



The Bigger, Better Network.

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January 13, 2010

Attention: Mr. David Archbold

The Managing Director
The Information Communications and Technology Authority
P.O. Box 2502
Grand Cayman, KY1-1104
CAYMAN ISLANDS

Dear Sirs:

Cable & Wireless (Cayman Islands) Limited have by letter dated January 7th 2010 applied to ICTA to publish to other ICT licensees in the Cayman Islands, namely WestTel and TeleCayman, the Determination Request made by Digicel (Cayman) Limited on December 9th 2009 in respect of six pre-contract disputes which C&W and Digicel were unable to resolve between them.

Cable & Wireless have singled out No. 1, (The Glide Path), No. 4 (Fixed Termination Rates) and No 5 (Transit Rates) out of the six pre-contract disputes between itself and Digicel and applied to ICTA to have WestTel and TeleCayman joined as either respondent or referring parties to them.

C&W has further applied to the ICTA to invite and consider submissions on Disputes No. 1, 4 & 5 from these named ICT operators and finally to extend any final determinations on these C&W/Digicel disputes as applicable to and binding on WestTel and TeleCayman.

Not surprisingly, Digicel finds this application of January 7th 2010 objectionable.

The disputes are all referred to ICTA as pre-contract disputes under Section 67 of the ICTA Law and Regulation 3 of the Information and Communications Technology Authority (Disputes Resolutions) Regulations 2003. They arose as C&W is well aware out of failed negotiations on a private party and party matter namely the Interconnection Agreement between only C&W and Digicel. As set out and evidenced by the various exhibits, C&W and Digicel negotiated for several months on a plethora of contractual issues and having exhausted the process required by Law, were constrained to take the matter before the ICTA in six very specific, jointly framed areas of disputes. Unless C&W also has by incredible coincidence, attempted to negotiate the same issues of the same nature, arising from the same facts and failed to agree them with both WestTel and TeleCayman in the same manner as set out in the Determination Request of

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December 9th 2009, they cannot claim that disputes 1, 4 and 5 should be decided with respect to TeleCayman and WestTel in the same way as they are to be decided vis-à-vis C&W.

Regulations 4 make it clear 'the referring party shall not submit a determination request to the Authority unless it has first made good faith and reasonable efforts to settle such dispute directly with the respondent' and we submit that until and unless the negotiation for an agreement between WestTel and C&W and TeleCayman and C&W (which would presumably be two separate agreements), have been tried and failed, no party could have referred disputes arising from the negotiation to ICTA. The referring party is required to prove that the process was given reasonable effort and by SWORN affidavit attest to the evidence supplied in proof. C&W has simply made the sweeping statement that WestTel and TeleCayman ought properly to become a party to the dispute as any decision made by ICTA will have a significant impact on them. It has failed to point out anywhere in the Regulations where a party to a dispute make seek to join a third party on this basis.

We expect that if C&W and WestTel and TeleCayman are embroiled in negotiations over an interconnect agreement and have pre-contract disputes inter se in the terms similar to or as set out in Disputes 1, 4 & 5 of our Determination Request, they may make a separate determination request pursuant to the Regulations and satisfy all the preconditions set by law. It may very well be that they cannot swear the required affidavit and therefore not have a legitimate set of disputes ready for referral to ICTA.

Regulation 9 of the regulations gives the Authority the power to consolidate two or more Determination Requests and to handle them as a single dispute where the Determination Requests are of "...similar nature involving one or more of the same parties.." and may be more efficiently and consistently disposed of.

This obviously presumes a determination request validly constructed and satisfying the mandates of Regulations 3, 4 and 5 which has been presented to the Authority. Due notice would have to be given to the respondent (Regulation 3(1)), the parties spend the required 30 days in good faith discussions of the notified dispute, (Regulation 3(3) and Regulation 4. We submit that an application to join WestTel or TeleCayman to the current Determination Request filed by Digicel would in effect be asking ICTA to join two or more disputes as one. This can only be made where a determination request has been made by C&W or the other two operators seeking resolution of a dispute between them.

The application to join these third parties appears even more absurd, where of the four parties relevant to the application; no dispute in fact has arisen between three of them, for which there has never been an interconnection agreement or request for interconnection. Other than being players on the telecommunications market offering limited competition to Digicel on fixed wireless voice telephony services and internet, there is no nexus between Digicel and WestTel and Digicel and TeleCayman out of which any dispute arises.

To put it briefly, there is in fact no actual dispute arising between Digicel and the two operators within the meaning of section 67 of the ICTA Law i.e. no pre-contract dispute exists. Further, if there are three issues between C&W and WestTel/TeleCayman of the same or similar nature, and arising from the same facts as set out in Disputes 1, 4 & 5, C&W is not allowed to co-opt these third parties into an existing disputes resolution process by a mere letter thereby circumventing the preconditions as laid out in Regulations 3. They ought to at least indicate (and provide evidence) in said application that there were negotiations, that they gave notice to the third parties of the disputes and that notwithstanding good faith attempts they have failed to agree. Finally, the regulations do not allow third parties to be declared disputants on the basis that a determination of issues arising out of a private contract between two disputants may have an impact on them.

We have discussed the impact of Regulation 9 on C&W's application notwithstanding the fact that this section was not relied on by them. They have not said that there are disputes with WestTel and TeleCayman which are before ICTA and which can be determined together with the Determination Request of December 9th 2009. They have instead argued Regulation 13. We accept that Regulations 13 (which is consistent with Regulations 8 (a) and (d)), allows for a third party to be heard, make submissions and otherwise participate in the disputes resolution process. This does not however make them a party to the Dispute and by so submitting, they cannot procure an order in their favour against any party on the record as a disputant. Under Regulation 13(1) the Authority of its own volition 'may hear submissions or allow participation in a proceeding, public or otherwise, from interested parties, other licensees or members of the public to *assist* in making a determination concerning a dispute.' (Italics supplied). We see no basis for determining that WestTel and TeleCayman are interested parties but they certainly are 'other licensees' within the meaning of this regulation. If C&W's letter of January 7th 2010 is seeking to have the Authority exercise this power then we believe there can be no difficulty with the request. It is procedurally sound. And if the Authority, with or without this request had decided to solicit the views and input of WestTel and TeleCayman then they are entitled to have the Determination Request published to the parties from whom the Authority wishes to hear. That is as far as Regulation 13 goes. Nowhere in this section relied on by C&W does the Authority have the right to include these persons as parties in the dispute as it is clear the purpose for

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which the power is granted. This is wholly and solely to 'assist in making a determination concerning the dispute.' It is to hear the views and canvass the public's and interested person's opinions, assess expert evidence from parties with knowledge of the situation surrounding the dispute and to identify the potential impact of the disputes and its solutions and to better determine the issues BETWEEN THE CONFLICTING PARTIES.

Having conceded that the Authority has the power to invite submissions from any person under regulation 13, it does not follow that in this case they should. Digicel cautions against ICTA forwarding its Determination Request to the two named operators and does not recommend the ICTA seek the submissions and participation of WestTel and TeleCayman in the resolution process. These disputes are already very involved and we see no good reason to add more parties to the evaluation thereof. WestTel and TeleCayman are not in fact major service providers in the mobile market and have small market shares in the Internet and fixed wireless segments. As far as we are aware they have already signed ICA agreements with C&W or are soon to do so and themselves have no disputes with C&W as Digicel does. The major arguments for and against the requests as we have set out in the Determination Request are lucidly enunciated by the parties closest to the disputes and we do not expect that submissions by any other operators will add anything material to the process. In any event ICTA may if it deems it necessary, formulate such questions as it believes should be directed to these operators and make specific requests of them under regulation 8(a). If the sole reason for requesting their input is that a decision will impact the industry then nothing stops ICTA from soliciting comments from any person or member of the public who may or may not be users of ICT services in the Islands. This can hardly be an expeditious and efficient process for resolving these three disputes and would run counter to the mandate of ICTA.

Further we would insist, if ICTA were to allow participation of WestTel and TeleCayman, that natural justice requires ICTA to give the other operators fair notice of the Determination Request, adequate time to respond and likewise, the respondents and the referring parties must be given appropriate opportunity to respond to any substantial comments submitted. These disputes between the two parties would then, without any clear and pressing need, become extended and delayed. The issues as we have raised them in the Request are clearly time sensitive and there is little room for delaying an expeditious resolution. A practical result of making a request for submissions by these operators would be to see the extension of this dispute easily by a further 40 days i.e. a possible 20 days to receive the comments and a further 20 days for the parties to all respond to WestTel and TeleCayman.

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In light of our request for time to comment on the final submission of January 12th 2010 from C&W on our Determination, we believe the process simply cannot accommodate more extensions of time.

For the above reasons, we urge the Authority to deny C&W's request to have WestTel and TeleCayman joined as parties to this dispute. We ask that the Authority not involve either WestTel or TeleCayman by requesting comments from them or otherwise involve them in the disputes resolution process. In the alternative, we ask that if the Authority is minded to request submissions from them, this is the most they should do and Digicel should be allowed at least 20 days to respond to any submissions received.

Yours sincerely,

Digicel (Cayman) Limited



Victor Corcoran
Chief Executive Officer