Digicel

The Bigger, Better Network.

REPLY TO LIME COMMENTS ON DIGICEL (CAYMAN) LIMITED REQUEST FOR RECONSIDERATION – ICT DECISION 2010-5

TO : THE INFORMATION & COMMUNICATIONS TECHNOLOGY AUTHORITY
PO BOX 2502
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GRAND CAYMAN KY1-1104

ATTENTION : THE MANAGING DIRECTOR
MR. DAVID ARCHBOLD

COPY : THE GENERAL MANAGER
CABLE &WIRELESS (CAYMAN ISLANDS) LIMITED
MR. ANTHONY RITCH

IN THE MATTER OF SECTION 78(3) OF THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY ACT 2006 ('THE LAW')

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DIGICEL (CAYMAN) LIMITED acknowledges the comments filed by LIME in response to its Request for Reconsideration of ICT Decision 2010-5 dated May 12th 2010. Our responses are as follows:

1. The Reconsideration Request which Digicel (Cayman) filed on May 12th 2010 requested a reconsideration of Decision ICT 2010-5 which was rendered following a Determination Request filed by Digicel on December 9th 2010. That Determination Request was made pursuant to Section 67 of the Act. Section 67 as we are all aware is a request to determine a **pre-contract dispute.** Consequently, the ICT Decision 2010-5 was a decision on a pre-contract dispute. It would therefore seem evident without submitting exhaustive arguments to show that the reconsideration request was pursuant to Section 78(1) (k), that on the face of the documents themselves, this reconsideration was submitted on the ground that the ICTA made a decision on a pre-contract dispute which has aggrieved Digicel.

2. In the Reconsideration Request we made it plain that Decisions 3 and 6 were pre-contract disputes which we submitted were not satisfactorily dealt with by the ICTA (para. 28). With respect to disputes 4 and 5 we also made the point at paragraph 29 when we said "where the tribunal is mandated to resolve **pre-contract disputes under Section 67** (emphasis mine) of the Law and does not do so, failing exceptional restrictions on its ability to carry out the function, this is unreasonable and a breach of procedural fairness."

3. Further at paragraph 32 of our Reconsideration Request. We reference Regulation 8 of the Regulations which indicates the options available to the ICTA for the resolution of pre-contract disputes.

4. In short, we asked for resolution of several pre-contract disputes, the ICTA decided pre-contract disputes, and we appealed that decision. Section 78(1) which sets out what can be appealed expressly allows the reconsideration request of a pre-contract dispute. This position is clearly supported by the ICTA when it said at paragraph 38 in coming to its Decision "Under the ICTA Law and Interconnection Regulations parties are required to negotiate the terms and conditions for interconnection and where there are disputes, parties are able to request a dispute resolution determination from the Authorities."

5. This is not to say the Reconsideration Request could not be additionally supported on the basis that there is a fundamental flaw in the procedural or substantive approach adopted by the ICTA. The Request itself makes several submissions under this head. Where the action of the ICTA is arbitrary and unreasonable this could lead to a flaw in its approach. Where no reasonable regulator could avail itself of the procedure or approach

used, then any decision arising from that process would be subject to reconsideration by the ICTA. At paragraph 11 of our Reconsideration Request we argued that the ICTA's approach was illogical. At paragraph 13 our submission was, "We believe on the Authority's reasoning it is an arbitrary, unsubstantiated determination incapable of curing other than by an overturning of Decision # 1."

6. With respect to the Glide Path submission we believe we had submitted compelling evidence to the ICTA of good regulatory and global best practices supporting its implementation and the existence of a waterbed effect in these situations. We further believe that in light of the uncontroverted evidence on best practices and the acknowledgement by the ICTA of the waterbed effect, however small, it was a flawed approach to simply ignore both and proceed to deny the implementation of a Glide Path. We submitted that this action was also arbitrary and unreasonable. We further submitted that it is not the law that a cost oriented regime mandated by statute is inconsistent with the imposition of a glide path. We repeat that we can ask for a reconsideration of the decision on this basis.

7. Our economic analysis of the waterbed effect supported our submission that when the MTR is suddenly reduced and significantly so, the operator's most immediate reaction is to consider increasing its retail rates to cushion the drastic reduction in its revenues. We note that subsequent rate adjustments by LIME (and announced only this week) on the face of it raises the presumption that this is what is taking place within that operations. Our waterbed effect is already evident in the Cayman Islands through the price movements imposed at LIME.

8. We repeat that there was no agreement on MTR within the meaning set out by the ICTA itself if to qualify for an agreement under the Law, the agreement must be reduced to writing, signed by the parties and filed by with the ICTA. This is not an issue of the ICTA setting the MTR. The ICTA in the Decision never attempted to exercise any powers to set the MTR and in any event it is doubtful as we have argued that it could have done so in that Decision. There being no properly derived MTR as per ICTA's position on what constitutes an agreement, we fail to see how the ICTA could have declared that the MTR be implemented immediately without recourse to a Glide Path. Whether the parties believe they have an agreement is irrelevant if as the Interim Decision indicated, the purported agreement does not meet the standard for agreements prescribed in the Law.

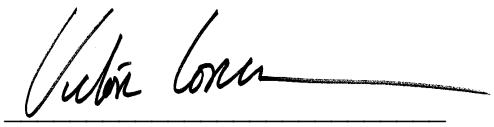
9. On Dispute No. 2 we submitted that where the evidence before the ICTA shows on a balance of probability that the parties were in discussions on a matter and where the parties have taken similar positions with respect to the same issue in many or all of its other jurisdictions and have never agreed, it is a flawed approach to direct them towards further discussions. This is particularly so where one party indicates that the other has

not entered the discussions in genuine good faith and has progressively deteriorated its offer to the other side. LIME's approach to further discussions is to delay and frustrate. Several weeks after the Decision whilst Digicel has aggressively sought to comply with the Determination and have discussions with LIME, Digicel can only point to a new offer on the transit rates from LIME which came more than one week after it was promised and not surprisingly the terms are worse than the previous "last offer".

10. To say therefore that we "prefer further action in front of the regulator to further discussion with the other party"[1] is therefore reasonable as the ONLY way to resolve this dispute when all indications by the other party (LIME) is that they will not genuinely facilitate a resolution by amicable means.

11. On the matter of Disputes 4 & 5, we appreciate that the ICTA has many options to settle pre-contract disputes however our submission is that the ICTA can ONLY avail itself of the options set out in the Regulations at 8. Our submission is also that Regulation 8(h) does not allow the ICTA to exercise its discretion and adopt a procedure which is patently uncertain and does not give either party a reasonable opportunity to resolve a pending dispute. The ICTA has simply said that at this time it will not make a determination because a FLLRIC process is afoot and when that is concluded, information therein might be able to assist in helping to resolve this current dispute. Our view is this is unreasonable particularly when the conclusion of the FLLRIC process is strongly influenced by one of the disputing party and there is no clarity on the time when this process will yield any information upon which the ICTA can resolve disputes 4 & 5.

DATED THIS 3RD DAY OF JUNE 2010



VICTOR CORCORAN
CHIEF EXECUTIVE OFFICER
DIGICEL (CAYMAN) LIMITED

[1] Paragraph 15 – LIME comments on Digicel Request for Reconsideration – ICT Decision 2010-5