CABLE & WIRELESS

Cable and Wireless
(Cayman Islands) Limited

P.O. Box 293
Grand Cayman KY1-1104
Cayman Islands
www.cw.ky

Telephone +1 (345) 949-7800
Fax +1 (345) 949 7962

25 August 2008

Mr. David Archbold,
Managing Director,
Information, Communication Technology Authority,
P.O. Box 2502,
3rd Floor Alissta Towers,
Grand Cayman.
KY1-1104

Dear Mr. Archbold:

Re: Digicel Request for Reconsideration of Decision 2008-2

We refer to your email dated August 15, 2008.

Cable & Wireless Cayman Islands ("C&W") welcomes the opportunity to respond to Digicel's request dated 14 August 2008 for reconsideration of ICT Decision 2008-2 ("the Decision"). C&W is not surprised by the request. It is in Digicel's interest to delay or derail this proceeding and has pitched all its submissions in the proceeding as a lead-up to judicial review or other court challenges. In this latest submission Digicel has explicitly expressed its intent to pursue such a path.

As we have advised the Authority in our letter dated 22 August 2008, any delay occasioned by the time it takes for the Authority to consider Digicel's request for reconsideration of the Decision, will result in a corresponding delay in the time it will take for C&W to file the Costs Model as directed by the Authority in the Decision.

Digicel's application for reconsideration should be rejected on the grounds outlined below.

Digicel in its request for reconsideration failed to identify the specific statutory or other legal basis on which its request for reconsideration is being made. This renders it difficult for C&W, and in turn the Authority, to respond appropriately to the request.

The only statutory basis on which a licensee may apply for "reconsideration" of a decision of the Authority exists by virtue of section 78(3) of the Information and Communications Technology Authority Law (2006 Revision), ("the Law"). The right to apply for reconsideration under section 78(3) is however limited to those decisions set out in section 78(1) of the ICTA Law (the "Law"), namely, a decision:

- not to grant a licence,
- to revoke a licence,
- to modify a licence under Section 31(4),

- to suspend a license under Section 32(1),
- that a Section 36 prohibition has been infringed,
- that a Section 40 prohibition has been infringed,
- in relation to an individual exemption under Part IV of the Law,
- to cancel an exemption,
- in relation to the imposition and amount of a penalty in accordance with Part IV,
- to give a direction under Section 47, 48 or 50,
- in relation to a pre-contract dispute under Section 67

and such other decision as may have been prescribed in accordance with the Law.

The Authority has, in ICT Decision 2006-2, considered the ambit of the right to apply for reconsideration under the Law and expressly recognised the limited scope of such a right. At paragraph 21 of that Decision the Authority states:

> "The Authority notes that s. 77 [now section 78 of the 2006 Revision] of the Law seeks to limit reviews and appeals to a relatively small group of the types of decisions routinely taken by the Authority."

The subject of the Decision clearly does not fall within the list of decisions set out in section 78(1) and consequently, Digicel has no right to apply for reconsideration under section 78(3).

The Authority, at paragraph 23 of ICT Decision 2006-2, acknowledges that it may, in certain circumstances, consider an application for reconsideration in respect of a decision which falls outside the scope of section 78 (1). The Authority however determined that such a discretion must be exercised quite sparingly. In the words of the Authority:

> "The Authority is of the view that the provisions of s. 77 [section 78 of the 2006 Revision] should be interpreted so as to seek finality concerning its decisions in relation to all matters not enumerated in section 77 (1) [section 78(1) of 2006 Revision]. 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 enumerated in s. 77(1) [section 78 (1) of the 2006 Revision]."

Digicel, in its application for reconsideration, has seized upon the latter sentence of paragraph 23 of ICT Decision 2006-2, and, in doing so, appears to be recognising that its application for reconsideration of the Decision is one which falls outside the ambit of the statutory right to apply for reconsideration, and which the Authority may only consider within the limited scope of its discretion as defined at paragraph 23 of ICT Decision 2006-2.

Digicel's application points to no fundamental procedural flaw in the process leading to the Decision. The application relies on alleged flaws in "the substantive approach adopted by the Authority" and, in this regard, purports to rely exclusively on a report done by Dr Chris Doyle, said to be an independent expert on the matters addressed in the Decision. The procedural inappropriateness of this *ex post facto* attempt to introduce expert evidence in the process is palpable. In particular:

(i) Digicel had every opportunity during Phase 2 of the FLLRIC process to have made the submissions now being made in Dr Doyle's report. In fact, Digicel had, and availed itself of the opportunity, to retain its own

experts, Ovum, who made detailed submissions on behalf of Digicel during Phase 2 of the FLLRIC process;

(ii) All of the matters now raised in Digicel's request, and in Dr Doyle's report, have already been addressed in evidence and submissions submitted by one or other of the parties in previous rounds of Phase 2 of the FLLRIC process, and have been addressed, either expressly or by implication, by the Authority - Digicel, by its present submission, is seeking to have two bites at the proverbial cherry;

(iii) C&W and the other interested parties have had no proper opportunity to consider and respond to any new submission which is contained in the report of Dr Doyle.

The Authority has previously expressed its disapproval of attempts by a party, which was afforded ample opportunity to present its case at first instance, to raise by way of an application for reconsideration, matters which it could have raised at first instance. At paragraph 25 of ICT Decision 2006-2 the Authority states:

> "…the Authority considers that it is of importance that parties should raise objections in the pleadings afforded at first instance by the Authority, rather than await a decision and raise such matters by way of grounds for reconsideration. In future, the Authority may consider such practice as a consideration in weighing the appropriateness of disturbing a decision taken at first instance."

The Authority has spent considerable time and expense during the previous Phases of the FLLRIC process in considering the representations of the respective parties before arriving at the Decision. The Authority had the benefit of its own knowledge and expertise on the matters relevant to the determination of an appropriate costs model for application to the Cayman Islands information and communications technology market. It also had the benefit of its own external experts, Telcordia, in addition to the data, and the expertise of the parties and the experts retained by them during the process. Reconsideration of these matters, already so thoroughly considered by the Authority, will only serve to delay further the completion of the FLLRIC process, now already at least four years behind schedule, to the detriment of the public interest.

In any event, Dr Doyle has pointed to nothing which could be considered a fundamental flaw in the substantive approach adopted by the Authority. Without prejudice to the right of C&W, and the right of other interested parties, to reply in detail to the submissions made by Dr Doyle (if, contrary to C&W's submission, the Authority decides to entertain Digicel's application for reconsideration), none of Dr Doyle's concerns and findings in relation to some aspects of the Authority's analysis can be said to be indicative of "substantive flaws" in the approach adopted by the Authority, as asserted by Digicel in its application . The fact that Dr Doyle, or, for that matter, other regulators, may have come to a different conclusion to that reached by the Authority on the matters addressed in Dr Doyle's report, is insufficient ground for the reconsideration of the Authority's Decision. Regulators throughout the world have taken different views on the approach of aspects to modeling including those which Dr. Doyle raises. The fact that regulators reasonably disagree over these matters does not mean that some have a substantive flaw in approach and others do not. Dr Doyle has himself acknowledged that he has not had the benefit of all the data which was before the Authority during the process and there is nothing in his report which suggests that no reasonable regulator, with the benefit of the evidence and submissions considered by the Authority, could have come to same determinations as those made by the Authority in the Decision and which have been impugned by Dr Doyle.

C&W's primary position is that this request by Digicel should be rejected by the Authority without further process. If, however, contrary to C&W's primary position, the Authority decides to consider Digicel's request on its merits, since C&W has had no proper opportunity to provide

a point by point response to the matters raised in Digicel's request and in Dr Doyle's report, C&W requests that Authority affords C&W and the other interested parties reasonable time within which to do so.

We herewith copy all interested parties.

Please contact me regarding any questions you may have.

Yours faithfully,
Cable & Wireless (Cayman Islands) Ltd.

"Signed"

_____
Rudy B. Ebanks
Chief Regulatory and Carrier Relations Officer

c.c. Timothy Adam, Chief Executive C&W
Ian Tibbetts, Chief Operating Officer C&W
Frans Vandendries, VP Legal and Regulatory C&W
Interested Parties in CD (2008) - 2