



## ICT Decision 2009-1

Grand Cayman, 9 February 2009

### **Decision on Digicel's Application to Reconsider ICT Decision 2008-5**

#### ***Summary***

*The Authority denies the application by Digicel to reconsider ICT Decision 2008-5. The Authority considers that ICT Decision 2008-5 is not a decision that is subject to reconsideration under section 78(1) of the ICTA Law. The Authority also notes that Digicel'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 Digicel'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. In ICT Decision 2008-5, the Authority determined that, based on the evidence filed with the Authority, the benefits likely to arise from the requirement to provide local number portability ("LNP") outweigh the likely cost of implementing it. The Authority also noted that it was satisfied on reasonable grounds that such a requirement would not impose an unfair burden on any licensee.
2. In accordance with section 71(3) of the Information and Communications Technology Authority Law (2006 Revision) ("ICTA Law"), the Authority therefore directed all operators licensed to provide telephony services (Type 1, 3, 4 and 5 Services) to implement LNP no later than 30 June 2010. The Authority noted that this requirement would not apply initially to the porting of numbers from a fixed network operator to a mobile network operator and vice versa. Furthermore, after careful consideration, the Authority found that it was preferable not to mandate any specific LNP solution. Accordingly, in ICT Decision 2008-5 the Authority directed that the licensees would be responsible for choosing an appropriate LNP solution for the Cayman Islands and implementing this solution no later than 30 June 2010.
3. ICT Decision 2008-5 was published on the Authority's web site on 18 December 2008 and sent to the licensees on 19 December 2008.

## **THE APPLICATION**

4. In a letter dated 12 January 2009, Digicel Cayman Limited (“Digicel”) requested that the Authority reconsider ICT Decision 2008-5. Digicel noted that the Authority has jurisdiction to reconsider ICT Decision 2008-5 because it is a decision made pursuant to section 71(3) of the ICTA Law, and therefore that it is “prescribed” under section 78(1)(l) of the ICTA Law.
5. Digicel submitted that, under section 71(3) of the ICTA Law, the Authority must conduct an “empirical”, “mathematical” and “quantitative” analysis of the cost and benefits of LNP prior to mandating the implementation of LNP. According to Digicel, the Authority failed to comply with this requirement and therefore did not have a sufficient basis on which to make a determination under section 71(3) of the ICTA Law. Furthermore, Digicel noted that, in the absence of precise cost information, it is unfair for the Authority to mandate a maximum cost-recovery amount on licensees.

## **PROCESS**

6. A call for comments on Digicel’s application for reconsideration was issued by the Authority on 15 January 2009. In the call for comments, the Authority noted that, without restricting the scope of the issues to be considered, the following should be addressed in the comments and in Digicel’s reply:
  - whether the Authority has jurisdiction, under section 78 of the Information and Communications Technology Authority Law (2006 Revision) or otherwise, to reconsider ICT Decision 2008-5; and
  - assuming that the Authority has jurisdiction, whether ICT Decision 2008-5 should be confirmed, reversed or modified, and for what reason(s).
7. The Authority received comments from Cable & Wireless (Cayman Islands) Limited doing business as LIME (“LIME”), TeleCayman Limited (“TeleCayman”) and WestTel Limited (“WestTel”).
8. LIME expressed its support for Digicel’s argument that the Authority should not have mandated a maximum cost-recovery amount until LNP costs have been fully determined. It also noted that it was inappropriate for the Authority to impose a maximum cost-recovery amount while and at the same time state that it does not necessarily need to be charged. LIME considers that, if a maximum cost recovery amount is imposed, then it must be mandatory and paid by all users of telephony services.
9. TeleCayman submitted that the Authority does not have jurisdiction under section 78 of the ICTA Law to reconsider ICT Decision 2008-5. According to Telecayman, section 78 includes a clear and specific list of decisions which are subject to reconsideration, none of which are applicable to ICT Decision 2008-5.

Furthermore, TeleCayman noted that it is incorrect to interpret the words “such other decisions as may be prescribed” in section 78(1)(l) of the ICTA Law as a catch-all provision that includes all other matters not specifically enumerated in section 78(1). In TeleCayman’s opinion, section 78(1)(l) of the ICTA Law recognizes that the Legislature, in its wisdom, may prescribe by amendment to the ICTA Law or by Regulations additional types of decisions which may give rise to reconsideration.

10. As a result, TeleCayman submitted that it would be moot for the Authority to embark upon a discussion of whether ICT Decision 2008-5 should be confirmed, reversed or modified. Nonetheless, should the Authority decide otherwise, TeleCayman argued that the Authority correctly and fully discharged its obligations under section 71(3). TeleCayman noted that, contrary to Digicel’s assertion, the ICTA Law does not require an empirical or mathematical cost-benefit analysis, but rather a determination of whether the “benefits likely to arise” outweigh the “likely costs” of implementation.
11. WestTel submitted that the Authority has the jurisdiction to reconsider ICT Decision 2008-5 under section 78(1)(l) of the ICTA Law. It also recommended that this decision be reversed pending a proper assessment of the costs and benefits of LNP. WestTel also argued that, while section 71(3) of the ICTA Law requires that the Authority assess the burden imposed on licensees, the Authority has assessed the burden on subscribers. Thus, WestTel submitted that ICT Decision 2008-5 is flawed and must be reconsidered.
12. Digicel did not file a reply to these comments, despite being given an opportunity to do so.

## **LEGISLATIVE AND REGULATORY FRAMEWORK**

13. In reaching a decision on Digicel’s reconsideration application, the Authority is guided by the ICTA Law and, in particular, by sections 71, 78 and 97. The relevant portions of the ICTA Law are as follows:

*71. (1) The Authority shall establish and manage a national plan for the allocation of telephone numbers among licensees in accordance with the regulations made in that respect under this Law by the Governor in Cabinet.*

*(...)*

*(3) Subject to this Law, the Authority may make rules imposing on any licensee the responsibility to offer number portability if the Authority is satisfied on reasonable grounds that –*

- (a) the benefits likely to arise from the requirement to provide a particular form of number portability outweigh the likely cost of implementing it; and*
- (b) the requirement will not impose an unfair burden on any licensee.*

*(4) In this section-*

*“number portability” relates to the ability of customers to change licensee without having to change their telephone numbers.*

*(...)*

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.*

(...)

*(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).*

(...)

97. (1) Without derogating from the powers to make regulations conferred elsewhere in this Law, the Governor in Cabinet may make regulations-

(a) prescribing matters required or permitted by this Law to be prescribed;

(b) facilitating-

(i) the investigation of; or

(ii) the bringing of criminal proceedings in respect of-  
the operation of an ICT network or provision of ICT services or use of the frequency spectrum that may be, or is, an offence under this or any other law;

(c) on the recommendation of the Authority, prescribing matters for the better carrying out of the duties and powers of the Authority or

(d) for carrying the purpose and provisions of this Law into effect.

(2) Regulations may provide that the contravention of any provision constitutes an offence and may prescribe penalties for any such offence not exceeding the maximum fine and term of imprisonment prescribed in this Law for any offence under this Law.

(3) The Authority may make regulations relating to-

(a) licence fees;

(b) infrastructure sharing;

(c) the numbering system; and

(d) quality standards under section 72 (3),

and the Authority shall consult with the Minister before making such regulations.

14. 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**

15. The jurisdictional issues raised by Digicel's application, namely the scope and applicability of section 78 of the ICTA Law, were recently canvassed in ICT Decision 2008-3. At the time, in response to another application for reconsideration filed by Digicel, the Authority noted that in order to avail itself of the opportunity to apply for reconsideration, Digicel must demonstrate that the decision in question falls within the scope of section 78(1) of the ICTA Law. The Authority also noted that, in exceptional circumstances, it may reconsider decisions not enumerated in section 78(1) of the ICTA Law to address fundamental flaws, including a mistake, fraud or similar issues, but this power will only be used sparingly.

16. The Authority also made the following comments regarding section 78(1)(l) of the ICTA Law:

*In the present case, Digicel submitted that ICT Decision 2008-2 is decision that is "prescribed" under paragraph 78(1)(l) of the ICTA Law. In doing so, Digicel appears to be suggesting that, in order to be subject to reconsideration under paragraph 78(1)(l), a decision can be prescribed by any provision of the ICTA Law (i.e. there is no requirement that it be prescribed specifically for the purpose of paragraph 78(1)(l)). In other words, Digicel appears to be arguing that ICT Decision 2008-2 is prescribed for the purpose of paragraph 78(1)(l) because it is a decision that flows from a proceeding that is prescribed under subsection 65(6) of the ICTA Law.*

*The Authority considers that this interpretation of paragraph 78(1)(l) is misguided and incorrect. If this interpretation was correct, subsection 78(1) would be devoid of meaning. As the vast majority of the Authority's decisions flow from the provisions of the ICTA Law, virtually all decisions would be subject to reconsideration. This, in turn, is inconsistent with the intent of subsection 78(1), which seeks to limit reviews and appeals of decisions of the Authority to a subset of the types of decisions taken by the Authority.*

*In the Authority's view, paragraph 78(1)(l) requires that types of decisions be "prescribed" as decisions to which the reconsideration process is applicable using one of the regulation-making powers in the ICTA Law (e.g. section 97) or elsewhere (e.g. the Authority's non-statutory residual powers). Since the type of decision under which ICT Decision 2008-2 falls has never been identified as such, it is not a "prescribed" decision under paragraph 78(1)(l) of the ICTA Law.*

17. Having reviewed the submissions filed by Digicel, LIME, TeleCayman and WestTel 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).

18. The Authority reiterates that it is incorrect to interpret the words “such other decisions as may be prescribed” in section 78(1)(l) of the ICTA Law as a catch-all provision that includes all other matters not specifically enumerated in section 78(1)(a) to (k). As noted in ICT Decision 2008-3 (above), such an interpretation would render section 78 devoid of meaning. The Authority considers that, in order to be “prescribed” under paragraph 78(1)(l), a decision must be specifically identified as a decision to which the reconsideration process applies using one of the regulation-making powers in the ICTA Law (e.g. section 97) or elsewhere (e.g. amendment to the ICTA Law, Authority’s non-statutory residual powers, etc.). The Authority notes that a decision made pursuant to section 71(3) of the ICTA Law has never been identified as such. Accordingly, the Authority determines that ICT Decision 2008-5 is not a decision that falls within the scope of section 78(1) of the ICTA Law.
19. Furthermore, the Authority notes that the parties did not make any reference to the Authority’s residual power to reconsider decisions not covered by subsection 78(1) i.e. its residual power to reconsider decisions to address fundamental flaws. As TeleCayman noted in its submission, and as stipulated by the Authority in ICT Decision 2005-1 and 2008-5, section 71(3) does not require a mathematical cost-benefit analysis. Instead, it requires that the Authority satisfy itself, on “reasonable grounds” that the “likely” benefits of LNP will outweigh its “likely” costs, and that LNP will not impose an unfair burden on any licensee. The Authority therefore considers that there is no reason to reconsider ICT Decision 2008-5 using the residual power to reconsider decisions not covered by subsection 78(1).
20. The Authority also wishes to point out that Digicel’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 2008-5 was published on the Authority’s web site on 18 December 2008 and sent directly (via e-mail) to the licensees, including Digicel, on 19 December 2008. 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 in the present case was 2 January 2009. Digicel’s application for reconsideration was filed 10 days later, on 12 January 2009.
21. In light of the above, the Authority determines that Digicel’s reconsideration application does not satisfy the requirements of section 78 of the ICTA Law. Digicel’s application for reconsideration of ICT Decision 2008-5 is therefore denied.