authority considers that a waterbed effect may exist. However, the issue that needs to be examined is whether the particular structure of the Cayman market would support the workings of a waterbed effect and if so, what the potential strength, if any, of such effect might be. Digicel has provided no convincing material or economic analysis on the potential impact on prices or effects on subscriber numbers in the Cayman market from a reduction in the MTR. According to Digicel, a lower MTR will result in reductions in the number of subscribers, reductions in coverage and/or higher retail price in some unknown combinations, all of which are predicted by academic theory. However, while Digicel has provided academic support for the existence of a waterbed effect it also identifies that it does not develop its commercial strategy based on academic guidance.
44. The Authority has reviewed the literature relied upon by Digicel. Of particular interest the Authority notes the reference to London-based academics Genokos and Valetti. Their recent paper "Testing the Waterbed Effect in Mobile Telephony" uses econometric methods to show that regulated reductions in the MTR increase mobile retail prices and also provides evidence that both competition and market saturation affect the overall impact of the waterbed effect. In particular, the authors note that the waterbed effect is expected to be lower in high penetration markets and find that the waterbed effect is stronger the more intense the competition.
45. When competition is fierce, the Authority considers a reduction in the MTR may imply that mobile operators would not recover their costs (or the rate of return would fall below that of the cost of capital). In this case operators may seek other means to bring themselves into balance by increasing revenues from other sources, for example, mobile subscription fees. While competition in the mobile market in Cayman is such that the Authority in 2004 removed regulatory constraints on LIME's mobile operations, the existence of only two mobile operators in Cayman may suggest that the degree of competitive intensity is such that margins may exist which have not been competed away and reductions to the MTR may be readily absorbed by the operators.

46. Given the high penetration rate and nature of competition in the Cayman Islands mobile market, the Authority considers that any waterbed effect in the Cayman is likely to be weak and hence of minor importance in the determination regarding a glide path.
47. Regarding the argument put forward by Digicel that any immediate drop in the MTR would have disruptive effects on the market, the Authority notes that as long as Digicel is able to price mobile termination above its underlying cost of production then the service will continue to be a source of economic profit. Also, even in the event that on balance, holding all other things constant, Digicel were to suffer a loss, second order effects from reductions in retail prices (such as stimulated increased calling) may have some offsetting effects. In addition, the overall profitability of Digicel is affected by a number of factors other than simply the revenue it receives from the MTR including, for example, the growth of revenue streams from data, messaging and international roaming services. Given these considerations, the Authority is not convinced that there will be any significant negative disruption in the market from a reduced MTR.
48. With regards to the comment by Digicel that a lowering of the MTR will create a windfall for LIME, the Authority notes that market competition always involves transfers from one market participant to another. When the Cayman telecommunications market was liberalised and LIME lowered its prices due to competitive pressures, transfers occurred from LIME to consumers and its competitors. Promotion of competition to the benefit of end-users will inevitably to some degree involve shifting of costs and revenue in the market.
49. Regarding international experience quoted by Digicel in support of a glide path, the Authority is unconvinced. While (some) European regulators of markets with well-established competition between 3, 4 or 5 competitors find glide paths to be appropriate, the Authority considers that the situation facing the Authority is different.
50. In the Authority's view there is a risk that any adjustment path from the current rate down to the agreed lower MTR may simply serve to decrease the overall level of efficiency that could otherwise have been achieved in the retail markets where both fixed to mobile and mobile to mobile services are provided, and as such represent a lost opportunity to increase competition and consumer welfare.

Cost Orientation and Glide path

51. Both LIME and TeleCayman opposed the introduction of a glide path with reference to the concept of cost orientation contained in the ICTA Law and Regulations.
52. In the Authority's view the ICTA Law clearly demonstrates the obligation on the part of licensees to negotiate interconnection agreements in good faith and to agree rates for services which are cost-oriented. In particular, sections 65 to 68 of the ICTA Law set out the regulatory regime for interconnection between licensees. Section 68(3) of the ICTA Law states that rates contained in

interconnection agreements must be “*Cost-oriented rates that are reasonable and arrived at in transparent manner having regard to economic feasibility, which 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.*”

53. The statutory obligation to negotiate interconnection arrangements is also reflected in the Interconnection Regulations. Regulation 6 repeats the statutory obligation to negotiate interconnection and to provide interconnection in good faith. Regulation 6(h) states that “*Interconnection...shall be cost oriented and shall be set to allow the responder to recover a reasonable rate of return on his capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responders fixed and common costs.*”
54. Based on the submissions received by the Authority, it has no reason to believe that the C\$0.08965/min MTR agreed to by the parties is not cost-oriented and hence contrary to the ICTA Law or the Regulations or the relevant licences.
55. While the parties in the dispute have agreed on a new MTR they have not agreed on whether or not there should be a glide path from the current rate to that new agreed rate. Given these circumstances and the discussion above concerning the effective expiration of the 2004 ICA and the economic rationale for a glide path in the Cayman Islands case, the Authority determines that the new agreed MTR should be implemented immediately with no glide path.

The Authority’s decision: Dispute No.1

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

Dispute No.2

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

Digicel’s Determination Request

58. Digicel maintained that under the ICTA Law it is entitled to have its mobile network connected directly to the mobile network of LIME in order to avoid paying a transit rate to LIME for calls terminating on LIME’s mobile network.

59. According to Digicel, it requested an offer on direct mobile to mobile interconnection in January 2009 and LIME replied to the request on 26 October 2009 with its proposed offer. Digicel submitted that LIME provided no supporting evidence for the costs included in the offer. In particular, Digicel argued that charges such as "billing upgrade" and "IT-Services" should be included in the MTR and should not be allowed to be charged for separately as part of a joining service fee. Further, Digicel argued that a FLLRIC model would include an inter-operator billing system and that the need for LIME to upgrade or modify its billing system is irrelevant in a forward-looking context. Finally, Digicel submitted that the cost of establishing direct interconnect between the parties should not be borne by Digicel alone since the links will be either bi-directional or at least be able to facilitate direct termination of LIME traffic to Digicel.
60. Digicel requested that the Authority determine that the charges payable by Digicel for direct mobile to mobile interconnection should be:
- minus all references to the "Billing Upgrade" and "IT services";
 - minus costs for all equipment which has to be duplicated on Digicel's side of the point of the interconnection; and
 - shared equally where equipment/items are used jointly between the parties.
61. Further, Digicel requested that the Authority set the full cost to Digicel of LIME providing them with direct mobile to mobile at the cost of the items provided by Digicel in Exhibit D of its determination request or in the alternative determine that LIME pay Digicel a charge similar to that requested by LIME for facilitating termination on its mobile network.
62. Finally, Digicel requested that the Authority determine that the transit fee charged by LIME should be set to zero from the date of the determination request until the date when the direct mobile to mobile interconnection is installed and exchanging live traffic. Digicel noted that in Trinidad and Tobago ("T&T") the issue of transit fees and direct mobile to mobile interconnection was addressed in a March 2008 arbitration where the Telecommunications Authority of T&T ruled that the transit rate should be 0.4 T&T cents and should not be charged until the incumbent dominant operator, Telecommunications Services of Trinidad and Tobago ("TSTT"), had provided Digicel (T&T) with an alternative for a typical direct connection to its mobile network.

Responses

63. LIME submitted that this dispute fails on a preliminary point to meet the criteria required for the submission of a dispute in accordance with Regulation 3 of the Dispute Resolution Regulations. In LIME's view, no negotiations can be said to have taken place between the parties in respect of direct mobile to mobile interconnection.

64. The first informal request for mobile to mobile interconnection on LIME's records is contained in e-mail from LIME to Digicel dated 3 March 2009. LIME submits that Section 65 of the ICTA Law requires a licensee to make an interconnection request with another licensee in writing and that Regulation 8(2) of the Interconnection Regulations provides that a request (defined in section 2 as a formal application for interconnection of infrastructure sharing) should contain certain information including projected quantities to be ordered.
65. LIME submitted that even without the formal requirements for request being met, it took steps towards the preparation of a proposal which was not successfully brought to closure. As a consequence, LIME requested from Digicel a forecast, in accordance with Regulation 8(2) of the Interconnection Regulations to complete the processing of the informal request. With the forecast received from Digicel and a formal proposal submitted to Digicel on 26 October 2009, it is LIME view that the parties ought properly to discuss its contents. Accordingly, LIME requested that the Authority exercise its discretion in accordance with Regulation 8 of the Dispute Resolution Regulations to direct the parties to commence or continue reasonable efforts to resolve the dispute.
66. With regards to the apportionment of costs, LIME identified that section 68 of the ICTA Law states that "*the cost of making any interconnection to the ICT network of another licensee shall be borne by the licensee requesting the interconnection*" and made reference to definitions of the terms "request", "requestor" and "responder" in Regulation 2 of the Interconnection Regulations.
67. LIME submitted that Digicel, as the party requesting direct mobile to mobile interconnection, is the requestor as defined in Regulation 2 of the Interconnection Regulations, and therefore obligated to pay all costs associated with such interconnection.
68. Regarding the Digicel reference to the March arbitration in T&T, LIME submitted that the arbitration panel found that the transit charge should not be offered until such time as TSTT had offered an alternative to the transit arrangement, and in the event that Digicel choose to continue using the existing arrangement after receiving a proposal for direct interconnection, that the transit rate should apply from thirty days following the offer for direct interconnection. In LIME's view, it follows that it has already in this particular case met the proposal requirement and that Digicel should continue to pay the transit charges for the use of the transit service until such time as the parties are able to agree on terms and conditions and charges for the service, or until such time as (after negotiation) the parties have properly referred the matter to the Authority as a dispute for resolution.
69. In Digicel's reply comments it admitted that the first e-mail sent by it in relation to direct mobile to mobile interconnection was 3 March 2009, but insisted that the matter was addressed at a meeting in January 2009. Nevertheless, Digicel submitted that LIME's proposal was delivered late in breach of section 65 of the ICTA Law and section 8(7) of the Interconnection Regulations. Further, Digicel

submitted that it had exhausted all effort to bring amicable resolution to this dispute.

70. Regarding the apportionment of costs, Digicel suggested that LIME's reading of the ICTA Law and Regulations in this particular matter was misguided and a proper reading must be that a request is made whenever a minute of traffic is being handed over to the other network.

Authority's Analysis

71. Based on the submissions, the Authority considers that the parties have not made a reasonable effort to settle the dispute before the Authority. While the Authority acknowledges that both parties have engaged in discussions on direct mobile to mobile interconnection, the Authority is of the view that adequate negotiation is lacking.
72. Digicel disputed cost items contained in the LIME proposal which it has been unable to verify. Further, Digicel admitted that they have no evidence that the costs in LIME's offer are correct and based on these assertions requested that the Authority rule that certain cost elements be deleted from LIME's proposal. While the Authority acknowledges that Digicel's lack of faith in the LIME proposal may be a result of brevity of the proposal itself, the Authority considers that further negotiations on the specifics of the LIME proposal may improve Digicel's understanding of its contents and assist in bringing the dispute to closure.
73. With regard to the issue of whether LIME is required under the ICTA Law to provide direct mobile to mobile interconnection with Digicel the Authority notes that all licensees have an obligation to provide interconnection. While the Authority acknowledges that the wording of section 68 of the ICTA Law requires the cost of interconnection to be borne by the licensee requesting the interconnection, the Authority also refers parties to Regulation 6(g) of the Interconnection Regulations which states: "*costs shall be borne either by the requestor or the responder or both based on whether respective requests and compliance with those requests cause costs to be incurred; and in accordance with an interconnection and infrastructure agreement between the parties*" and Regulation 10(1)(c) which states that a responder's charges for interconnection shall be "*reciprocal for the same service in order that the responder and requestor pay the same rate for providing each other the same services*".
74. Regarding Digicel's request to set the transit fee to zero from the date of the dispute application until the date when direct mobile to mobile interconnection is in place and exchanging live traffic, the Authority notes that this would contravene the requirement of the ICTA Law and regulations for cost-oriented rates.

The Authority's decision: Dispute No.2

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

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

Dispute No.3

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

Digicel's Determination Request

77. Digicel submitted that LIME is required under the 2004 ICA to offer to Digicel all new services by virtue of clause 42 Legal Framework (New Services) and that this is obligation also follows from Annex 5 PART 6 - Wholesale Services sections 64-70 in LIME's License. In the new interconnection agreement LIME is proposing that the obligation be mutual. Digicel disagrees and insists that the original clause be maintained in its entirety.
78. Digicel requests that the Authority determine that the obligation remains wholly an obligation of LIME's and if Digicel should have any obligation at all it should only be an obligation to conduct good faith negotiations to settle the terms of any new services to be offered to LIME.

Responses

79. LIME disagreed with Digicel's interpretation of clauses 64-70 of Annex 5 of LIME's 10 July 2003 ICT Licence (the "Licence"). LIME asserted that it must offer any service to other licensed operators on a wholesale basis if the Authority has issued a written direction requiring it to do. LIME identified that it is prepared to comply with a directive given by the Authority in exercise of its powers, but ought not to be obliged to exceed that obligation.
80. LIME submitted that clause 42 in the 2004 ICA goes beyond the requirements of the legislation and of LIME's ICT Licence. If there is to be an obligation to provide underlying wholesale services, whether by contract, by licence, or by regulation, LIME submitted that the obligation ought to be reciprocal.
81. LIME asked the Authority to reject Digicel's request for the inclusion of the asymmetric obligation and to mandate the inclusion of a mutual contractual obligation under the new interconnection agreement to provide underlying wholesale services. In the alternative, LIME asked that this clause be deleted in its entirety, and that the power to mandate the provision of a wholesale service should rest solely with the Authority.

Authority's Analysis

82. The wording of the dispute by Digicel suggests there is some confusion over the interpretation of the wholesale service as identified in LIME's licence and

interconnection service more generally as defined by the ICTA Law. Clauses 64-70 of Annex 5 of LIME's licence is related to the mandate of resale and the obligation on LIME to offer retail services on a wholesale basis should the Authority determine that this is appropriate. This is different from the obligation under clause 42(1) of 2004 ICA to provide interconnection for retail services that are introduced in the market.

83. The Authority notes that, in accordance to section 65 of the ICTA Law, all licensees have an obligation to provide interconnection and, in accordance with LIME's licence, it has an obligation to provide certain wholesale services. As these requirements are adequately addressed in the ICTA Law and the licence, the Authority sees no need that they be duplicated as conditions in interconnection agreements.

The Authority's decision: Dispute No.3

84. The Authority determines that the content of clause 42(1) be deleted in its entirety.

Dispute No.4

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

Digicel's Determination Request

86. Digicel requested that the Authority intervene under the ICTA Law to set the FTR. Digicel proposed that the FTR should be decreased by the same percentage as the MTR, and based on the same rationale outlined under Dispute 1 be subject to a glide path.
87. Digicel submitted that even with such a proportionate decrease, the FTR will still be well above the European average FTR and that by leaving the FTR at the current level mobile subscribers will effectively will be subsidising the fixed network.

Responses

88. LIME submitted that 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 that it would be inappropriate to apply a different rate until a determination is made in the FLLRIC proceeding.
89. LIME disagreed with Digicel's claim that mobile subscribers are subsidising the fixed network especially considering the MTR currently being charged.

Authority's Analysis

90. As noted above, parties are required to negotiate cost-oriented interconnection rates.

91. In the Authority's view simple references to benchmark rates in other countries do not constitute sufficient evidence for a departure from cost orientation in Cayman. First, it is unclear to the Authority whether the rates referred are in fact cost-oriented in the countries in question, i.e. based on a cost model. Second, differences in population size, geographical characteristics, number of operators, cost of capital etc. make any comparisons uncertain. Finally, Digicel provided no rationale that a reduction in the FTR by the same percentage as the MTR would result in a cost-oriented rate.
92. The Authority considers that the representations made to it concerning the FTR do not enable it make a final determination at this date.
93. In terms of an appropriate costing methodology, the Authority notes that the development of the FLLRIC model is continuing. The Authority anticipates that once the FLLRIC methodology and model is approved, one of the uses of the model could be a review of the costs associated with fixed termination. If the parties are unable to agree to cost-oriented fixed termination rates, then after the FLLRIC model is approved, the Authority could have a follow-up proceeding on the FTR. The Authority anticipates that completing the FLLRIC model and then having a follow-up proceeding on the FTR will likely take considerable time.
94. As the Authority does not have satisfactory information on which to make a final determination on an appropriate cost-oriented rate, the Authority therefore determines that it will issue an interim order setting the interim rates for fixed termination.
95. However, the Authority notes that the parties may be reluctant to have interim rates and may prefer to have final rates with no potential retroactive adjustments. If, after receipt of this decision, the parties are able to agree on rates, the Authority would remove the requirement for interim rates.

The Authority's decision: Dispute No.4

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

Dispute No.5

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

Digicel's Determination Request

98. According to Digicel, LIME proposed that the transit rate under the new interconnection agreement be set at CI\$0.0158/min. Digicel proposed that the transit rates be set to zero awaiting the determination of mobile to mobile interconnection being implemented. Unlike its proposal on MTR and FTR Digicel was of the view that the transit rate reduction should not be subject to a glide path.
99. Digicel believed that the transit fees currently charged by LIME are exorbitant and as such should be decreased by 95%. Even with this decrease Digicel submitted that transit rates in Cayman would still be well above transit rates in T&T and more in line with Scandinavian transit rates.
100. Since the transit rate has to be added to the MTR when Digicel terminates traffic on LIME's mobile network, Digicel submitted that the transit rates proportion of the total cost to Digicel of terminating traffic on LIME's mobile network will increase when the MTR is decreased. In Digicel's view this provides LIME with an effective MTR well above what LIME should be entitled to and effectively breaches the reciprocity obligation in the ICTA Law.

Responses

101. LIME submitted that the current charge for the transit service should remain unchanged. In LIME's view it is based on the genuine cost incurred in the provision of the transit service and, as such, is consistent with the ICTA Law.
102. LIME submitted that the transit charge is not a part of the MTR and should not be considered as such. It is recognized as a separate service offered by which calls from one network are passed across another to arrive at a destination network.
103. As regards Digicel's submission that transit charges be set at zero until such a time that mobile to mobile interconnection is in place, LIME reiterated its responses to Dispute No. 2 that this would result in removing incentives for Digicel to negotiate mobile to mobile interconnection and result in LIME subsidising Digicel calls to LIME's mobile network, which is contrary to the ICTA Law.
104. Digicel maintained that the current transit rates cannot hold as they have not been subject to independent scrutiny and are being used by LIME to effectively charge an asymmetric MTR.

Authority's Analysis

105. The Authority agrees with LIME that the transit service is separate from the mobile termination service. The 2004 ICA between Digicel and LIME allowed LIME to charge for transit from its fixed network to its mobile network. While any reduction in the MTR with the transit remaining unchanged would increase the relative proportion of cost of transit to Digicel, the Authority views this as a result of simple mathematics and not indicative of any incorrect interconnection costs and does not indicate a breach of reciprocity (as defined by Regulation 10 of the Interconnection Regulations) as transit is separate service.
106. Regarding Digicel's request to set the transit fee to zero from the date of the dispute application until the date when direct mobile to mobile interconnection is in place, the Authority notes that this would contravene the legal requirement for cost-oriented rates.
107. The Authority considers that the representations made to it concerning the transit rate do not enable it make a final determination at this date.
108. In terms of an appropriate costing methodology, the Authority notes that the development of the FLLRIC model is continuing. The Authority anticipates that once the FLLRIC methodology and model is approved, one of the uses of the model could be a review of the costs associated with the transit service. If the parties are unable to agree to cost-oriented transit rates, then after the FLLRIC model is approved, the Authority could have a follow-up proceeding on transit rates. The Authority anticipates that completing the FLLRIC model and then having a follow-up proceeding on the transit rate will likely take considerable time.
109. As the Authority does not have satisfactory information on which to make a final determination on an appropriate cost-oriented rate, the Authority therefore determines that it will issue an interim order setting interim rates for transit.
110. However, the Authority notes that the parties may be reluctant to have interim rates and may prefer to have final rates with no potential retroactive adjustments. If, after receipt of this decision, the parties are able to agree on rates, the Authority would remove the requirement for interim rates.

The Authority's decision: Dispute No.5

111. The Authority makes the following determinations:
 - the transit rates for interconnection traffic between Digicel and LIME is made interim effective from the date of this decision and until the Authority makes a determination on the transit rate in a follow-up proceeding after the FLLRIC model is approved,
 - the interim transit rates are CI\$0.0125 per call in a Call Setup charge, CI\$0.0026 per minute in Call Duration charge and CI\$0.00070 in Interconnect-specific charge.

- LIME and Digicel are to keep detailed records of the quantities and rates used to bill for each of those interconnection services to enable any adjustments to be applied retroactively to the date of this decision.

Dispute No.6

112. Dispute No. 6 is over whether LIME is entitled under the ICTA Law to charge different fixed to mobile retail rates to its fixed subscribers in the Cayman Islands market and whether those rates can differ from the rates LIME charges to terminate fixed calls on its own mobile network.

Digicel's Determination Request

113. According to Digicel the 2004 ICA specifically disallowed LIME from setting different retail rates from its fixed network subscribers to any mobile operator's subscribers, LIME mobile included. LIME now refuses to maintain this provision in a new interconnection agreement.
114. Digicel maintained that this is a requirement following LIME's License and also section 40 of the ICTA Law.

Responses

115. LIME noted that its retail services are regulated by the terms of its ICT Licence. On this basis, LIME was opposed to the inclusion of a clause in a new interconnection agreement which would serve to restrict LIME's freedom to set its own retail rates within the parameters of the ICTA Law and its licence.
116. LIME noted that the 2004 ICA contained the clause "*C&W agrees that the retail rates for a Fixed to Mobile Call shall be the same for Calls from C&W PSTN Subscriber Connection to any mobile Service Provider, including C&W mobile*". According to LIME, neither the ICTA Law, the Regulations nor LIME's Licence justifies the inclusion of such a clause in an interconnection agreement between the parties.

Authority's Analysis

117. The Authority notes that LIME's fixed to mobile calling service is subject to retail price regulation as set out in Annex 5 of LIME's Licence. In particular fixed to mobile calling is classified as a Category 1 service and LIME is required to file with the Authority for prior written approval any changes to its fixed to mobile tariffs.
118. As the regulatory requirements for LIME's retail services are detailed in LIME's Licence, the Authority can see no legitimate reason that an additional condition be made part of an interconnection agreement. Therefore, the Authority determines that such a clause need not be included in the interconnection agreement.

119. However, the Authority wishes to emphasize that this determination is not meant to imply that LIME may introduce different rates for fixed originated calling based on which operator's network the call terminates. Currently, LIME is required to have the Authority's prior written approval for changes to its fixed originated calling services and, if LIME were to propose any such change, the Authority would evaluate the reasonableness of the proposed rates, terms and conditions at the time of the filing as it does for all such LIME service filings.

The Authority's decision: Dispute No.6

120. The Authority determines the clause "*C&W agrees that the retail rates for a Fixed to Mobile Call shall be the same for Calls from C&W PSTN Subscriber Connection to any mobile Service Provider, including C&W mobile*" is to be excluded from the interconnection agreement.

Disposition of the Authority's 24 December 2009 interim determination

121. As noted above, the Authority's 24 December 2009 determination made the mobile terminate rate, fixed termination rates, and transit rates interim effective that date.
122. In this decision, the Authority has determined that the terms and conditions of the 2004 ICA as amended by the 2004 AA continue to apply until the date of this decision. Additionally, the Authority notes that the interim rates were set at the rates in the 2004 ICA as amended by the 2004 AA. Therefore, the Authority hereby makes the rates in the 24 December 2009 determination final and determines that no retroactive adjustments need to be made for the period of 24 December 2009 to the date of this decision.