Digicel
The Bigger, Better Network.

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October 25, 2010

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

Dear Mr. Archbold:

Re: Request for Reconsideration of ICT Decision 2010 – 9

The Information Communication and Technology Authority has by Decision No. 2008-5 mandated that the operators of mobile and fixed line telephony in the Cayman Islands implement Local Number Portability (LNP) by June 30th 2010 (later extended) They further commissioned the creation of a consortium of the existing four operators to do.

The Consortium having spent the past several months discussing this project and seeking a unified approach to the execution of the Authority's decision sought a determination from the ICTA as to the sharing of common costs amongst the operators and by Decision 2010-8 and pursuant to the Information and Communications Technology Authority (2006 Revision) Law, the ICTA ruled inter alia that LIME's costs would be 56.16% of total common costs.

By Submissions of September 3rd 2010, and pursuant to the Information & Communication Technology Authority (Disputes Resolution) Regulations, LIME in a Determination Request indicated to the ICTA that "LIME would be willing to consider a methodology whereby each operator receives a number of votes proportional to its share of the common costs of LNP/MNP but where one operator would receive more than 50% of the votes, it could not exercise more votes than 50% of all the votes of the Consortium."

The ICTA has disagreed and by ICT Decision 2010 – 9 paragraphs 24 determined that the Consortium where it cannot agree must put the dispute to a series of votes to be settled by a majority of three operators. By paragraphs 27 and 28 ICTA has addressed the matter of a possible tie-breaker there being four operators at present. ICTA has mandated the immediate implementation of a random tie breaking mechanism through the "… randomly drawing of the name of one operator from a 'hat' containing the names of all members of the Consortium."

LIME has by submissions filed on October 19th 2010 asked for a reconsideration of this section of ICTA Decision 2010-9. Digicel by this submission is also asking for the reconsideration of the Decision in part by the withdrawing of paragraph 27 and the replacement thereof with another mechanism for breaking a deadlocked vote at the Consortium.

The ICTA questions:

Does the ICTA have the authority under section 78 of the Information Communication and Technology Law to reconsider paragraphs 27 and 28 of Decision 2010-9?

The request made to the ICTA to settle the voting rights was properly made under the Regulations and implicit in the submission by ALL the parties is that the ICTA had the jurisdiction to hear the grievance as a grievance under regulation 3 vis a vis ALL the operators. The ICTA did not decline to hear the dispute having decided that none of the exemptions at Regulation 10 obtained. Further at Regulation 18(2) the said regulations preserves whatever rights the licensees'' have to appeal any decision made by the Authority "Nothing in these regulations precludes a party to a dispute from appealing a determination of the Authority."

Decision 2010-9 is subject to the principles governing the Court's inherent power to entertain an application by any of the other licensees for Judicial Review. Whilst section 78 does not allow the parties to ask for a RECONSIDERATION of the decision by the ICTA, the ICTA has itself in previous decisions ruled that it can on application by any of the parties affected by its decisions, embark on a reconsideration on much the same principles as those which govern the parties access to Judicial Review in the Courts.

We are therefore of the view that ICTA may review its own decision outside of the specific provisions of Section 78 relying on the same inherent jurisdiction that a Court has to review ICTA's determinations where such a decision is arbitrary and unreasonable.

Assuming the Authority has jurisdiction should paragraphs 27 and 28 of Decision 2010-9 be confirmed, reversed or modified and for what reasons?

Paragraphs 27 and 28 are unreasonable, arbitrary and irrational.

We agree with LIME that these paragraphs require the settlement of complex matters affecting the licensees and the industry by an arbitrary, irrational and unreasonable methodology. The Law requires disputes between the parties to be settled by the ICTA as specified under Section 65 of the Law where they are pre-contract disputes. Where there are grievances between the parties the Disputes Regulation requires the ICTA to settle them under regulation 3. This ruling that a dispute/grievance between the parties is to be settled by the drawing of a random name from a hat is as the Authority itself recognizes, arbitrary and unreasonable. Parties who have complex commercial decisions to make on LNM/MNP and other matters can and do have reasonable disagreements and grievances hence the provision in the Law that an informed and binding decision is to be made by the application of the discretion and wisdom of a judicial and in this case a quasi-judicial body, the ICTA. Having these deadlocks broken, not by reason but by chance, is unreasonable and irrational. Parliament has caused the identification of special individuals comprising a Board of Directors possessing specific expertise under Section 4(1) of the Law. This expertise is required by Law to be brought to bear in a reasoned manner on ALL affairs governing the telecommunications sector as provided for under the said Law. This expertise must be equally available and particularly so when after vigorous and genuine debate between the individual operators; there still exists either a pre-contract dispute, or a grievance as defined under the Law and Regulations.

We appreciate that the decisions made by the Board must be determined expeditiously as mandated by Regulation 11; however the decision must be settled expeditiously, BY THE ICTA and any mechanism chosen by the ICTA must contain the exercise of discretion similar or superior to that expected of the ICTA.

All the actions open to the ICTA where it determines it has jurisdiction to hear a dispute under the Regulations are set out clearly in Regulation 8. Where the ICTA wishes to appoint any other party to make the determination it can only do so only regulation 8 (f) or 8(h).

Regulation 8(f) is clear to us that where ICTA itself does not wish to make the determination it may appoint an agent to do so on its behalf. It may not delegate the responsibility such as to make the decision one of another third party. It has not in this instance, appointed an arbitrator nor mediator in compliance with Regulation 8(f) and therefore we must examine 8(h) to see if the action taken by the ICTA is supported in a reasonable and rational way by this regulation.

Firstly, it is unheard of that decisions of the type which can lead large and experienced operators to conflict should be sacrificed to the type of expediency that ICTA urges. If this was the most expedient manner of resolving COMMERCIAL disputes, it would certainly be a well recognized and entrenched corporate strategy. It is certainly a rare if not impossible to find mechanism with any other telecommunications Authority in the Caribbean where similar issues of LNP/MNP has or are soon to arise. No reasonable authority under parliamentary duty to guide the development of the industry could believe that drawing a name out of a hat, based on guidelines given by an unknown, unauthenticated website, and is the preferred and recommended method of determining a dispute between licensees.

What is most injurious to the expeditious resolution of matters of LNP/MNP is that the ICTA has left the industry without clear and fair terms of reference to carry out the job which is the statutory function of the ICTA. It is not the inability of the parties to strike agreements which are of commercial efficacy advantageous to the industry which puts the industry at risk, but rather the inability and continued refusal of the ICTA to carry out its functions under the Law in a reasonable and rational manner as evidenced by this Decision.

Digicel notes also that the ICTA, whilst it complains in the Decision that the parties did not suggest a mechanism for breaking a possible deadlock, did not even comment on Digicel submission that Decisions on critical matters should not be settled by a simple majority but by unanimous decision failing which they should be referred to the ICTA under the express provisions for dealing with grievances. This complete lack of attention to one party's submission in the Decision is a glaring breach of its statutory duty to hear and determine a grievance between the parties. This supports our argument that the Decision in-part is arbitrary and unreasoned.

We ask that the Decision be modified in that all deadlocks should be referred to the ICTA for its proper adjudication as required by Law and that where the parties are unable to arrive on a unanimous decision on all critical decisions as suggested by Digicel, those too should be settled by the ICTA.

Yours sincerely,

Victor Corcoran
Chief Executive Officer