



## ICT Decision 2010-2

Grand Cayman, 26 February 2010

### **Decision on LIME's Application to Reconsider the FLLRIC Phase 3 disclosure request**

#### ***Summary***

*The Authority determines that LIME's reconsideration request does not satisfy the requirements of section 78 of the ICTA Law. Further, the Authority determines that LIME has not identified any flaw in the procedural or fundamental approach used by the Authority in arriving at the disclosure decision and therefore the decision should not be considered under the Authority's residual power to reconsider decisions not covered by subsection 78(1) except for one instance of an accidental mistake.*

(Note: This summary 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.)

#### **THE APPLICATION**

1. In a letter dated 27 January 2010, Cable and Wireless (Cayman) Limited ("LIME") requested that the Information and Communications Technology Authority ("ICTA" or "Authority") reconsider its 14 January 2010 determinations (the "Decision") ordering the public disclosure of certain information claimed confidential by LIME in the FLLRIC models and interrogatory responses submitted in the FLLRIC Phase 3 proceeding.
2. LIME's letter also set out the reasons for its request. LIME claimed that the Authority committed a fundamental error in arriving at the determinations, as they are irrational and not proportionate. Specifically, LIME argued that the harm to LIME clearly outweighs the public interest in disclosure and that a reasonable person would not have come to the same determinations.

#### **PROCESS**

3. A call for comments on LIME's request for reconsideration was issued by the Authority on 28 January 2010. The Authority invited parties to file comments on LIME's applications and requested parties to address:

- whether the Authority has jurisdiction, under section 78 of the Information and Communications Technology Authority Law (2006 Revision) (the "ICTA Law") or otherwise, to reconsider the Decision; and
  - assuming that the Authority has jurisdiction, whether the Decision should be confirmed, reversed or modified, and for what reason(s).
4. The Authority received comments from Digicel dated 9 February 2010. Digicel was of the view that there are no grounds for reconsideration of the Decision within the legislation and that view is consistent with a previous ICTA determination in a similar issue in Decision 2009-1. Digicel was also of the view that the Decision did provide reasons and did not lack proportionality.
5. The 28 January 2010 procedures established by the Authority allowed LIME to submit reply comments but LIME did not file any response to Digicel's submission.

## LEGISLATIVE AND REGULATORY FRAMEWORK

8. In reaching a decision on LIME's reconsideration request, the Authority is guided by the ICTA Law and, in particular, by section 78. The relevant portions of the ICTA Law are as follows:

- 78. (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;*
  - (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.*

(...)

- (3) Where-*
- (a) a licensee;*
  - (b) an applicant for a licence;*

*(c) party to an agreement in respect of which the Authority has made a decision under Part IV; or*

*(d) a person in respect of whose conduct the Authority has made a decision under Part IV,*

*is aggrieved by a decision specified in subsection (1) ("the original decision"), he may, within fourteen days of the receipt of the decision and written reasons therefore, apply in the prescribed manner to the Authority for a reconsideration of that decision.*

*(4) The Authority shall, under subsection (3), confirm, modify or reverse the decision, or any part thereof, specified in subsection (1), and render its determination within a reasonable period of time not to exceed twenty-eight days.*

*(5) Where the original decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.*

*(6) Where an application is made under subsection (2) -*

*(a) the Authority may, on application by the aggrieved person, order that the decision shall not take effect until a determination is made under subsection (3); and*

*(b) the Court shall not hear an appeal under section 80 in relation to a reconsideration under subsection (3) until the Authority has made a determination under subsection (3).*

## **AUTHORITY ANALYSIS AND DETERMINATION**

9. As a general rule, the Authority derives its powers from its enabling statutes. Further, in accordance with well-established administrative law principles, the Authority has certain residual powers which are not explicitly mentioned in its enabling statutes, but which may be regarded as incidental or consequential to its statutory powers. The courts have recognized, for example, that an administrative tribunal may, in exceptional circumstances, reconsider a decision in order to correct an accidental mistake, set aside a decision obtained by fraud, or review a decision where facts subsequently discovered have revealed a miscarriage of justice. In the absence of such special circumstances, a tribunal's decision is irrevocable, unless the statute in question provides otherwise.<sup>1</sup> This exceptional power was referred to by the Authority in previous decisions, including ICT Decision 2006-2, ICT Decision 2007-2, ICT Decision 2008-3 and ICT Decision 2009-1.
10. In order to avail itself of the opportunity to apply for reconsideration, LIME must demonstrate that the disclosure request falls within the scope of subsection 78(1) of the ICTA Law. If the decision is not enumerated in subsection 78(1) of the ICTA Law, the Authority considers that, as a matter of principle, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in relation to a proceeding at first instance before it, it should decline to entertain an application for reconsideration of a matter that falls outside the list of subject areas enumerated in section 78(1).

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<sup>1</sup> Sir William Wade and Christopher Forsyth, *Administrative Law*, Ninth Edition, Oxford University Press, 2004, pp. 230 and 938.

11. In the present case, LIME did not in its letter of 28 January 2010 demonstrate that the disclosure request falls within the scope of subsection 78(1) of the ICTA Law. Instead LIME argued that the Authority had committed a fundamental error in arriving at the determinations. The Authority therefore considers that LIME's request should be considered pursuant to the Authority's residual power to reconsider decisions not covered by subsection 78(1). Accordingly, in the absence of a fundamental flaw to the procedural or substantive approach adopted by the Authority in the proceeding that led to the Decision, the Authority should decline LIME's request for reconsideration.
12. The Authority notes that LIME's request for reconsideration does not identify any fundamental flaw to the procedural approach adopted by the Authority in the proceeding that led to the Decision.
13. With regards to the substantive approach, the Authority notes that, contrary to LIME's claims, the Decision did provide reasons. The Decision specifically noted that the Authority "gives consideration to the nature of the information and assesses the relative weight of the specific direct harm to the party providing the confidential information against the broader public interest in a full and fair public process". The decision also identified that "the Authority evaluates disclosure requests individually and with due consideration of the particularities of each request and the purposes of the proceeding" and that the determination of the cost of mobile termination was one of the purposes of this proceeding. The Authority concluded that there was "strong public interest in disclosing the full methodology and underlying data used to determine the cost of mobile termination" (emphasis added). The Decision also clearly stated that if the values (other than the ones noted in the 'FAC Input' sheet and the pre-paid and post-paid subscribers values) LIME claimed in confidence in the 2G and the 3G modules "do not influence (are not a precedent for) the cost calculation of mobile termination (in cell E68 of the 'Mobile Service Costs' tab), LIME may continue to use dummy data for these inputs." Simply put, except for a limited number of identified instances, if the data is used to determine the cost of mobile termination, it should be disclosed.
14. In evaluating the specific direct harm to LIME, the Authority reviewed the rationale provided by LIME when it made its confidentiality claims and when it replied to Digicel's disclosure request. In its submissions dated 15 October 2009 and 16 November 2009 (which are the subject of the disclosure determinations), LIME stated that parts of the submissions were being filed in confidence and the reasons were set out in its 9 April 2009 letter.
15. The entirety of LIME's rationale for the confidentiality claim in the 9 April 2009 letter is provided in three sentences:

The other Appendices contain confidential information about LIME's network design, customers, costs or revenues. This information is not made available to the public, and LIME consistent (sic) treats it as confidential. Its disclosure to the

public, in particular to its competitors, can reasonably be expected to cause LIME financial and competitive harm, as LIME's competitors would be able to prepare targeted and more effective competitive responses to LIME's initiatives, which would be to LIME's financial and competitive detriment.

16. In its 18 December 2009 reply to Digicel's disclosure request, LIME opposed the request arguing that it was based on a false premise, that it was an inappropriate request, and LIME maintained that the cost, traffic and customer information is highly sensitive and carefully protected from disclosure to the public and to competitors.
17. In arriving at the Decision, the Authority weighed the claims of LIME that harm would result from disclosure against the public interest in disclosure. Whilst LIME may disagree with the Authority in its conclusions in a number of cases, it has not identified a fundamental flaw to the substantive approach.
18. In reaching its conclusion in the Decision, the Authority notes that it relied on the confidentiality claims submitted by LIME, in particular LIME's reference to the letter of 9 April 2009 when submitting both first and second tranche (15 October 2010 and 16 November 2010, respectively) of its responses to interrogatories and LIME's response to Digicel's disclosure request. As noted above, LIME referred generically to confidential information in the form of LIME's network design, customers, costs and revenues, noting that disclosure to the public, in particular to its competitors, could reasonably be expected to cause LIME financial and competitive harm. This contrasts with the more specific explanations of certain data elements and arguments provided in LIME's 27 January 2010 reconsideration request.
19. LIME is reminded that Paragraph 4(1)(b) of the Confidentiality Regulations requires confidentiality claims to be:

*... accompanied by the reasons for the claim, and, where one of the reasons is that specific direct harm would be caused to the party claiming confidentiality, sufficient details shall be provided as to the nature and extent of such harm; and the minimum details which the submitting party shall provide shall be as follows-*

- (i) identification of the specific information for which confidentiality is sought;*
- (ii) an explanation of the circumstances giving rise to the claim of confidentiality;*
- (iii) an explanation of the nature and degree to which the information claimed as confidential qualifies as information falling under regulation 3;*
- (iv) identification of the measures taken by the submitting party to prevent unauthorised disclosure;*
- (v) an explanation of how the disclosure of the information could reasonably be expected to result in significant financial loss or gain*

*to any person, to prejudice significantly the competitive position of any person, or to affect contractual or other liabilities of any person;*

- (vi) identification of the degree to which the information may pertain to a service which is subject to competition; and*
  - (vii) justification for and the period of time for which the information should not be available for public disclosure;*
20. LIME, if it intends to claim specific direct harm should, in accordance with the Confidentiality Regulations, provide those claims and supporting rationale when it makes the initial filing, not after the Authority and parties have gone through a disclosure process and the Authority has reached its conclusions.
21. In the Authority's view, it would be procedurally flawed for it to now to consider LIME's arguments of specific direct harm when LIME was under an obligation to provide that rationale when it initially made its submissions and before the Authority made the Decision.
22. The Authority also considers LIME's claims of lack of proportionality to be unfounded. As identified above, except for a number of specified data elements, if the data was used to determine the cost of mobile termination, the Authority determined that the data is to be disclosed. The Decision noted that LIME acknowledged that the objective of the FLLRIC proceedings is to determine the costs of a forward-looking efficient operator, not necessarily the cost of a specific operator. The fact that LIME sometimes used LIME actual data to represent an efficient operator was balanced against the public interest in the disclosure of the underlying costs of mobile termination. The Decision clearly indicates that the Authority gave more weight to the need for disclosure of the underlying data than to LIME's claims of harm by requiring disclosure if the data affected the cost of mobile termination. In contrast, while Digicel did request the full disclosure of all information filed in confidence by LIME, the Authority did not require the disclosure of much of the underlying data in the fixed module because, consistent with the purposes of the proceeding, review of fixed interconnection services are not included in the scope of this FLLRIC Phase 3 proceeding.
23. LIME, in its 27 January 2010 letter, claimed that "there can be no argument that this information is confidential", that "the Authority did not suggest that the information noted ... was not confidential" and that the Authority "implicitly agreed [certain information that LIME was required to disclose] was confidential." None of these contentions are correct. Section 5(1) of the Confidentiality Regulations requires the Authority to assess the claims of any specific direct harm against the public interest in disclosure and "[w]here the Authority is of the opinion that, based on all the material before it, no specific direct harm would be likely to result from disclosure, or where any such specific direct harm is shown but is not sufficient to outweigh the public interest in disclosing the document, the document shall be placed on the public record." In addition, section 5(2) allows the Authority to order the disclosure of a redacted version of a document, or a part thereof, where the Authority is of the opinion that the specific direct harm likely to result from

public disclosure justifies a claim for confidentiality for some parts of a document. Therefore, the Authority's requiring the disclosure of items where LIME's confidentiality claims were not justified means that, contrary to LIME's claims, the information is not confidential.

24. As noted in paragraph 9 above, the Authority has the ability to correct an accidental mistake in its determinations. The Authority notes that there is one instance in the Decision where the Authority did make an accidental mistake. In the Decision, the Authority determined that, among other data items, the fixed network call volume and the number of mobile subscribers in the 'Drivers' tab of Appendix V should be disclosed. Those data elements were included in the disclosure list by mistake and the Authority hereby consents to LIME replacing in the public version the actual values for these data elements with dummy data using the masking rules stipulated in the Decision.

## **CONCLUSION**

25. In light of the above, the Authority determines that LIME's reconsideration request does not satisfy the requirements of section 78 of the ICTA Law. Further, the Authority determines that LIME has not identified any flaw in the procedural or fundamental approach used by the Authority in arriving at the Decision and therefore the Decision should not be considered under the Authority's residual power to reconsider decisions not covered by subsection 78(1). Considering this, except for the one instance identified above, LIME's reconsideration application is denied and LIME is directed to provide the revised public versions to the parties on the FLLRIC Phase 3 distribution list by 4 March 2010.