



ICT Decision 2008-3

Grand Cayman, 5 September 2008

Decision on Digicel's Application to Reconsider ICT Decision 2008-2

Summary

The Authority denies the request by Digicel to reconsider ICT Decision 2008-2. In this decision, the Authority determines that Digicel's request does not satisfy the requirements of section 78 of the Law. Furthermore, the Authority determines that Digicel has failed to demonstrate that ICT Decision 2008-2 should be reconsidered under the Authority's residual power to reconsider decisions not covered by subsection 78(1).

(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. On 31 July 2008 the Information and Communications Technology Authority ("Authority") published ICT Decision 2008-2. That decision was the conclusion of the second phase of a three-phase process to implement an appropriate regulatory costing methodology.
2. In ICT Decision 2008-2, the Authority made determinations on the cost model, methodology and assumptions to be used by Cable & Wireless (Cayman Islands) Limited ("C&W") when it develops costs for its services. The Authority also determined that while it was satisfied with much of the Forward-looking Long-run Incremental Costing ("FLLRIC") methodology proposed by C&W, there were a number of specific changes that were required in order to align the methodology with the Phase I Principles and Guidelines. In addition, the Authority required additional information, supporting documentation and rationale from C&W for a number of its assumptions.

THE APPLICATION

3. In a letter dated 14 August 2008, Digicel Cayman Limited ("Digicel") requested that the Authority reconsider certain elements of ICT Decision 2008-2. Digicel's letter did not identify a specific statutory basis for this request, but noted that, in ICT Decision 2006-2, the Authority reserved the right to reconsider a decision where there is a "fundamental flaw to the procedural or substantive approach adopted by the Authority".

4. Digicel argued that many aspects of ICT Decision 2008-2 are fundamentally flawed in terms of the substantive approach adopted by the Authority and that these therefore need to be reconsidered. To substantiate this assertion, Digicel submitted a report by Dr. Chris Doyle, an Independent Consultant Economist and Associate Fellow in the Department of Economics at the University of Warwick, commenting on certain aspects of ICT Decision 2008-2. The report criticizes the following aspects of the decision:
 - the use of the standard annuity approach to depreciation;
 - the calculations related to the cost of capital;
 - the averaging of the cost of capital for mobile and fixed line operators;
 - the use of a virtually complete NGN architecture for the fixed network;
 - the length of the asset lives to annualise costs;
 - the requirement for C&W to model a 3G architecture;
 - the interpretation of the scorched node; and
 - the use of mark-ups for network elements.

PROCESS

5. A call for comments on Digicel's request for reconsideration was issued by the Authority on 15 August 2008. 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) ("ICTA Law") or otherwise, to reconsider the Decision; and
 - assuming that the Authority has jurisdiction, whether the Decision should be confirmed, reversed or modified, and for what reason(s).
6. The Authority received comments from C&W on 25 August 2008. C&W argued that ICT Decision 2008-2 falls outside the list of decisions set out in subsection 78(1) of the Law and consequently that Digicel has no right to apply for reconsideration under subsection 78(3). While C&W acknowledged that the Authority may, under certain circumstances, reconsider a decision that is excluded from subsection 78(1), it noted that the Authority must do so quite sparingly. In addition, C&W submitted that there is no substantive reason for reconsidering ICT Decision 2008-2, as there is no fundamental flaw in the procedural or substantive approach applied by the Authority in arriving at this decision.
7. Digicel responded to this letter on 28 August 2008 arguing that ICT Decision 2008-2 is a decision that is "prescribed in accordance with the Law" and therefore that its request for reconsideration is permissible under paragraph 78(1)(1) of the ICTA Law. Digicel also submitted a letter by Dr Chris Doyle arguing that C&W had failed to give proper consideration to the arguments presented in his report.

LEGISLATIVE AND REGULATORY FRAMEWORK

8. In reaching a decision on Digicel's reconsideration request, the Authority is guided by the ICTA Law and, in particular, by sections 65, 78 and 97. The relevant portions of the ICTA Law are as follows:

65. (5) Any interconnection provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to -

- (a) any non-affiliated supplier;*
- (b) any subsidiary or affiliate of the licensee; or*
- (c) any other part of the licensee's own business.*

(6) Without prejudice to subsection (5), the Authority shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms and conditions of the interconnections will be determined.

(...)

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.

AUTHORITY ANALYSIS AND DETERMINATION

9. As a general rule, the Authority derives its powers from its enabling statutes. Furthermore, 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, and to 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 As noted by Digicel and C&W, this exceptional power was referred to by the Authority in previous decisions, including ICT Decision 2006-2 and ICT Decision 2007-2.
10. Therefore, in order to avail itself of the opportunity to apply for reconsideration, Digicel must demonstrate that ICT Decision 2008-2 is a decision that 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 may reconsider the decision to address a mistake, fraud or similar issues, but this power will only be used in exceptional circumstances.
11. 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.
12. 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.
13. 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

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

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.

14. As a subsidiary argument, Digicel submitted that ICT Decision 2008-2 is fundamentally flawed in terms of the substantive approach adopted by the Authority and therefore needs to be reconsidered pursuant to the Authority’s residual power to reconsider decisions not covered by subsection 78(1). After carefully considering Digicel’s submissions, the Authority has determined that this argument is without foundation. Digicel has failed to identify any fundamental flaw to the procedural approach adopted by the Authority that would justify the use of this residual power.
15. With respect to substance, whilst Digicel and Dr. Doyle disagree with several aspects of ICT Decision 2008-2, these disagreements do not amount to fundamental flaws. Rather, they are indicative of the different views on cost modelling methodologies.
16. The Authority notes that Dr. Doyle alleges a factual error by stating that the standard annuity formula in Decision 2008-2 was incorrect. However, as shown in Annex 1, the formula expression adopted by the Authority is equivalent to Dr. Doyle’s suggested correction.
17. In light of the above, the Authority determines that Digicel’s reconsideration request does not satisfy the requirements of section 78 of the ICTA Law. Furthermore, the Authority determines that Digicel has not identified any substantive or procedural reason for reconsidering that determination under the Authority’s residual power to reconsider decisions not covered by subsection 78(1). Digicel’s request for reconsideration of ICT Decision 2008-2 is therefore denied.

ANNEX 1

1. Dr. Chris Doyle states in his report that the standard formula for an annuity reproduced in paragraph 141 of the ICT Decision 2008-2 is incorrect and instead should read:

$$\text{Annualised cost} = \frac{WACC}{1 - \left(\frac{1}{(1 + WACC)^{\text{Asset Life}}} \right)} \times \text{Asset Capital Cost}$$

2. The Authority notes that this formula is equivalent to that used by the Authority albeit with a slight difference in presentation of the algebra. Specifically the formula shown by the Authority in the ICT Decision 2008-2 is:

$$\text{Annualised cost} = \frac{WACC}{1 - \left(\frac{1}{1 + WACC} \right)^{\text{Asset Life}}} \times \text{Asset Capital Cost}$$

3. The Authority's formula may be re-written as follows:

$$\text{Annualised cost} = \frac{WACC}{1 - \left(\frac{1^{\text{Asset Life}}}{(1 + WACC)^{\text{Asset Life}}} \right)} \times \text{Asset Capital Cost}$$

4. Since 1 to the power of "Asset life" is 1 the formulas presented by Dr. Doyle and that of the Authority are equivalent.