



ICT Decision 2006-6

Grand Cayman, 14th December 2006

Decision on C&W Determination Request on Mobile Termination Rates

Summary

The Authority denies the application by C&W to assess and modify the mobile termination rate. Since 27 July 2004, C&W and Digicel have been conducting business on the basis of a document that set out the mobile termination rate to apply for the exchange of traffic between them and which purported to be an amendment to the Interconnection Agreement between C&W and Digicel. The Authority has determined that C&W should rely upon the dispute resolution provisions of the Agreement, rather than the regulatory process, in its efforts to seek to modify the mobile termination rate.

(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 25 October 2006, Cable & Wireless (Cayman Islands) Limited (“C&W”) applied to the Authority, requesting that it issue a determination that the mobile termination rate (“MTR”) that applies among C&W, Digicel Cayman Limited (“Digicel”) and Wireless Ventures Cayman Islands Ltd (“WVCIL”) is not a cost-oriented rate as required by the Information and Communications Technology Authority Law (2006 Revision). C&W requested that, instead, the Authority determine that an MTR of CI\$ 0.11 is a cost-oriented rate and that this rate should apply for termination on all mobile networks in Cayman.
2. On 31 October 2006, Digicel filed an Answer to the Application. Digicel argued that C&W’s Application did not constitute a valid dispute determination request because it was not preceded by a notice pursuant to Regulation 3, which has the effect of affording the parties 30 days to seek to resolve their differences before engaging the Authority. In addition, Digicel argued that, even were C&W to start the process again, this matter is a private dispute between the parties, and the Authority should decline jurisdiction, so that the parties would avail themselves of dispute resolution procedures set out in their Interconnection Agreement.

3. C&W filed Replies on 2 November and 7 November 2006. C&W argued that to follow the process specified in Regulation 3 in the present case would clearly lead to meaningless negotiations with no prospect of producing a resolution. C&W argued that the Authority should not require the parties to rely upon the dispute resolution procedures set out in the Interconnection Agreement, for these negotiations would be unlikely to be meaningful, and, further, the issue of a cost-oriented MTR is a regulatory issue.
4. C&W also argued that ICT licensees may not abrogate to themselves the jurisdiction of the Authority to determine whether an MTR is a cost-oriented rate. C&W further submitted that the dispute resolution provisions of the Interconnection Agreement are not exclusive, for the Interconnection Agreement specifies that a party may refer any dispute arising under the Agreement to the Authority.
5. Digicel filed a final pleading on 17 November 2006, in which it submitted that the Authority should rely upon Regulation 10 to decline jurisdiction in this matter.

Authority Analysis and Determination

6. Since 27 July 2004, C&W and Digicel have been conducting business on the basis of a document that set out the mobile termination rate to apply for the exchange of traffic between them and which purported to be an amendment to the Interconnection Agreement between C&W and Digicel. The Authority notes that Article 34 of the Interconnection Agreement between C&W and Digicel specifies detailed procedures which the parties have agreed to use to resolve a dispute which arises with respect to the interpretation or application of the Agreement.
7. These procedures, consistent with modern commercial practice, specify timeframes and processes for escalation of negotiation, culminating in arbitration procedures. At the same time, Article 34 of the Interconnection Agreement also specifies that “nothing herein shall prevent a Party from...[r]eferring the dispute to the ICTA in accordance with [its] dispute resolution procedure”.
8. The Authority does not view these provisions as being in conflict, or inappropriate for such an agreement. Accordingly, the Authority is of the view that it was perfectly appropriate for C&W to apply to the Authority as it did on 25 October 2006, seeking a determination in accordance with the ICTA Dispute Resolution Regulations, 2003.
9. At the same time, however, the Authority has come to the view that the correct course of action for the Authority is to assess the particular nature of the dispute before it in the light of Regulation 10 (i) of the Dispute Resolution Regulations, which reads as follows:

The Authority may decline at any time to deal with a determination request if it determines that-

- (i) the subject matter of the dispute should continue to be governed by the terms and conditions of an existing contract between the referring party and respondent.

10. In the present case, as the parties are well aware, the Authority is engaged in the public process of developing its preferred costing methodology, following which a meaningful assessment of the costs of mobile termination will be made. In the interim, no meaningful evidence can be adduced to support a change in the MTR to render it more reflective of costs in Cayman.
11. In these circumstances, the Authority is of the view that there is no further relevant regulatory process that can at present be undertaken. The Authority has come to the view that this case is therefore one to which Regulation 10(i) clearly properly applies.
12. Accordingly, the Authority has concluded that C&W should rely upon the dispute resolution provisions contained in Article 34 of the Interconnection Agreement in its efforts to seek to modify the mobile termination rate. The Authority therefore denies the Application by C&W.
13. The issue addressed in some detail in this proceeding concerning whether it is required to commence the process of filing for a determination by the Authority under the ICTA Dispute Resolution Regulations, 2003, through the medium of a notice under Regulation 3(1) has now arisen twice in 2006 alone, with one party arguing both sides of the question a mere two months apart. The Authority has determined that it will seek to amend the regulations to remove any ambiguity. In light of the particular disposition of the present case, however, this uncertainty in the process requirements would not have had any effect upon the outcome of the case.