



CABLE & WIRELESS

Cable and Wireless (Cayman Islands) Limited
P.O. Box 293
Grand Cayman, KY1-1104

Office: +1 (345) 949-7800
Fax: +1 (345) 949-7962

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7 November, 2006

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

Dear Mr. Archbold,

Re: C&W's Application for the Determination of a Cost-Oriented MTR

1. By letter to the Authority dated 25 October 2006 C&W applied to the Authority pursuant to section 9(3) and 68 (3) of the Law and regulation 6(h) of the Interconnection Regulations for the determination by the Authority of a cost-oriented MTR. The letter, which was copied to all other telecommunications licensees, set out in detail the legal and regulatory basis of the application. By letter dated 31 October 2006 under the caption "C&W's further request of 25 October 2006", at page 3 onwards, Digicel purports to respond to C&W's application.¹
2. Digicel, by its own admission, has failed to respond to the factual assertions and legal propositions made in C&W's application. Instead, Digicel appears to have rested its case on what appears to be a jurisdictional challenge to the Authority's power to hear and determine C&W's application. According to Digicel, neither section 68(3) of the Law nor regulation 6(h) of the Interconnection Regulations entitles C&W to apply to the Authority for the determination sought in C&W's application. Such an

¹ In the same letter Digicel also responded to C&W's Determination Request dated 25 October 2006. C&W has responded to Digicel's submissions in response to the Determination Request by letters to the Authority dated 2 November 2006 and 7 November 2006. Due to the procedural nature of the Determination Request those letters have not been copied to telecommunications licensees other than Digicel

application, according to Digicel, may only be made by way of a valid determination request under the Dispute Resolution Regulations.

Procedural Basis of C&W's application

3. Before addressing the merits of Digicel's argument that the Authority may not hear C&W's application it is important that the Authority recognises the procedural significance of C&W's application. In light of the history of MTR in the Cayman Islands as outlined by C&W in the application dated 25 October 2006, and as stated in the final three paragraphs of the application under the heading "The Authority Must Intervene", it is critical that there is determined for the Cayman Islands an MTR which is applicable to all telecommunications licensees.
4. The determination of an MTR applicable to all telecommunications licensees may not be made in proceedings commenced by way of a determination request arising from a bilateral dispute between Digicel and C&W, unless the Authority, on its own motion, elects to invite public participation pursuant to regulation 13(1) of the Dispute Resolution Regulations. It is for these procedural reasons that C&W felt obliged to make this application.

The Authority has statutory and regulatory jurisdiction to hear and consider C&W's application.

5. Digicel's denial of the Authority's jurisdiction to entertain C&W's application is erroneous in law. First, no attempt is made to address the clear intention and purport of section 68(3) of the Law and regulation 6(h) of the Interconnection Regulations. Second, Digicel ignores the express reliance in the application on the wide powers of the Authority under section 9(3) of the Law, and the numerous other provisions in both the Law and the Interconnection Regulations by virtue of which the Authority's jurisdiction to hear C&W's application is exercisable.
6. These provisions make it manifest that under the legal and regulatory regime existing in the Cayman Islands, interconnection and infrastructure charges are required to be cost-oriented. Section 68(3) and regulation 6(h) are but the clearest expression of this policy. An MTR contained in an interconnection agreement which is not cost-oriented is contrary to the Law. Not only does the Authority have wide general powers to ensure compliance with the Law in all instances, but in the case of the MTR, the Authority has specific express powers to ensure that the MTR is cost-based and therefore in compliance with the Law. The whole range of the Authority's powers may be seen from the provisions below cited.

7. Section 9(1) of the Law provides:
- “Subject to this Law, the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law.”
8. Section 9(2) outlines, *inter alia*, the following functions of the Authority:
- (a) to promote competition in the provision of ICT services and ICT networks where it is reasonable necessary to do so;
- (c) to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks;
- (e) to license and regulate ICT services and networks as specified in this Law and the Electronics Transactions Law (2003 Revision);
- (g) to resolve all disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;
- (h) to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure.”
9. Section 9(4) provides:
- “The Authority may regulate the rate, prices, terms and conditions of any ICT service or ICT network that is required to be licensed where the Authority is of the opinion that it is in the interests of the public to do so.”
10. Section 65(5) and (6) of the Law provide:
- “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 interconnection will be determined.”
11. Section 68(3) of the Law provides:
- “The cost [of making any interconnection] shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard

to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting interconnection service does not have to pay for any network components that are not required for the interconnection service to be provided.”

12. Regulation 6(f) of the Interconnection Regulations provides:

“costs and tariffs shall be sufficiently unbundled so that the requestor shall be obliged to pay the responder only for the network elements or infrastructure sharing services that it requires...”

13. Regulation 6(h) of the Interconnection Regulations provides:

“interconnection and infrastructure sharing rates shall be cost-oriented and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder’s fixed and common costs...”

14. Regulation 10(1) and (2) of the Interconnection regulations provide:

(1) A responder’s charges for interconnection or infrastructure sharing shall be -

(a) determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;

(b) non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;

(c) reciprocal for the same service in order that the responder and the requestor pay the same rate for providing each other the same services, except for any applicable contribution towards an access deficit that may be approved by the Authority;

(d) preferably such that non-recurring costs shall be recovered through non-recurring charges and recurring costs shall be recovered through recurring charges;

(e) such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and

(f) based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.

(2) In accordance with section 53 of Annex 5 to [C&W’s] licence, until the development of an approved FLLRIC model, [C&W] shall use its fully allocated cost model with the following adjustments (adjusted FAC model)-
...”

15. Regulation 25 of the Interconnection Regulations provides:
- “Interconnection and infrastructure sharing agreements and the procedures for arriving at such agreements shall be based upon the terms of the Law, conditions of the licence, relevant regulations, regulations, (*sic*) decisions, directives or standards and other guidelines that the Authority may prescribe.”
16. Regulation 22(2) of the Interconnection Regulations provides:
- “The Authority may reject any interconnection or infrastructure sharing agreement, or any portion thereof, if it determines that the agreement does not comply with the Law, conditions of the licence, relevant regulations, regulations, (*sic*), decisions, directives or standards and other guidelines that the Authority may prescribe.”
17. Regulation 7(3) of the Interconnection Agreement provides:
- “Interconnection and infrastructure sharing agreements shall be based upon the Law and the terms of the responder’s legal framework document.”
18. Regulation 7(2) provides:
- “The Authority may, in its discretion, direct a licensee to amend the legal framework document to reflect the terms of its licence, relevant rules, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe...”
19. There is evidently no lack of express power in the Law and in the Interconnection Regulations enabling the Authority to take decisive action to ensure that the MTR is cost-oriented and in compliance with the Law. The Interconnection Regulations even set out the precise basis on which the Authority may determine a cost-oriented MTR. By regulation 10(1)(f) the Authority shall use the FLLRIC model, and pursuant to regulation 10(2), until the FLLRIC model is developed, the recognised benchmark is C&W’s adjusted FAC model.
20. If, in spite of the above cited provisions of the Law and the regulations, it is still to be argued that the Authority has no jurisdiction to hear and determine C&W’s application, the Authority may yet resort to the long established legal principle that where a statute confers a power on a statutory body, that body is deemed to be empowered to do not only the acts expressly authorised but, in addition, all things which may reasonably and properly be done under the main purpose.² Accordingly, the Authority may hear and consider C&W’s application as a reasonable and proper

² *Attorney General v Great Eastern Railway Co.* (1880) 5 App. Cas. 473, 481; *R v. Director of Public Prosecutions, ex. p. Duckenfield*, [1999] 1 WLR 55

function incidental to the carrying out of the Authority's main function of regulating the rate of any ICT service as provided for under section 9(4) of the Law.

Urgent action from the Authority required

21. The suggestion that the Authority is only empowered to carry out these clear, express statutory and regulatory functions upon receipt of a so-called "valid determination request", if correct, would result in the emasculation of the Authority. The statutory and regulatory power to determine a cost-based MTR exists. The reasons for the Authority acting now, as set out in C&W's application, are compelling. C&W implores the Authority to proceed as expeditiously as possible towards the close of the proceedings and the resolution of this critical issue. As demonstrated in C&W's application pursuant to section 68(3) of the Law and regulation 6(h) of the Interconnection Regulations for the determination of a cost-oriented MTR, there is a compelling confluence of circumstances for the Authority to act urgently and decisively pursuant to its statutory obligation. The exchange of correspondence between C&W and Digicel is a clear indication that there is no prospect of this issue being resolved through bilateral discussions. There is no justifiable basis for the Authority to await the outcome of the FLLRIC proceeding. The distortion of the retail market by acts of arbitrage engaged in by some licensees to the detriment of others and the likely damage that may result from a protracted dispute between C&W and Digicel demand immediate action. The Law and the regulations require that there be a cost-oriented MTR. C&W has made the first bold step towards compliance with the Law by insisting on an MTR which is no more than CISO.11 per minute. There is now in the market no MTR which is either agreed by telecommunications service providers or approved by the Authority which must now act decisively in accordance with its statutory obligation to restore the previously existing period of regulatory peace only on a more sustainable and lawful footing.

Digicel has failed to respond to substance of C&W's application

22. Digicel has to date failed to respond to the critical issue arising in these proceedings, namely, whether the MTR of CISO.1845 agreed between Digicel and C&W is in fact cost-oriented, as required by the Law and the Interconnection Regulations, and if not, what is an appropriate cost-based MTR, and on what basis should such an MTR be determined. In light of the Authority's practice note contained in ICT Decision 2006-2³ Digicel may not reserve its case on these issues beyond the close of the proceedings by the Authority. In light of the need for prompt action C&W will insist on strict compliance with this practice note.

Yours faithfully,
Cable & Wireless (Cayman Islands) Limited

"Signed"

Rudy B. Ebanks
Chief Executive (Acting)

³ Paragraphs 24 and 25.

cc.: Mr. Timothy Adam, Chief Executive
Hon. Arden McLean, Minister for Communications, Works and Infrastructure
Blue Sky Communications Ltd.
Blue Sky Wireless Ltd.
E-Technologies Ltd., trading as CaymanOne
Digicel (Cayman) Limited
Infinity Broadband Ltd.
TeleCayman Limited
WestTel Limited