



ICT Decision 2004-4

Grand Cayman, 19th May 2004

Digicel's Request to Reconsider ICTA Decision 2004-1 and ICT Decision 2004-2

The Authority finds, on the preliminary issue of jurisdiction, that Digicel's request for reconsideration is properly before the Authority for adjudication.

The Authority finds merit in Digicel's request for reconsideration and proposes modifications to ICTA Decision 2004-1 and may, if deemed advisable upon receipt of the results of further imputation test analysis, vary ICT Decision 2004-2.

The Authority further finds as follows:

- *Subsequent information filed both by C&W and Digicel on usage supports Digicel's proposal to vary the utilisation of postpaid plans based on revised demand estimates,*
- *Given that the Authority will issue a decision in the mobile termination proceedings in the near future, the use of an FAC-based mobile termination rate for this Decision should not unduly prejudice parties and the Authority reserves the right to review the imputation test results once it issues the final mobile termination rate,*
- *Recently received information indicates there is merit in including the handset subsidy in the imputation analysis, and*
- *Appropriate GSM costs are an important consideration and this issue will be pursued as part of the mobile termination rate proceeding which may result in a revised imputation test.*

Cable & Wireless is directed to provide and meet ongoing information requirements in a complete, accurate and timely manner so that the Authority may conclude the review of the imputation analysis and issue its findings in accord with this Decision.

(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.)

Background

1. On 21 April 2004, pursuant to section 55A(1) and section 55(2) of the Information and Communications Technology Authority Law, 2002 as amended ("the ICTA Law"), Digicel (Cayman Islands) ("Digicel") filed a request with The Information and Communications Technology Authority ("ICTA" or "the Authority") seeking a

reconsideration of ICTA Decision 2004-1 (“Decision 2004-1”) and ICT Decision 2004-2 (“Decision 2004-2”), insofar as the latter decision was based on Decision 2004-1. In its filing, Digicel requested the Authority to reconsider the application of the imputation test in Decision 2004-1 and, as part of the appeal process, to reassess all of the mobile plans of Cable & Wireless (Cayman Islands) (“Cable & Wireless,” or “C&W”) for anti-competitiveness.

2. Specifically, Digicel requested that the Authority:
 - a. reconsider its assessment of all of C&W’s mobile plans assessed in Decision 2004-1, taking full account of all of the comments by Digicel in its request and at the ICTA hearing to be held on 29 April 2004;
 - b. use the interim mobile termination rate, as agreed by C&W and Digicel, as the mobile termination rate in the imputation test for mobile services instead of C&W’s opening negotiating position of the estimated cost of mobile call termination, as described in paragraph 81 of Decision 2004-1;
 - c. revise the approach outlined in paragraphs 64 and 65 of Decision 2004-1 to instead make assumptions based on rational consumer behaviour as proposed by Digicel in its 21 April 2004 submission;
 - d. take full account of handset subsidy costs within the meaning of ‘subscriber acquisition costs’ as discussed in paragraph 67 of Decision 2004-1, if the Authority has not already done so; and
 - e. amend Decision 2004-2 consequent upon the requested revisions to Decision 2004-1.

Process

3. Copies of Digicel’s request for reconsideration were sent to Cable & Wireless and to Wireless Ventures (Cayman Islands) (“Wireless Ventures”) (collectively with Digicel “the parties”).
4. On 23 April 2004, the Authority issued a letter agreeing to Digicel’s request to make a presentation to the Board on 29 April 2004 on the matters raised in Digicel’s reconsideration request. Digicel was requested to file a written brief in advance of the presentation, addressing all the issues to be raised at the presentation. Digicel was advised that it would be permitted to raise and address, in its oral presentation, only those issues raised in its written brief. The Authority informed Digicel that all submissions would be placed on the public record.
5. On 26 April 2004, Digicel filed its written brief for the presentation meeting.
6. On 27 April 2004, Wireless Ventures (Cayman Islands) (“Wireless Ventures”) filed its comments stating that, although it was satisfied with the general tenor of Decision 2004-1, it agreed with a number of the issues in Digicel’s reconsideration request. Wireless Ventures requested that the Authority make the following changes to C&W’s cost assumptions in the imputation analysis:

- a. treat calls between C&W's GSM and C&W's TDMA mobile networks as off-net calls instead of on-net calls since the two networks are physically separate and distinct;
 - b. increase the 25% adjustment factor for GSM costs to 50% since a GSM mobile call requires two circuits to complete a call;
 - c. use the interim rate as the cost of mobile termination; and
 - d. include the cost of mobile handsets.
7. On 28 April 2004, Cable & Wireless filed with the Authority its response to the Digicel reconsideration request. C&W's comments addressed Digicel's right of appeal and, if the Authority were to rule in Digicel's favour, C&W's right to participate in the proceedings.
8. On 28 April 2004, the Authority issued a letter to C&W stating that C&W and Wireless Ventures could, if they wished, make individual presentations to the Board on matters raised in their written submissions responding to Digicel's reconsideration request. In order to ensure transparency, each party was invited to send one representative to the meetings. With respect to C&W's submission as to whether Digicel can request reconsideration, the Authority stated that it believed the legislation is sufficiently clear and that, as an application is properly before the Authority, the Authority must adjudicate upon the matters raised in the request. However, C&W could, if it wished, pursue the matter of parties' rights in the reconsideration proceeding.
9. On 29 April 2004, Digicel made a presentation to the Board on the matters raised in its reconsideration request. C&W was in attendance; Wireless Ventures declined to attend.
10. On 30 April 2004, the Authority issued a letter to all three parties stating, among other things, that if C&W wished to file comments addressing the substantive matters raised in Digicel's reconsideration request, it do so by 7 May 2004. Both C&W and Wireless Ventures were invited to make oral presentations to the Board on 10 May 2004, provided their presentations would be limited to the issues raised in their written submissions. Digicel, if it wished, was provided the opportunity to file reply comments by that same date.
11. On 7 May 2004, C&W filed its comments stating that, in its view, Authority should dismiss Digicel's reconsideration request for the following reasons:
 - a. Digicel's proposal to estimate demand implies unrealistic customer consumption;
 - b. Digicel's proposal for the use of cost benchmarks is misleading, inapposite and based on out-of-date data;
 - c. Digicel's claim that the Authority can or should abandon the FAC model costs is contrary to the ICTA Law and unjustified; and
 - d. Digicel's suggestion that handset subsidies be included in C&W's costs for the purpose of the imputation analysis is ad hoc and biased.

12. On 10 May 2004, Wireless Ventures made a presentation to the Board on the matters raised in its comments. Digicel was in attendance; C&W chose not to attend.
13. At the presentation on 10 May 2004, Digicel served copies of its reply comments on the Authority and on Wireless Ventures and sent electronic copies to all parties that same day.

Summary of Decision 2004-1

14. Assumptions were made with respect to usage, and costs. Plan usage was estimated based on an average subscriber's forecast demand for the plan's services. To estimate forecast demand, the Authority used two conditions:
 - a. to be conservative, only previous TDMA and GSM plans with included minutes equal to or less than the current plan were considered, and
 - b. of the TDMA and GSM plans considered, the forecast relied upon only the previous TDMA and GSM plan that was most similar with respect to included minutes. For example, to forecast plan usage for C&W's b350 plan, plan usage of the company's b300 and Digital 275 plans were considered.
15. A mapping of previous plans used to forecast current plans is presented on page 19 of the confidential version of Decision 2004-1. From these forecasts the Authority estimated on-net (included) minutes, additional on-net minutes, off-net minutes, voice mail minutes, SMS calls, and the number of handsets employed by the plan. Additional on-net and off-net minutes were stimulated based upon an assumed -0.20 price elasticity. Based on the usage profiles and the tariffed rates for the plans' services, the Authority estimated total plan revenues for an average subscriber.
16. The following costs were taken into account:
 - a. subscriber acquisition,
 - b. monthly maintenance,
 - c. mobile call origination transport and termination.
17. The following cost elements were missing from the information submitted by Cable & Wireless:
 - a. enhanced features,
 - b. maintenance cost ,
 - c. additional support per additional handset,
 - d. plan migration costs including subscriber termination costs.

The above are summarised in paragraph 108 of Decision 2004-1.

18. Costs for originating and terminating calls on the GSM network were proxied by increasing the FAC-based costs of originating and terminating TDMA calls by a factor of

25%. C&W was requested to provide the missing cost information within fourteen days of the date of the decision. C&W was also requested to provide further support for information it did not sufficiently document or explain. For instance, C&W failed to provide any meaningful explanation for:

- a. forecasted demand,
- b. the mobile to fixed and mobile to mobile (on-net) split, and
- c. discrepancies between cost inputs in its original and revised imputation tests. In several instances, cost inputs were hard-entered and it was unclear how they were related, if at all, to the FAC model.

19. The mobile plans and services considered in Decision 2004-1 and the results of the imputation tests applied to these plans and services are summarised below.

Postpaid Plans			
Plan	Monthly Rate 7th April 2004	Mandated Increase	New Monthly Rate 8th April 2004
b350	\$ 35	\$ 8	\$ 43
b500	\$ 45	\$ 21	\$ 66
b750	\$ 60	\$ 6	\$ 66
b1150	\$79	None	\$ 79
bBiz2200	\$129	None	\$129
bBiz3750	\$189	None	\$189
bBiz7500	\$299	\$ 60	\$359
bBiz20000	\$599	None	\$599

Prepaid Plans			
Plan	Per Minute Rate 7th April 2004*	Mandated increase to per- minute rate on a weighted average basis	New Per Minute Rate 8th April 2004*
bFree Anytime	From \$0.07 to \$0.35	\$0.04	From \$0.11 to \$0.39 (see also ** in Notes)
bFree	From \$0.20 to \$0.35	None	Unchanged
Pay as You Go	From \$0.20 to \$0.35	None	Unchanged

Notes:

* Depending on called network (i.e., “on-net” or “off-net” and day and time).

** Plan not available to new subscribers. New rates effective for subscribers who obtained service on or prior to 7 April 2004.

Mobile IDD				
Plan	Zone and Time of Day	Per Minute Rate 7th April 2004	Mandated increase to per-minute rate	New Per Minute Rate 8th April 2004
TDMA/GSM Postpaid	Jamaica, Turks & Caicos Islands, USA, Canada, UK, Ireland			
	- Day	\$0.45	None	Unchanged
	- Evening	\$0.40	None	Unchanged
	- Weekend	\$0.35	None	Unchanged
	Rest of the world (except for Other)			
	- Day	\$0.55	None	Unchanged
	- Evening	\$0.50	None	Unchanged
	- Weekend	\$0.45	None	Unchanged
	Other			
	- Day	\$0.80	\$0.16	\$0.96
	- Evening	\$0.60	\$0.12	\$0.72
	- Weekend	\$0.55	\$0.11	\$0.66
	TDMA/GSM Prepaid *	Jamaica, Turks & Caicos Islands, USA, Canada, UK, Ireland		
- Day		\$0.45	None	Unchanged
- Evening		\$0.40	None	Unchanged
- Weekend		\$0.35	None	Unchanged
Rest of the world (except for Other)				
- Day		\$0.55	None	Unchanged
- Evening		\$0.50	None	Unchanged
- Weekend		\$0.45	None	Unchanged
Other				
- Day		\$0.80	None	Unchanged
- Evening		\$0.60	None	Unchanged
- Weekend		\$0.55	None	Unchanged

Note:

* bFree Anytime, bFree, Pay as You Go.

Comments by Interested Parties

A. Digicel's right to seek a reconsideration

20. In the course of the hearing of this application for reconsideration and throughout written submissions a preliminary point of jurisdiction was raised and argued. The ICTA was greatly assisted by the submissions of the parties. Their respective submissions are set out below. It should be noted that Wireless Ventures did not make any submissions in relation to the question of the ICTA's jurisdiction to entertain this application for reconsideration

C&W's Primary Submissions

21. By letter dated 28 April 2004, C&W submits that:

“Digicel has no right of appeal against or to apply for a reconsideration of the Authority's findings regarding the imputation tests. Digicel contends that its right of appeal or to apply for a reconsideration arises by virtue of section 55A(1) and section 55(2) of the Information and Communications Authority Law (“the Law”).

The Section 55A (1) provides:

“A person who-

- (a) is not a party to an agreement in respect of which the Authority has made a decision (as specified in paragraphs (da) to (df) of section 55(1) (“the relevant decision”);
- (b) is not a person in respect of whose conduct the Authority has made the relevant decision; and
- (c) has no right of a appeal under section 55, may apply to the Authority asking it to withdraw or vary the relevant decision.”

22. C&W states that the right to apply for reconsideration under section 55A therefore arises only in respect of a “relevant decision” which is one of the decisions specified in paragraphs (da) to (df) of section 55(1), namely,

- “(da) a decision that a section 34B prohibition has been infringed;
- (db) a decision that a section 34F prohibition has been infringed;
- (dc) with regard to an individual exemption under Part IIIA-
 - (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 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;
 - (v) a decision on the duration of the exemption referred to in subparagraph or ;
 - (vi) a decision to cancel an exemption;
- (de) a decision to impose a penalty in accordance with Part IIIA and a decision as to the amount of such penalty;

(df) a decision to give a direction under section 34F[sic - should read M], 34N or 34P.”

23. C&W states that the right to request a reconsideration only applies to decisions that a prohibition (under either 34B or 34 F) has been infringed. C&W submits that in this case Digicel is largely challenging instances in Decisions 2004-1 and 2004-2 that C&W's rates do pass the imputation test. Therefore, even to the extent that a finding regarding the imputation test could be said to underlie any finding in Decision 2004-2 and thus form the basis for an appeal by Digicel (which as set out below, C&W denies), C&W states that the "decisions" being challenged by Digicel are not those that C&W has infringed any Section 34 prohibition but rather that it has not.
24. C&W states that the imputation test was carried out pursuant to the terms of C&W's Licence, and Decision 2004-1, which determines the rates which would satisfy the imputation test, can in no way be said to constitute any one of the types of decisions specified in paragraphs (da) to (df) of section 55(1) of the Law. Consequently, C&W argues that Digicel has no right under section 55A(1) to apply for a reconsideration of the imputation test.
25. C&W expects that Digicel may claim that the basis for its right to apply for reconsideration of the imputation test findings is that, since Decision 2004-1 is incorporated by reference in Decision 2004-2, and forms the basis of the conclusion that C&W is guilty of conduct deemed to be a breach of section 34F, then the findings in Decision 2004-1 regarding the imputation tests, amount to a finding that C&W is in breach section 34F. C&W states this is belied by Digicel's own submissions referencing Digicel's statement that it is seeking a "reconsideration of ICT Decision 2004-1 and ICT Decision 2004-2 insofar as it is based on ICT Decision 2004-1.”
26. C&W maintains that Digicel is unable to use the incorporation by reference of Decision 2004-1 into Decision 2004-2 in order to claim the right to request a reconsideration. C&W states as follows:

“The findings in Decision 2004-1 and the findings in Decision 2004-2 are separate and distinct. In Decision 2004-1, the Authority concludes that in some instances C&W failed the imputation test. In Decision 2004-2, the Authority finds that, having regard to the findings in Decision 2004-1, C&W is guilty of anti-competitive conduct in breach of section 34F. Decision 2004-1, not being a decision that a section 34F prohibition has been breached, does not give rise to a right to Digicel to apply for reconsideration.”

27. C&W is of the view that Digicel is seeking to use a right to apply for reconsideration which could only arise in respect of certain aspects of Decision 2004-2 to mount a challenge on the results of the imputation test. C&W maintains that the effect of Digicel's application is that it seeks not a variation or withdrawal of the decision that C&W has been guilty of anti-competitive conduct, but a collateral attack on the Authority's application of the imputation test pursuant to C&W's licence. In C&W's view the statutory right to apply for reconsideration could not have been intended to be used in this manner.

Digicel's reply

28. In their letter dated 30 April 2004 attorneys Jones Day, acting for Digicel, replied to C&W's contentions on jurisdiction.
29. Digicel requests a reconsideration of "ICT Decision 2004-1 and ICT Decision 2004-2 insofar as it is based on ICT Decision 2004-1." Digicel maintains that disregarding the request to reconsider Decision 2004-1, it cannot be contested that Digicel has requested a variation of Decision 2004-2, which by its very terms incorporates ICT Decision 2004-1. It is Digicel's view that Decision 2004-2 includes a finding that C&W has abused a dominant position contrary to Section 34F of the ICTA Law as amended ('the ICTA Law'). Therefore, in Digicel's view, even if C&W is correct that Decision 2004-1 is not a finding that section 34F has been infringed (which is denied), it is clear that Decision 2004-2 meets the statutory requirement.
30. Digicel submits that Decision 2004-1 also amounts to a decision that Section 34F has been infringed. The basis for the Digicel view is that this is because the purpose of an imputation test (failure of which in and of itself is a violation of C&W's licence) is to detect anti-competitive behaviour by way of below-cost pricing. Below-cost pricing is proscribed by virtue of the Section 34F prohibition on unfair prices. Digicel states that as such, once the imputation test is found to be failed, that amounts to a finding that Section 34F has been infringed.
31. In the alternative, Digicel maintains it is possible to treat Decision 2004-1 and Decision 2004-2 as one composite decision for the purposes of reconsideration and variation as both arise from the Authority's consideration of one matter, namely complaints by Digicel and Wireless Ventures against C&W as part of a single regulatory procedure. Digicel maintains that the fact that the Authority's findings took the form of two separate decisions is simply a matter of form and not substance.
32. Digicel is seeking reconsideration of an ICT decision that Section 34F has been violated in so far as it incorporates, in Digicel's view, an erroneous application of the relevant imputation tests. Digicel submits that the reference in the ICTA Law to 'a decision that a section 34 F prohibition has been infringed' refers to all of the analysis contained within an impugned decision. Digicel maintains that to argue that reconsideration is only possible in so far as a decision finds that there has been an abuse is an absurd construction, not least because it would mean that an aggrieved party such as Digicel could only challenge the elements of a decision that were actually in its favour, and not those that were adverse to it.

C&W's Further Submissions

33. By letter dated 7 May 2004, C&W contends Digicel's position on this issue is based on the argument that, since the purpose of the imputation test is to detect anti-competitive behaviour by way of below-cost pricing; and below-cost pricing is proscribed by section

34F, therefore, once the imputation test is found to be failed, that amounts to a finding that section 34F has been infringed. C&W maintains that this argument contains a fallacy. In its view the purpose of the imputation test is to detect below-cost pricing, not anti-competitive behaviour and that the Authority itself has found in paragraph 56 of Decision 2004-2, below-cost pricing does not by itself necessarily constitute anti-competitive conduct. C&W is of the view that not every decision of the Authority is amenable to reconsideration.

34. As previously noted C&W repeats its assertion that both decisions ought to be treated as separate and distinct. However even if one were to treat both decisions as one, C&W maintains that Digicel would have no right to mount a collateral challenge of the imputation test findings by challenging Decision 2004-2. C&W states the imputation test findings can amount to no more than the reasons for the decision that C&W is guilty of anti-competitive conduct. In this regard C&W references a principle of English common law that a right of appeal is against a decision, not the reasons upon which the decision is based [*Lake v. Lake* [1955] 2 All ER 538 cited]. C&W maintains that this principle applies with equal force to Digicel's right to apply for a reconsideration of a decision under the Law.

Digicel's rebuttal

35. Digicel notes that C&W does not adduce any argument beyond the assertion that Decisions 2004-1 and 2004-2 should be treated as separate and distinct. Digicel maintains that C&W failure to offer any explanation as to why the Authority's express incorporation of Decision 2004-1 into Decision 2004-2 should be disregarded. Further, Digicel points out that paragraph 42 of C&W's own licence states that the imputation test identifies a 'floor price for determining whether C&W is engaging in anti-competitive behaviour'. As such, Digicel argues C&W's argument is invalidated by the terms of its own licence.
36. C&W goes on to argue that the Authority found in paragraph 56 of Decision 2004-2, that below-cost pricing does not by itself necessarily constitute anti-competitive behaviour. Digicel states this is an obvious misrepresentation of the Authority's position maintaining that what the Authority is saying is that an abuse of a dominant position may arise, not only where there has been below-cost pricing, but also where there has been behaviour falling short of below-cost pricing, where it is accompanied by other anti-competitive conduct. Digicel maintains that this explains the Authority's reliance on the decision of the European Court of Justice in *Compagnie Maritime Belge*, where a finding of abuse was made in such circumstances.
37. Furthermore, Digicel states, as the Authority clearly and unambiguously records in paragraph 53 of Decision 2004-2 where C&W's mobile prices have failed to pass the imputation test C&W is deemed to have engaged in anti-competitive conduct. Digicel asserts that this statement can only be regarded as declaratory in respect of a prior finding, namely that contained in Decision 2004-1, to the effect that C&W failed the applicable imputation tests. Later at paragraph 55 the Authority states that it "finds

C&W's failures with respect to the imputation test, in and of themselves, constitute anti-competitive conduct resulting in a breach of both its Licence and the Law." Accordingly, Digicel concludes Decision 2004-1 is a relevant decision.

38. With respect to C&W's reference to rely on the decision of the English Court of Appeal in *Lake v. Lake*, Digicel states that reliance is misconceived, and does not overcome the argument that there is one composite decision. *Lake v. Lake*, Digicel notes, relates to an attempted appeal against a stylised form of judgment or order, which is not the case here. Digicel points out that on the very first page of Decision 2004-2 a note prior to the first paragraph states that 'For details and reasons of the conclusions, the reader is referred to the various parts of the Decision'. As such, Digicel maintains, the reasons for the Authority's decision, just as much as the individual findings of abuse are all part of a decision, reconsideration of which is permitted. In any event, according to Digicel, *Lake v. Lake* relates to the right of appeal under the Rules of Superior Courts, not reconsideration of a decision under the Law.
39. As to what precisely Digicel has requested reconsideration of, Digicel states it is seeking to have Decisions 2004-1, and alternatively, Decision 2004-2 (to the extent that it incorporates Decision 2004-1 or that there is only one composite decision), varied by reason of the misapplication of the imputation test.

B. Plan utilisation for C&W's postpaid mobile plans

Digicel

40. In its 26 April 2004 filing, Digicel states that one of the key features of C&W's post-paid mobile plan is the number of free minutes of mobile voice calls that originate on C&W's mobile network and terminate on C&W's mobile or fixed-line networks ("on-net") that is offered on each postpaid plan. The number of free on-net minutes offered in each plan and how these relate to the price of the plan will have an impact on the plan that the customer decides to purchase.
41. Digicel states that C&W's original assumptions regarding the usage of plan minutes is flawed because:

"The more free minutes that are offered the higher the cost of subscribing to the plan. An example of the irrational type of behaviour from Caymanian customers that C&W relies on in order to make plans profitable is that a subscriber will not necessarily choose the plan that best suits its need over time. For instance, say, a consumer generally only utilises about 700 'on-net' minutes per month, C&W's tests make assumptions analogous to that consumer choosing, perhaps, the Bbiz1150 or even the Bbiz2200 plans as opposed to the b750 plan, which of course is cheaper than the other two. In this example, Digicel contends that Caymanian consumers are intelligent and rational enough to choose b750

instead of making the mistake of choosing the b1150 plan, which of course would be a waste of money and reflective of highly irrational behaviour.”¹

42. Digicel states that, in Decision 2004-1, although the Authority adjusted the number of minutes for each existing postpaid plan by using higher pre-existing postpaid plans as the basis for its usage forecasts, C&W’s usage forecasts for all its postpaid plans were significantly understated, thereby resulting in significantly understated costs in the imputation analysis.
43. Digicel presented two approaches that were consistent with its logic, for purposes of analysing the reasonableness of the usage forecasts in the imputation analysis of the postpaid plans. Digicel’s first method, which is also its preferred approach, describes the point at which a consumer would actually be better off by moving to the next plan. Up until the consumer’s usage reaches that point, he would be better off staying within the lower plan. In its 21 April 2004 filing and its 29 April 2004 presentation, Digicel summarised the results of applying its first alternative approach as follows:

C&W Postpaid Plan	Minimum number of minutes in each plan demanded by a rational consumer (“switch point”)
b350	Not available
b500	417 minutes
b750	600 minutes
b1150	877 minutes
bBiz2200	1483 minutes
bBiz3750	2600 minutes
bBiz7500	4483 minutes
bBiz20000	9500 minutes

44. Digicel states that if the minutes at the “switch point” are used in the imputation analysis, it would be higher than what must have been assumed in Decision 2004-1. However, Digicel states that even this assumption would be fairly low. For example, it would be assumed that a bBiz2200 customer would only utilise 1483 (or 67%) on-net minutes. In reality, Digicel states that an average customer on this plan may use many more than this number of minutes as there would still be 717 unused minutes available under the plan (i.e., 2200 – 1483 = 717).
45. In its 26 April 2004 filing, Digicel states that, as an alternative second method, it could be assumed that if a subscriber chooses a higher plan, the subscriber will, at a minimum, demand the number of minutes available on the plan immediately below the higher plan. Therefore, one could assume that the minimum level of on-net minutes demanded on each plan equals the number of minutes offered on the plan immediately below it, as follows:

¹ Digicel’s written brief dated 26 April 2004, for the presentation meeting, page 2.

Plan	Minimum number of minutes in each plan demanded by a rational consumer (“previous plan maximum”)
b350	Not available
b500	350
b750	500
bBiz1150	750
bBiz2200	1150
bBiz3750	2200
bBiz7500	3750
bBiz20000	7500

46. Based on the above, Digicel states that its second alternative allows for the scenario that consumers cannot gauge demand perfectly. This allows for a fair degree of consumer irrationality because it assumes that customers only use the maximum number of minutes from the previous plan when they would, in fact, be better off up to a higher utilisation point.
47. In its 21 April 2004 filing, Digicel states that, if for some reason the Authority does not revise the demand assumptions in the imputation analysis for the postpaid plans, C&W’s postpaid plans will remain anti-competitive because other mobile Licensees are prevented from offering similarly-structured and priced plans. Digicel states that one way to remove the scope for this behaviour would be to regulate the number of free minutes offered rather than the monthly rate of each postpaid plan.
48. However, Digicel re-iterated that Caymanian customers are sophisticated and do behave rationally, as Digicel’s sales team has found. Digicel does not believe that underutilisation in plan minutes is due to irrational behaviour on the part of Caymanian customers and, in any case, the Authority should not assume that customer behaviour observed in the past would necessarily be the case in the future, particularly in a competitive environment.

Wireless Ventures

49. In its comments, Wireless Ventures states that it supports Digicel in calling for a review of C&W’s postpaid plans. Wireless Ventures agrees with Digicel that customers will use a much higher number of minutes, especially at the upper-level plans, or customers will switch to lower-priced plans.
50. Wireless Ventures supports the adjustments recommended in Digicel’s first approach even though Wireless Ventures believes that this approach is extremely conservative and in C&W’s favour since it left so many minutes unused.

C&W Response

51. In its comments, C&W states that Digicel's view of consumer rationality is too narrow. While C&W agrees that consumers are rational, the rationality of a consumer is not exhibited solely in terms of his reaction to prices and cannot be considered solely in terms of a historic view of consumption. C&W states that the following additional factors must also be considered:
- a. consumers may often have expectations of usage that differ from backward-looking consumption patterns;
 - b. the costs involved in analysing the optimal bundle may offset the incremental pure price savings;
 - c. consumers may prefer to purchase more minutes to avoid thinking about how much they are spending per minute;
 - d. monthly rates of additional handsets vary between plans, creating incentives for staying within the plan if downgrading would generate higher charges per handset; and
 - e. in some instances, the choice of plans are divorced from the user, i.e., in the case of corporate clients.
52. In its comments, C&W provided the percentage of customers that use all the free minutes in a plan, in confidence with the Authority, in order to provide a sense of underutilisation of the postpaid plans. C&W states that this gives clear evidence that consumers do not optimise their utilisation in a manner suggested by Digicel.
53. C&W states that Digicel's claim that irrationality occurs only in a monopoly environment is unsubstantiated and false. The company states that revenue forecasting for pricing of usage bundles, flat-rate plans and out-of-plan per minute charges is highly confidential. However, C&W asserts, it is common knowledge that these forecasts do involve assumption of systematic underutilization of plans. In support of its statement, C&W points to an extract of BT's responses in its submission to OFTEL in the UK.

Digicel's Reply Comments

54. In its reply comments filed on 10 May 2004, Digicel states that C&W's argument that consumers may often have expectations of usage that differ from backward-looking consumption patterns assumes that consumers do not learn from their past usage. This contradicts the concept of rationality. Even if C&W is correct in its assumption, Digicel states that it would be reasonable to assume that this irrational behaviour is normally distributed among consumers that overestimate their usage demands and those that underestimate their usage demands. Digicel states that this provides a compelling argument for using its first method.
55. Digicel states that C&W's argument that the costs involved in analysing the optimal bundle may offset the incremental pure price savings is not applicable to the corporate market, small/medium enterprises ("SMEs") or high-end residential users. Digicel states

that rational consumers, particularly the groups noted above, will analyse the benefits of switching to different plans.

56. Digicel states that C&W's argument that consumers may prefer to purchase more minutes to avoid thinking about how much they are spending per minute is plausible to a small degree; however, only on the residential side of the market. Digicel states that rational customers care about price and "avoided thinking" about price would constitute irrational behaviour and is not reflective of real world economics.
57. Digicel states that C&W's argument that the structure of its postpaid plans creates incentives for customers to stay at higher plans if the result of downgrading would generate higher charges per handset, is rarely if ever reflective of real world situations. Further, Digicel states that C&W has provided no evidence to support this.
58. Digicel states that C&W's argument that, in some instances, the choice of plans are divorced from the user leading to underutilisation does not detract from Digicel's proposed methodology.
59. Digicel states that it agrees with C&W that consumers base their choice of postpaid plan on more than just price. However, Digicel states that even C&W would find it difficult to dispute that price is not important given that C&W's marketing material and its website are heavily focused on prices.
60. Digicel states that C&W's argument that the experience of BT in the UK suggests that price is not the primary driver for customers is an incorrect conclusion from BT's paper.

C. Plan costs for C&W's mobile plans

Digicel

61. In its 26 April 2004 filing, Digicel states the Authority should take into account the cost of handsets because the more handsets that are offered on each plan, the higher the total subscriber acquisition cost per plan. If the Authority has not taken account of handset subsidies as part of the "subscriber acquisition costs" in the imputation analysis in Decision 2004-1, Authority should do so in as part of the reconsideration request.
62. Digicel states that one of the most significant elements of the mobile costs incurred by C&W is that of terminating a call on its own or other networks. Given that the issue of the correct level of mobile termination costs is under review and given the strong anecdotal evidence that C&W has misrepresented its true costs, Digicel states that, in making an assessment of anti-competitive behaviour, the mobile termination cost that should be used is the interim rate as agreed between the disputing parties. As an alternative, Digicel states the average of a reliable international benchmarking data set should be used.

63. In support of this latter approach, Digicel argues that the Authority is not constrained to relying solely on the costs as supplied by C&W pursuant to the Main Agreement between the Cayman Islands Government, C&W and the Authority, dated 10 July 2003, in assessing anti-competitive behaviour, given that the Main Agreement is subordinate to the ICTA Law.

Wireless Ventures

64. In its comments, Wireless Ventures shares Digicel's concerns about certain aspects of Decision 2004-1 that accept some of C&W's cost inputs without modification. Wireless Ventures states this is an important matter, particularly given the Authority's stated concerns that C&W's FAC model is not as rigorous or as accurate as it should be. The following are examples cited by Wireless Ventures:
- a. Although Decision 2004-1 notes that C&W's GSM switch is in Jamaica and its TDMA switch is in the Cayman Islands, the Decision does not state whether a mobile call from a C&W TDMA customer to a C&W GSM customer should be treated as an on-net or as an off-net call. Wireless Ventures states that it believes C&W's two mobile networks are distinct from both a physical and network architecture standpoint and therefore calls between these networks should be considered as off-net traffic.
 - b. The Decision does not adequately account for the overall termination costs for calls to C&W's GSM customers. C&W's GSM switch is in Jamaica and thus any call termination on this switch would involve the use of two voice circuits. Wireless Ventures states that the increase to C&W's costs should be, at a minimum, 50% to account for the additional circuit needed to switch calls terminating on the GSM switch from the TDMA network.
 - c. In addition, the Authority should consider using the wholesale rate to estimate the cost of capacity used between C&W's GSM and TDMA networks and between C&W's GSM network and its fixed network for mobile calls. Wireless Ventures states that, prior to 1 April 2004, all calls terminating on C&W's GSM network should have been calculated using the retail International Direct Dialed (IDD) rates to Jamaica minus the 20% wholesale discount.
 - d. Regarding the proper mobile termination rate to use in the imputation analysis, Wireless Ventures states that, in the interim, the only appropriate mobile termination rate to use is the interim rate agreed upon between C&W and its competitors. Wireless Ventures states that it is not proper for too low a mobile termination to be used at the present time.
 - e. With respect to handset costs, Wireless Ventures shares Digicel's concern that Decision 2004-1 may not include all appropriate handset costs. Wireless Ventures states that, as C&W is on a large-scale program to give away handsets to

new customers, those handsets constitute a substantial customer acquisition cost for C&W's operations.

C&W Response

65. In its comments, C&W states that it categorically rejects Digicel's unsubstantiated allegation that it manipulated the allocation of costs in its FAC models. C&W states that the *in camera* proceeding on the FAC models will convince parties that there was no strategy to shift costs between its fixed and its mobile FAC models.
66. C&W states that Digicel's presentation of benchmark cost information for fixed and mobile interconnection in Europe is flawed for the following reasons:
 - a. benchmarks, especially the ones presented by Digicel, are not a relevant proxy for C&W's costs,
 - b. in any event, the benchmarks presented by Digicel are out of date.
67. C&W states that there is no justification for Digicel's proposal that the interim rate be used as the cost for mobile termination in the imputation analysis. According to C&W, there are two main reasons for not using the interim rate as proposed by Digicel:
 - a. the Authority is obliged to use C&W's FAC model as the basis for determining costs during the imputation test. C&W states that the Authority's power to request that C&W's mobile rates pass an imputation test is derived entirely from C&W's licence and in applying the imputation test, the Authority is obliged to follow all the rules governing the imputation test as prescribed by C&W's licence; and
 - b. there is no evidence that TDMA costs are not a good proxy for termination costs. C&W points out a number of countervailing considerations that would lead to GSM being less expensive than TDMA.
68. C&W states that Digicel's argument that handset subsidies need to be taken into account are exaggerated and probably biased. C&W states that the extent to which handset subsidies are used tend to depend on the maturity of the market. C&W states that if the Authority is going to include handset subsidies in an imputation analysis, the Authority should also include the large margins earned on accessories. Further, if one accepts that the plan is the appropriate level for the analysis, this implies that domestic calling should not be considered separately from the plan revenues, but instead should be included along with roaming, international revenue, inbound traffic volumes, etc. C&W states that the omission of revenues from the analysis ignores margins from these services which should have been associated with the called party purchasing the plan.

Digicel's Reply Argument

69. In its 10 May 2004 reply comments, Digicel notes that the Authority criticised C&W's FAC model in Decision 2004-1 and C&W has not, at least in its submission, answered any of the Authority's criticisms.
70. Digicel states that C&W's argument that Digicel's benchmarking information is incorrect may more reflective of differences in the method of calculating interconnection rates rather a criticism of the vintage of the benchmarking data. Digicel recommends that the Authority obtain additional information where there are differences between the information provided by C&W and Digicel.
71. Digicel states that C&W's argument that the Authority has no authority to depart from the procedures prescribed in its licence for imputation analysis is incorrect. Digicel states that paragraph 41 of Annex 5 to C&W's licence permits the Authority to vary the imputation test including variations or qualification to the use of the FAC model, or as will eventually be the case, C&W's LRIC model. Digicel states that, since the Authority may depart from C&W's FAC costs as a matter of law, it would seem unreasonable for the Authority to adopt a figure generated by a model that has yet to undergo public scrutiny instead of a figure representing an actual cost currently incurred by C&W in the market.
72. Digicel states that C&W's argument that handset subsidies are not significant and if included, other revenues should be included, is without merit. Digicel states that for a customer to avail himself of services in the plan, he must have a handset that is compatible with the carrier's network. Excluding handset subsidies from the imputation tests would be justified if handsets were not subsidised; however, as there is a high likelihood that the handsets are subsidised, they should be accounted for in the imputation analysis.

D. Other Issues

73. In its 27 April 2004 comments, Wireless Ventures requests the Authority to provide a means for Wireless Ventures and other interested parties to be made aware of C&W's timing and method for compliance with the ordering provision in Decision 2004-1. In this regard, Wireless Ventures raises the following issues: 1) Decision 2004-1 requires C&W to provide additional costing information and makes directives regarding C&W rates. However, it is unclear to Wireless Ventures as to the timeline for the receipt of the missing information and what the next steps will be. Wireless Ventures requests that the Authority clarify these items. 2) Competitors like Wireless Ventures as well as the general public do not have a clear means of knowing if and how C&W is complying with all of the requirements of the Decision. Wireless Ventures suggests that a method be established so that interested parties can be kept apprised of C&W's compliance with the Authority's directives.

Authority's Assessment of Interested Party Comments and Findings

A. Digicel's right to seek a reconsideration

74. In correspondence dated 28 April 2004 the Authority stated that with respect to C&W's submission as to whether Digicel may request a reconsideration, the Authority is of the view that the legislation is sufficiently clear in this regard and that the application was properly before, and must be adjudicated upon by, the Authority. Having reviewed the very complete and extensive submissions of the parties the Authority remains of the view that the Digicel request for reconsideration is properly before the Authority for adjudication.
75. Both C&W and Digicel have submitted arguments as to the relationship between Decisions 2004-1 and 2004-2 and whether they constitute separate and distinct decisions or whether they represent one composite decision. The Authority was quite clear at paragraph 52 of Decision 2004-2 wherein it stated as follows:
- “Decision 2004-1 is incorporated by reference and the analysis and conclusions noted therein constitute a part of this decision.”*
76. Further, at paragraph 55 the Authority goes on to state as follows:
- “The Authority finds that C&W's failures with respect to the imputation test, in and of themselves, constitute anti-competitive conduct resulting in breach of both its Licence and the Law.”*
77. Both decisions were issued the same day and stemmed from the Authority's initial concern, as expressed in the Authority's correspondence of 8 March 2004, that the proposed C&W mobile rates were in breach of anti-competitive provisions in the C&W Licence. Clearly, the expressed intent of the Authority was to incorporate both decisions in the context of a finding of anti-competitive conduct contrary to the C&W Licence and the Law. Accordingly, the Authority finds that the Digicel request for a reconsideration is of matters pertaining to a section 34F infringement and must be addressed by the Authority.
78. An additional consideration supporting the Authority's conclusion that Digicel has status to appeal lies in the very nature of a failure to pass an imputation test. It is commonly understood both by the industry and those involved in telecommunications competition that prices below costs by an incumbent in a dominant position will be viewed as anti-competitive conduct. In the negotiations leading to the introduction of the imputation test provisions in Annex 5 to the Cable & Wireless Licence, Cable & Wireless business, regulatory and legal staff were well aware that the intent for inclusion of these provisions was to guard against anti-competitive activity on the part of the incumbent. This is exemplified in paragraph 42 of Annex 5 of the C&W Licence wherein it is stated as follows:

“ The Interim Imputation Test identifies a floor price for downstream services...for purposes of determining whether C&W is engaging in anti-competitive behaviour”.

79. Decision 2004-1 contains a clear statement that C&W rates, in certain instances, fail to pass the imputation test. This failure of certain rates to pass the imputation test results in anti-competitive conduct. Anti-competitive conduct is prohibited by Condition 15 of the Cable & Wireless Licence and section 34F of the ICTA Law, as amended. It is the substantive failure of rates to pass the imputation test which results in a breach of section 34F and not whether the Authority has made a specific reference to 34F in issuing Decision 2004-1. The entitlement of Digicel to appeal is a result of the substantive failure of rates to pass the imputation test, which constitutes anti-competitive conduct, and this right should not be constrained by the novel argument that the form of the Authority’s approach by issuing two decisions prevents a party from exercising a right to appeal.
80. Paragraph 53, 54 and 55 of Decision 2004-2 are predicated upon the substantive findings and determinations contained in Decision 2004-1. It is C&W’s conduct as found in these substantive findings and determinations which constitute the anti-competitive activity. As noted by the Authority at paragraph 55 of Decision 2004-2:

“The Authority finds that C&W’s failures with respect to the imputation test, in and of themselves, constitute anti-competitive conduct resulting in breach of both its Licence and the Law.”

81. It is difficult to conceive, had the Authority not issued Decision 2004-2, that Cable & Wireless could argue that although the substance of the Authority’s findings as to certain of its rates failing the imputation test constitute anti-competitive conduct, the failure to specifically reference section 34F in Decision 2004-1 thereby prevents an aggrieved party from applying for a reconsideration of Decision 2004-1 pursuant to section 55A(1) of the ICTA Law. The Authority would fail in its statutory obligations were it not to view Digicel’s appeal as properly submitted within the parameters of the legislation.
82. Accordingly, the Authority will entertain Digicel’s request for reconsideration and adjudicate upon the merits of its submissions. In doing so the Authority shall also have regard to the submissions made by the other interested parties to this proceeding.

B. Plan utilisation for C&W’s postpaid mobile plans

83. Compiling accurate forecasts of plan usage is central to performing an imputation test of C&W’s postpaid mobile plans. The demand estimates should be broadly consistent with rational consumer behaviour and reflect how customers would be reasonably expected to behave. Hence, demand estimates that do not reflect how customers would be reasonably expected to react, should be adjusted.
84. In assessing the imputation tests filed by C&W, the Authority did not have before it information other than C&W’s forecast and the February 2004 data provided by C&W.

As stated in Decision 2004-1, the Authority found that C&W's forecasts resulted in implausibly low usage estimates. The Authority was therefore limited in the information it could reasonably consider in its assessment. For the most part, this was limited to using simple averages of the plans' various usage characteristics.

85. In the proceeding leading to Decision 2004-1, the Authority issued an interrogatory to C&W seeking assurances and justification for using averaged information in the company's imputation test. The company did not respond to the question. Instead, the company concluded, among other things, that its plan and service-level tests, based on simple averages, were presented "only to emphasize the robustness of the analysis."² The Authority notes that this methodology is appropriate if the customers within a plan are reasonably comparable to one another.
86. In an effort to validate C&W's method and determine whether simple averages are an appropriate assumption, the Authority also asked the company to provide, if available, forecast usage volumes for each postpaid mobile plan, disaggregated by level of usage.
87. In reply to this interrogatory, the company stated that this information was not available, as the company did not generate data at the requested level of granularity for its business planning.³ Given that the Authority was unable to obtain additional information from C&W without further delaying the issuance of its decision, and the Authority's concern with C&W's own forecasts, the Authority based the usage estimates for an average subscriber on the February 2004 data for the pre-existing mobile plans that were most similar to the existing mobile plans. The Authority concluded such adjustments were reasonable and consistent with the usage information on record at that time.
88. Since issuing Decision 2004-1, the Authority has sought and obtained from C&W information on actual plan usage for the months of March and April 2004, disaggregated by level of usage.
89. This information provides for a more sophisticated method of identifying average usage for each plan. In particular, the Authority requested that the company sort, by plan, its subscribers by their use of on-net minutes. The Authority asked that the customers to a plan be aggregated by decile (i.e., aggregated into 10 groups based on their relative on-net usage).
90. Based on this disaggregated data, the Authority can evaluate whether information based on a simple average calculation is appropriate for imputation test purposes. It appears that, within each C&W postpaid plan, subscriber usage varies substantially across deciles. This means that using a simple average is not appropriate for estimating the plan usage for a typical mobile customer.
91. While there may be some validity in C&W's argument that some postpaid mobile customers may have avoided analysing their usage in the past, this assumption may not

² C&W response dated 30 March 2004 to interrogatory 18.

³ C&W response dated 30 March 2004 to interrogatory 11.

be reasonable in an environment where there is more than one supplier and where customers are likely to become more conscious of plan price and value. This focus on price and value is not inconsistent with the marketing efforts observed by the Authority of all three mobile Licensees. Clearly the new data and preliminary analysis support a conclusion that a new imputation test analysis should be undertaken.

92. Upon review of Digicel's application for reconsideration of Decision 2004-1, the Authority finds merit in reviewing and revising the imputation analysis for C&W's postpaid mobile plans in Decision 2004-1. Such a review would be consistent with the Authority's findings in paragraph 75 of Decision 2004-1 where it states that:

“Over time, in the Authority's view, it is more reasonable to assume that customers will choose a calling plan that best matches their demand. Having chosen a calling plan that best matches their demand, it is not unreasonable to assume that, in equilibrium, the average usage of subscribers within calling plans will be relatively insensitive to change to the monthly plan rate.”

C. Plan costs for C&W's mobile plans

93. Digicel and Wireless Ventures voice concern that handset subsidies were not properly accounted for in the imputation tests set forth in Decision 2004-1. The Authority notes that the costs and revenues of handsets for the average subscriber were excluded from the imputation analysis in Decision 2004-1.
94. Subsequent to the issuance of Decision 2004-1, the Authority posed interrogatories to C&W on the number of handsets, the cost to C&W and the price paid by subscribers, for each mobile postpaid plan, disaggregated by the level of usage. While C&W has provided some information on handsets, the more detailed information is still outstanding. The Authority intends to resolve the issue of handsets at the time it issues the revised imputation analysis.
95. Digicel and Wireless Ventures also expressed a concern regarding the appropriate method of measuring mobile termination costs. The imputation tests set forth in Decision 2004-1 rely on costs derived from C&W's FAC model with some exceptions. One exception is estimated cost of mobile termination. As described in Decision 2004-1, paragraphs 85 and 86, the same mobile termination rate was used to estimate the cost of C&W's on-net and off-net mobile termination. Therefore, the imputation tests treat the cost of calls originating on C&W's TDMA or GSM network and terminating on C&W's mobile or fixed-line network (“on-net” calls) the same as the cost of calls originating on either of C&W's mobile networks and terminating on a third party mobile network (“off-net” calls).
96. A Determination Request⁴ seeking resolution of a final mobile termination rate is presently before the Authority. As part of that proceeding, parties requested and obtained

⁴ Digicel and C&W filed a determination request on the mobile termination rate on 29 January 2004. C&W and Wireless Ventures filed separate correspondence, dated 24 February 2004 and 27 February 2004,

an expedited process. Parties also sought and obtained sight of the FAC model as part of the Determination Request proceeding, thereby providing them with the opportunity to scrutinise the costs in the FAC model.

97. Given that an expedited Determination Request proceeding is currently underway, and assuming this request is accomplished and resolution is achieved in the near future, the Authority is of the view that the use of an FAC-based mobile termination rate in the interim for imputation test purposes should not unduly prejudice either C&W or its competitors. The Authority determines, therefore, that it would not be appropriate to rely on an interim rate in the imputation test. Use of an interim rate may, among other things, result in unnecessary changes to the imputation test and unwarranted confusion in the marketplace, particularly if those changes are short-lived. Until the mobile termination rate is finalised, the Authority has relied on the costs for mobile termination from the FAC model for imputation test purposes, and has reserved the right to review those results once the Authority issues its determination on the final mobile termination rate.
98. Wireless Ventures contends that C&W's cost of mobile termination to GSM customers is accounted for inadequately in the imputation analysis, given that a significant number of GSM assets are omitted or not fully reflected in the FAC model. C&W provided no cost information nor estimated volumes associated with the GSM network that would have allowed the Authority to determine whether there exist material cost differences between the company's TDMA and GSM networks.
99. As stated in paragraph 88 of Decision 2004-1, the Authority considers that there likely exists a difference in the cost of originating and terminating calls to C&W's GSM and TDMA networks. The construction of C&W's GSM network, including the location of its GSM switch in Jamaica, would suggest that certain costs are unique to the GSM network and are not reflected in the TDMA network costs. In Decision 2004-1, in the absence of information from C&W, the Authority applied an additional 25 percent to the TDMA costs to proxy the additional costs of originating and terminating GSM calls.
100. Wireless Ventures' proposal to use a 50 percent markup of C&W's TDMA costs is not, in the Authority's view, adequately supported. Similarly, in its comments, C&W argued that additional costs in the GSM network would likely be offset by savings in the GSM network. However, C&W did not provide any information that would allow the Authority to satisfy itself there would in fact be savings and to assess the magnitude of those savings.
101. Given the above, the Authority is not inclined to adjust the 25 percent factor at this time. Notwithstanding, the Authority considers the matter of any cost differences between the TDMA and GSM network to be an important issue and will pursue this issue in its final determination on the mobile termination rate.

respectively, seeking a determination request on the mobile termination rate. The determination requests from both Digicel/C&W and Wireless Ventures/C&W were joined by the Authority as one determination request by letter dated 2 March 2004.

D. Other Issues

102. On the issue of Digicel's request to reconsider the assessment of all of C&W's mobile plans addressed in Decision 2004-1, the Authority notes that the issue of utilisation is more relevant to C&W's postpaid mobile plans. As a result, the Authority has not, in this Decision, reviewed C&W's prepaid mobile plans.
103. Pending any adjustments to the FAC model in the proceeding dealing with the Determination Request for a final mobile termination rate and any additional information received, the Authority may determine that it would be appropriate to review the imputation analysis for C&W's prepaid mobile plans.
104. With respect to Wireless Ventures' proposal that the Authority provide a means for interested parties to be made aware of C&W's timing and method of compliance with the orders in Decision 2004-1. C&W did not comment specifically about this issue in its response.
105. The Authority finds there is merit in Wireless Ventures' proposal. The Authority has, as of 17 May 2004, included a section on the Authority's website (www.icta.ky) that identifies the status of C&W's compliance with the directives in Decisions 2004-1 and 2004-2.

E. Amendment of ICT Decision 2004-2

106. Digicel has requested that the Authority amend Decision 2004-2 consequent upon revisions to Decision 2004-1. The Authority has reviewed paragraphs 52 through to 55 which are the pertinent portions of its findings as concerns Decision 2004-1. The substantive findings of the imputation test analysis, found in paragraphs 52 through to 55 of Decision 2004-2, pertaining to Decision 2004-1 are as follows:
 - a. the Authority has found that C&W's revised mobile rates have failed to satisfy the imputation test in a number of areas and that Decision 2004-1 is incorporated by reference and the analysis and conclusions noted therein constitute a part of this decision;
 - b. in those instances where C&W's mobile prices have failed to pass the imputation test, C&W is deemed to have engaged in anti-competitive conduct which constitutes a breach of Licence and, after 1 April 2004, a breach of section 34F of the Law;
 - c. in those instances where it has failed to include all appropriate costs, the effect of which is to compromise the imputation test assessment, C&W has unnecessarily tainted the validity of its various mobile prices to the prejudice of the marketplace. The Authority is of the view that it is unreasonable for C&W to be the beneficiary of its failure to include proper costs to the detriment of the imputation test analysis and competitors in the marketplace.

Further the Authority necessarily concluded that the legitimacy of C&W's prices cannot be supported as a whole and, as such, cannot be said to pass the imputation test, thereby contravening its Licence and the Law;

- d. C&W's failures with respect to the imputation test, in and of themselves, constitute anti-competitive conduct resulting in breach of both its Licence and the Law.

107. The Authority is of the view that there is nothing in Decision 2004-4 or the additional information obtained from C&W on usage patterns which requires any modification to the above substantive findings. Once the results of the further imputation test analysis have been obtained the Authority may deem it advisable to vary Decision 2004-2 both as to substance and disposition.

Revision of Imputation Tests

108. As a result of the foregoing analysis, the Authority will review the imputation analysis for C&W's postpaid mobile services and will issue the revised imputation analysis as soon as it possibly can.
109. The Authority has already commenced this analysis. A challenge to finalising such analysis is that the Authority has just received or has yet to receive information requested of C&W. Whilst appreciating the challenges that C&W may itself face in capturing and verifying the required data, the Authority has a responsibility to ensure that such internal difficulties do not adversely impact other Licensees or consumers. The Authority therefore directs C&W to be responsive in terms of both the completeness, accuracy and timeliness of its responses. C&W is reminded of the powers available to the Authority under the provisions of the ICTA Law should it consider that C&W is delaying the Authority in the completion of its imputation analysis and the issuance of its findings.