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LIME

28th May 2010

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

Dear Mr. Archbold,

Re: LIME / Digicel Interconnection Dispute

Cable and Wireless (Cayman Islands) Limited, trading as LIME, is pleased to submit the attached comments on Digicel Cayman Limited's Request for Reconsideration of the Authority's ICT Decision 2010-5, *Decision in Digicel Determination request related to Digicel/LIME Interconnection Agreement Dispute*, of 29 April 2010.

Please do not hesitate to contact the undersigned if you should have any questions.

Sincerely yours,

'Signed'

Frans Vandendries
Vice President Legal Regulatory and Corporate Affairs

c.c. Digicel/LIME Interconnection Dispute distribution list

Encl.

LIME COMMENTS ON

DIGICEL REQUEST FOR RECONSIDERATION – ICT DECISION 2010-5

1. Cable and Wireless (Cayman Islands) Limited, trading as LIME (“**LIME**”) is grateful for the opportunity to respond to the Digicel Cayman Limited (“**Digicel**”) 12 May 2010 Request for Reconsideration of the Authority’s determination regarding six disputed matters in respect of the Interconnection Agreement between Digicel and LIME (the “**Determination**”¹).
2. Digicel’s disagreement with the Determination of the Authority does not, in respect of any of the six referred disputes, constitute a basis for reconsideration under the Law or any Regulation.

Legislative and Regulatory Framework

3. An application for reconsideration of a decision of the Authority is based on Section 78 of the *Information and Communications Technology Authority Law* (the “**Law**”). A party seeking reconsideration must show that the decision is enumerated in Section 78 (1) set out below:

(1) This section shall apply to the following decisions of the Authority -

- (a) a decision not to grant a licence;*
- (b) a decision to revoke a licence;*
- (c) a decision to modify a licence under section 31(4);*
- (d) a decision to suspend a licence under section 32(1);*
- (e) a decision that a section 36 prohibition has been infringed;*
- (f) a decision that a section 40 prohibition has been infringed;*
- (g) with regard to an individual exemption under Part IV-*
 - (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 or obligation 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; or*
 - (v) a decision on the duration of the extension referred to in subparagraph (iv);*
- (h) a decision to cancel an exemption;*
- (i) a decision to impose a penalty in accordance with Part IV and a decision as to the amount of such penalty;*

¹ ICT Decision 2010-5, *Decision in Digicel Determination Request related to Digicel/LIME Interconnection Agreement Dispute*, 29 April 2010.

- (j) a decision to give a direction under section 47, 48 or 50;
- (k) a decision in relation to a pre-contract dispute under section 67; and
- (l) such other decision as may be prescribed.

4. The Authority has ruled on several occasions that, if the decision in question is not enumerated in Section 78(1), the aggrieved party must show a fundamental flaw to the procedural or substantive approach adopted by the Authority in arriving at its decision.² The Authority has set a high threshold for reconsidering a decision on the basis that the aggrieved person has shown a fundamental flaw in its procedural or substantive approach in making the decision. The fact that the applicant does not agree with the decision reached by the Authority is not sufficient to impugn the decision.
5. LIME notes that Digicel did not make any submissions on whether the Determination falls within any of the enumerated categories in section 78(1). If the Determination is a section 78(1) decision, LIME submits that the Authority must consider the Request for Reconsideration, but that, as will be shown below, Digicel has not demonstrated any errors in the Determination which could justify any changes to it. In other words, the Determination is, on the merits, a sound decision, and the Request for Reconsideration should be denied.
6. Alternatively, if the Determination is not a section 78(1) decision, it is LIME's argument that Digicel, in its Request for Reconsideration, has failed to show any such fundamental flaw in the procedural or substantive approach of the Authority, and that the Authority should "as a matter of principle... decline to entertain [the] application...".³

Dispute 1

7. Digicel puts forward that the Mobile Termination Rate ("**MTR**") was somehow deemed to have been agreed. In fact, the question of the level of the MTR was never put before the Authority as a dispute as both parties have indicated in their respective submissions that the rate was agreed. The only dispute referred to the Authority in respect of the MTR was the application or non-application of a glide path to arrive at that rate. Contrary to Digicel's assertion, the agreement to which that rate applies is not the expired agreement, but the proposed one. Neither party is capable of diminishing the power of the Authority to set rates, and the rate presented to the Authority as agreed having been accepted as such, is effective from the date of the Determination.
8. Digicel's suggestion that the 2004 Settlement Agreement would apply to the agreed rate by virtue of the date on which the new MTR was agreed is, at best, a stretch.

² See, for example, most recently ICT Decision 2010-2, *Decision on LIME's Application to Reconsider the FLLRIC Phase 3 disclosure request*, 26 February 2010; and ICT Decision 2010-3, *Decision on LIME's Application to Reconsider the 14 January 2010 Interim Directive on the Use of Deep Packet Inspection and Similar Technologies*, 4 March 2010.

³ Paragraph 10 of ICT Decision 2010-3.

9. As regards Digicel's submission in paragraph 13 that the Authority has somehow erred in law by assuming facts not in evidence in accepting the position put forward by both parties that a new MTR had been agreed, Digicel cannot now claim, having presented to the Authority a fact not in issue, which was subsequently confirmed by LIME, that the Authority should have looked behind the parties' own statement of the facts to enquire whether an agreement on rates had in fact been arrived at.
10. LIME submits that this position is not inconsistent with the Authority's acknowledgement that some formal documentation is required where the validity of an agreement is in issue. LIME submits that the Authority's decision was properly arrived at and correct in all the circumstances.
11. Digicel has sought to misrepresent the position of the Authority which, having examined at length in paragraphs 42 to 50 of the Determination both the economic theory of the glide path and its applicability to the market in the Cayman Islands, has determined, not that it is illegal, but that its benefits do not outweigh the benefit of immediate application of a more cost-oriented rate in the Cayman Islands.
12. LIME submits, therefore, that the Authority's Determination in respect of Dispute 1 is both procedurally and substantively correct, and should not be changed.

Dispute 2

13. On the issue of direct mobile-to-mobile interconnection ("**M2M**"), Digicel submitted that there was no basis for the Authority's determination that the parties had not exhausted their obligation to make reasonable efforts to reach agreement, and therefore to refer the matter back to the parties for discussion. LIME disagrees.
14. Regulation 4 of the *Information and Communications Technology Authority (Dispute Resolution) Regulations 2003* (the "**Dispute Regulations**") require the parties to a dispute not to file a determination request unless they had "first made good faith and reasonable efforts to settle such dispute directly". The Authority had detailed submissions before it on the discussions that had been held between the parties up until that time. It is clear from the Determination that the Authority considered those submissions before reaching its conclusion that "adequate negotiation is lacking". Regulation 8 of the Dispute Regulations permits the Authority to refer a dispute back to the parties for further discussions.
15. In other words, the Authority had an adequate record before it, something Digicel does not dispute, considered all the evidence, and made a determination that it was entitled to make under the Dispute Regulations. Nothing in this discloses any procedural or substantive flaw justifying reconsideration of the Authority's Determination in respect of Dispute 2. In this respect, LIME is disappointed that Digicel should prefer further action in front of the regulator to further discussion with the other party.

Dispute 3

16. Digicel argues that the Authority's reasoning in respect of Clause 42(1) is flawed because the Authority has an obligation "to discharge its statutory obligations to make a determination [where the parties are at odds] and set this beyond doubt."⁴ This is in fact precisely what the Authority did in the Determination and Digicel's disagreement with the result does not mean the Authority did not set the matter "beyond doubt".
17. In the Determination, the Authority clarified the distinction between the obligation imposed upon LIME, by virtue of Annex 5 of its Licence, to provide certain retail services to other Licensees on a wholesale basis, and the obligation imposed on all Licensees, by virtue of section 65 of the Law, to provide interconnection for retail services. The original wording of Clause 42 was inconsistent with that statutory obligation and, while LIME had submitted in the alternative that Clause 42(1) could either be modified to reflect a mutual obligation or deleted entirely, the Authority chose to require its deletion.
18. As the Authority has provided the clarification requested by the parties, Digicel cannot now argue that there remains such a degree of ambiguity as to constitute a flaw in the Authority's reasoning. In other words, the Authority's Determination of Dispute 3 is correct and should not be varied.

Disputes 4 and 5

19. Digicel submits that the Authority has failed to exercise a duty to the parties to make a final determination on the appropriate levels of the fixed termination and transit rates, and that it should have requested the information necessary to make a determination. Digicel further submitted that this failure was unreasonable and a breach of procedural fairness.
20. With all due respect, this is misrepresenting what the Authority determined. The Dispute Regulations permit the Authority to take a number of actions in response to a determination request. While one of them is, as Digicel pointed out, to request of the parties further information, Regulation 8(h) gives the Authority a wide discretion to adopt such other approach as would resolve the dispute. In this case, the Authority reasonably noted that a benchmarking exercise would not permit it to discharge its obligation to set cost-oriented rates and that the FLLRIC proceeding was still underway, and reasonably determined to make the fixed termination and transit rates interim rates and, following the conclusion of the FLLRIC proceeding, to hold a further proceeding to consider the appropriate level of those rates. Given the circumstances, this approach is reasonable and lawful, and does not disclose any flaw.
21. Further, contrary to Digicel's allegation, the Authority did not leave the issue open-ended. The Authority explicitly noted in paragraphs 96 and 111 of the Determination

⁴ Paragraph 25 of the Request for Reconsideration.

that it would make a determination in follow up proceedings on the fixed termination and transit rates. However, the Authority also left open the possibility, in paragraphs 95 and 110 of the Determination, for the parties to reach an agreement on the level of the fixed termination and transit rates, which would obviate the need for a follow up proceeding. Both of these determinations are reasonable and not flawed.

Dispute 6

22. Digicel argues, in essence, that because LIME accepted the inclusion of Clause 9.7 in the Legal Framework of the first Interconnection Agreement, the Authority is required to retain it in the second Interconnection Agreement, notwithstanding any other provision in the legal and regulatory framework applicable to ICT services in the Cayman Islands.
23. Digicel's arguments do not identify any flaw in the reasoning applied by the Authority. The Authority reviewed the arguments of the parties as well as LIME's Licence and the applicable Law and regulations, and determined that LIME's retail services are appropriately regulated under the terms of LIME's Licence, and that there is "no legitimate reason" to impose any additional condition on LIME's retail services in an interconnection agreement. This is a reasonable and reasoned position, and within the jurisdiction of the Authority to take.
24. Further, the effect of Digicel's position would be to fetter the Authority by forcing it to make determinations consistent with prior agreements of its Licensees, even where the agreement is no longer in force and where one of the Licensees no longer agrees with the prior position. This is untenable, and would expose the Authority to judicial review if it were to adopt that approach.
25. LIME submits, therefore, that the Authority's Determination in respect of Dispute 6 is sound on its merits, and that Digicel has demonstrated no procedural or substantive flaw which would justify a change.

All of which is respectfully submitted t6his 28th day of May, 2010.