



ICT Decision 2006-2

Grand Cayman, 27th July 2006

Decision on TeleCayman Application to Reconsider Decision 2006-2

Summary

The Authority denies the application by TeleCayman to reconsider ICT Decision 2006-1. In the original decision, the Authority determined that Cable & Wireless is entitled to pass through to TeleCayman the current mobile termination rate for transiting traffic. In this decision, the Authority determines that it did not err by failing to understand the agreement between TeleCayman and Cable and Wireless, and did not exceed its statutory authority in embarking upon an interpretation of the contract.

(Note: This overview 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. On 14 July 2006, TeleCayman Limited (“TeleCayman”) applied to the Authority, requesting that it reconsider and vary Decision on Cable & Wireless Application for Determination of Transit and Termination Rates, ICT Decision 2006-1, 13 July 2006. TeleCayman raised three arguments in support of its Application for Reconsideration, and requested an Order that ICT Decision 2006-1 not take effect until a determination is made on the request for reconsideration.
2. First, TeleCayman argued that the impugned decision is in error in that it fails to appreciate the distinction between international and domestic mobile termination rates (MTR), as set out in the May 2004 Interconnection Agreement with TeleCayman (“the Agreement”), and therefore is ambiguous in stating that TeleCayman is liable to pay 18.45 cents per minute for traffic which Cable & Wireless (Cayman Islands) Limited (“C&W”) pays to terminate TeleCayman traffic on other mobile networks in Cayman.
3. TeleCayman’s second argument was that the Authority exceeded its statutory mandate in embarking upon an adjudicative role in interpreting contracts between parties. TeleCayman argued that the parties cannot extend the Authority’s mandate by agreement. In support of this argument, TeleCayman noted that the Information and Communication Technology (Dispute Resolution) Regulations, 2003 (“the Dispute Resolution Regulations”) do not make a specific reference to the Authority resolving matters of contractual interpretation.

4. In the alternative, argued TeleCayman, natural justice considerations would have required the Authority (a) to make it explicit to the parties that the Authority would be acting as arbitrator; and (b) to set out explicitly the rules for arbitration. TeleCayman stated that Decision 2006-1 set an unfortunate precedent in that the function of construing contracts is properly left to the judiciary.
5. Thirdly, TeleCayman argued that the Authority erred in its interpretation of the contract, and that on a proper interpretation of the contract, there is no basis for concluding that C&W is entitled to pass through the rate of 18.45 cents per minute which C&W pays to terminate traffic on other mobile networks in Cayman.

Process

6. On 19 July 2005, the Authority requested an Answer from C&W by 21 July 2006 and a Reply from TeleCayman by 25 July 2006, and asked the parties in these pleadings to consider the effect on the Application, if any, of ss. 77 to 79 of the Information and Communications Technology Authority Law (2004 Revision) (“the Law”). On 21 July 2006, C&W filed an Answer to the Application.
7. C&W argued that the Authority did not misunderstand the original application, but that the language used in paragraph 9(a) of Decision 2006-1 could be viewed as overly broad, in that TeleCayman should not pay 18.45 cents for the termination of traffic originating overseas, but only for traffic originating on TeleCayman’s network. C&W argued that the Authority has jurisdiction to interpret a contract relating to the interconnection of ICT networks, citing ss. 9(3)(c) and 9(3)(g) of the Law; ss. 22 and 26 of the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003; and s.3 of the Dispute Resolution Regulations.
8. C&W argued that the Authority did not misinterpret the Agreement, but rather that TeleCayman in its Application for Reconsideration has deliberately misrepresented the Agreement.
9. C&W argued that s. 77 to 79 of the Law do not apply to the present case, but that the Authority should nonetheless retain the right to reconsider one of its own decisions, if the merits of the case so warrant, in order to correct obvious mistakes, or to modify its policies. C&W argued that the present proceeding was not such a case.
10. TeleCayman filed a Reply on 25 July 2006, in which it argued that matters of contractual interpretation are best left to the judiciary, and that an attempt to find a jurisdictional base for the Authority’s decision in regulations is suspect, as they do not carry the weight of empowerment from the legislature.
11. TeleCayman submitted that its Application to reconsider Decision 2006-1 is permitted by virtue of the provisions of s. 78(1)(c) of the Law, which is intended to allow all persons to seek that the Authority reconsider its decisions.

Authority Analysis and Determination

12. The Authority has carefully considered the pleadings of the current proceeding in the context of the pleadings leading to Decision 2006-1, and the Agreement itself, filed with the Authority on 20 May 2004. The Authority considers that it may dispose of the first and third grounds together, for they are very closely related.
13. The Authority is of the view that the contractual regime between the parties is correctly set out in the letter of C&W dated 16 February 2006 attached to the Application of C&W of 2 March 2006. The Authority considers that the pleadings of the parties, as in the context of civil litigation before the Courts, help to shape and define a dispute before the Authority. The Determination Request by C&W specifically relates solely to the PSTN Transit Service, as a result of which, as explained clearly at page 2 of the letter of C&W of 16 February 2006, "C&W transits across its fixed network calls originating on TeleCayman's fixed network in the Cayman Islands, and destined for a third party network in the Cayman Islands".
14. When Decision 2006-1 is read in this context, the Authority is of the view that Decision 2006-1 cannot reasonably be considered to raise the ambiguity that it may be construed so as to apply to international traffic. This is particularly true for the parties themselves to the Agreement.
15. In addition, the Authority considers that the Agreement is clear on its face that C&W is entitled to pass through to TeleCayman the rate which C&W pays to terminate TeleCayman traffic on other mobile networks in Cayman. Accordingly, The Authority is of the view that Decision 2006-1 does not erroneously interpret the Agreement.
16. The Authority views itself as having two distinct heads of power in relation to TeleCayman's second argument, that the Authority exceeded its statutory mandate in interpreting the terms of the Agreement. First, the Authority considers that the Agreement constitutes the private law of the parties, which, absent a provision which is determined to be void as against public policy, should govern their relationship.
17. The Authority considers that it is entirely appropriate, and today common practice, to agree to dispute resolution procedures within a contract. It is difficult for the Authority to imagine that it can be viewed as inappropriate for the parties to agree, in clause 34.1.5(c) of the Agreement, that one avenue of recourse open to a party in the event of a dispute concerning the Agreement should be to the regulatory authority charged with statutory responsibilities to ensure that appropriate interconnection regimes are established in Cayman.
18. The Authority considers that the second head of its power in relation to the terms of the Agreement is the Law. The Authority considers that the provisions of s.9 of the Law establish not only that the Authority may resolve disputes concerning interconnection, but also that the Authority is required to resolve complaints from service providers and to promote an efficient, economic and harmonized utilization of ICT infrastructure.

19. The Authority considers that it is not a credible interpretation of the Law to argue that parties may insulate themselves from this key dimension to the jurisdiction of the Authority merely by entering into contractual arrangements concerning interconnection.
20. Accordingly, the Authority denies the Application for Reconsideration by TeleCayman. In light of the date of this decision, 16 days before payment is due pursuant to Decision 2006-1, the Authority is of the view that the requested Order that ICT Decision 2006-1 not take effect until a determination is made on the request for reconsideration is unnecessary.
21. The Authority notes that s.77 of the Law seeks to limit reviews and appeals of decisions of the Authority to a relatively small group of the types of decisions routinely taken by the Authority. The Authority notes that this list comprises those decisions which tend to be the most significant, not only in terms of the economic impact on the parties to the proceedings, but also in terms of the development of public policy in Cayman.
22. In order to avail itself of the opportunity to apply for reconsideration of a decision of the Authority accorded by s.78(1) of the Law, the Authority considers that TeleCayman must satisfy each of the tests set out in s. 78 (1) (a), (b), and (c). The Authority notes that TeleCayman is the person in respect of whose conduct the Authority has made the relevant decision, within the meaning of s.78(1)(b) of the Law. Accordingly, the Authority considers that TeleCayman fails to satisfy the three-prong test set out in s. 78(1) that would enable it to seek reconsideration under this provision.
23. The Authority is of the view that the provisions of s.77 should be interpreted so as to seek finality concerning its decisions in relation to all matters not enumerated in s. 77(1). The Authority, accordingly, 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 an Application at first instance before it, the Authority should decline to entertain an Application for Reconsideration of a matter that falls outside the list of those subject areas enumerated in s.77(1).
24. Finally, as a practice note, the Authority expresses concern that TeleCayman declined to address the alleged deficiencies in the Determination Request (the Application by C&W at first instance), in its Answer to the Determination Request. The Authority is strongly of the view that the pleadings in a proceeding before it are helpful in creating the grounds upon which the parties present issues and, in turn, the Authority renders its determinations.
25. Accordingly, the Authority considers that it is of importance that parties should raise objections in the pleadings afforded at first instance by the Authority, rather than await a decision and raise such matters by way of grounds for reconsideration. In future, the Authority may consider such practice as a consideration in weighing the appropriateness of disturbing a decision taken at first instance.