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4 September 2006

Mr. Greg van Koughnett  
General Counsel and  
Head of Licensing & Compliance  
Information and Communications Technology Authority  
Alissta Towers  
P.O. Box 2502  
Grand Cayman KY1-1104  
Cayman Islands

Dear Sir

**Re: TeleCayman Determination Request MPLS/CJFS**

We act for Cable & Wireless (Cayman Islands) Limited (C&W).

We now provide C&W's formal response to the request of the Authority made by e-mail dated August 23, 2006.

### **Nature and Scope of Proceedings**

1. The request of the Authority followed an exchange of correspondence started by a "Determination Request" by TeleCayman (TCL) dated 11 July 2006 and ending with a letter from TCL to the Authority dated 7 August 2006. In the correspondence from TCL very serious and damaging allegations have been made against C&W. These include allegations of breaches by C&W of the terms of its Licence and of at least two charges of anti-competitive conduct on the part of C&W, in breach of the Information and Communications Technology Authority Law (the ICTA Law).
2. These allegations, if found by the Authority to be proven, in whole or in part, could result in serious adverse consequences to C&W. Indeed, TCL itself, in the letter dated 7 August 2006, states that the alleged conduct of C&W is "reprehensible, anti-competitive and deserving of a penalty in accordance with the Law." C&W therefore treats the allegations and the request of the Authority which flows from them with the utmost



seriousness, and we submit that the Authority should similarly treat the allegations and any proceedings emanating from them.

3. For this reason we have found rather disappointing the response of the Authority to the letter from C&W dated 28 August, 2006 requesting that the Authority advise of:
  - the precise nature of the proceedings being undertaken by the Authority;
  - the precise power under the ICTA Law or any applicable regulations pursuant to which the proceedings have been undertaken by the Authority;
  - the basis on which the Authority has arrived at the conclusion that the documents requested are relevant or necessary to the proceedings being undertaken by the Authority; and
  - the basis on which the Authority has arrived at the conclusion that it is necessary and proper for C&W to release to TCL the documents requested, in whole or in part.
4. The Authority's response by way of its letter dated 29 August, 2006 states, among other things, that the proceeding is that commenced by TCL by Application on 11 July, 2006, and that the Authority relies on Article 4.1 of the C&W Licence and "all of its statutory powers" contained in the ICTA Law (2006 Revision).
5. The first difficulty faced by C&W in the face of the Authority's response is that the "Application" by TCL could give rise to more than one type of proceeding, each of which is not identical to the other with respect to how, in accordance with the ICTA Law and relevant regulations, these proceedings ought to be conducted. The second difficulty faced is that the reliance by the Authority on the broad general powers contained in Article 4.1 of the C&W Licence, and "all of [the Authority's] statutory powers" under the Law, suggests that C&W is not entitled to the specific procedural safeguards prescribed by the Law and the regulations made under it for the conduct of proceedings of the type which would seem capable of arising from TCL's allegations.
6. We submit that the basic rules of procedural fairness entitle C&W to be advised of the specific nature and scope of the proceedings being undertaken by the Authority. These should be defined with precision and C&W should be entitled to all the statutory safeguards which are available with respect to any proceedings being undertaken where, especially, there is a risk of adverse findings, including the imposition of penalties, against C&W. The proper definition of the nature of the proceedings would also assist C&W in determining whether the documents requested are indeed relevant to the proceedings being undertaken.



### Procedural safeguards available to C&W

7. Without the benefit of a precise definition from either TCL or the Authority, we have examined the various letters from TCL to identify the specific complaints being made, in order to determine the nature of the proceedings which may possibly properly flow from these complaints. The complaints appear to be as follows:
- (a) TCL requests from the Authority an order that C&W's MPLS offering is a Category 2 service and should be provided in accordance with the rules for categorisation under the C&W Licence (i.e. the rates for MPLS should be published);<sup>1</sup>
  - (b) TCL alleges that C&W engaged in anti-competitive practices (tied sales), contrary to section 40(2)(d) of the ICTA Law;<sup>2</sup>
  - (c) TCL requests that it be provided by C&W with E1 capacity and pricing on the CFJS cable system at a price which is the lesser of a cost oriented rate or 20% less than that offered by C&W in response to MPLS bids;<sup>3</sup>
  - (d) TCL alleges that C&W has engaged in anti-competitive conduct in breach of section 36(2)(d) of the ICTA Law by applying dissimilar pricing conditions to equivalent transactions thereby placing TCL at a competitive disadvantage;<sup>4</sup>
  - (e) TCL requests that the Authority issue a determination that Carrier Relations in C&W has an obligation to advise carriers of price reductions in the facilities and services required by carriers at the time [the reductions] take place or when C&W's retail department is advised.<sup>5</sup>
8. We submit that where a public statutory authority has broad general powers, it is nonetheless under a duty in law to exercise those powers fairly and reasonably. An extension of this principle is that where the statute provides broad general powers on the one hand, and specific powers which are intended to apply in certain circumstances on the other, it would be an unreasonable exercise of statutory power to resort to the broad general powers of the statute in preference to the specific powers applicable to the particular circumstances.

#### *Procedures for investigating allegations of anti-competitive conduct*

9. Among the charges made by TCL are two specific charges of anti-competitive conduct on the part of C&W. There are specific provisions in the ICTA Law governing

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<sup>1</sup> TCL letter dated 11 July 2006, p.1

<sup>2</sup> TCL letter dated 11 July 2006, p. 1

<sup>3</sup> TCL letter dated 11 July 2006, p. 1

<sup>4</sup> TCL letter dated 18 July 2006, p.1

<sup>5</sup> TCL letter dated 7 August 2006, p.6



proceedings relating to charges of anti-competitive conduct. In our submission the Authority is obliged to follow these procedures. They are mandatory, not optional.

10. Section 41 of the ICTA Law provides:

“Without limiting the generality of section 9(3) (c), the Authority may conduct an investigation under this Part, on application by any party or on its own initiative, if there is reasonable ground for suspecting-

- (a) that the section 36 prohibition has been infringed; or
- (b) that the section 40 prohibition has been infringed.

Section 42 provides in part:

“(1) For the purposes of an investigation under section 41, the Authority may, by notice in writing, require any person to produce to it a specified document, or to provide it with specific information, which it considers relates to any matter relevant to the investigation.

(2) A notice under subsection (1) shall indicate -

- (a) the subject matter and purpose of the investigation; and
- (b) the nature of the alleged offence to which the investigation relates.”

11. The statutory prerequisite of “reasonable ground for suspecting” is critical, as it creates an objective basis on which any request for the production of documents pursuant to these provisions may be made. It requires the existence of some credible evidence upon which the suspicion may be grounded. In this case, we have seen no evidence capable of grounding a reasonable suspicion. The allegation by TCL that C&W has been guilty of “tied selling” is based on a “belief” by TCL, without a shred of supporting evidence.<sup>6</sup>
12. Again, the allegation that C&W applied dissimilar pricing conditions to equivalent transactions is based on wholly unfounded speculation on the part of TCL that C&W used certain reduced prices for capacity on the CJFS cable system on a particular bid.<sup>7</sup>
13. The main purpose of the statutory requirement for “reasonable ground for suspecting” anti-competitive conduct is to discourage fishing expeditions of the type being requested by TCL, and to ensure that the Authority has sufficient evidence to justify an investigation. The Authority should not allow itself to be drawn into proceedings as serious as an investigation into anti-competitive conduct on the basis of a competing licensee’s “belief” and conjecture, without any supporting evidence whatsoever.
14. The Authority has issued no notice pursuant to section 42 (2) of the ICTA Law, which it is obliged to do if in fact it has commenced an investigation under the Part of the Law relating to anti-competitive conduct. In response to the specific request by C&W<sup>8</sup> that

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<sup>6</sup> TCL letter dated 11 July 2006, p.2

<sup>7</sup> TCL letter dated 7 August 2006, p. 6

<sup>8</sup> C&W letter dated 28 August 2006



the Authority state the basis on which the documents were being requested, the Authority has produced nothing which could properly constitute a notice under section 42(2). C&W is therefore entitled to assume that the documents are not being requested in relation to an investigation of allegations of anti-competitive conduct made by TCL against C&W.

*Proceedings under the Dispute Resolution Regulations*

15. In the letter dated 28 August 2006, C&W argued that no proper determination request has been commenced in accordance with the ICTA (Dispute Resolution) Regulations, 2003 (the Dispute Resolution Regulations). The Authority's response<sup>9</sup> is that the requirement to precede a request for a determination request with a notice pursuant to regulation 3(1) is optional and not mandatory. With respect, we submit that the Authority's conclusion on that point is wrong in law. Regulation 3 (4) provides:

"Where any grievance as set out in paragraph (1) has not been resolved between the relevant licensees within a period of 30 days following the receipt of the relevant notice of grievance, any of the aggrieved or notified licensees may submit a determination request to the Authority."

Under this provision, only one type of determination request may be submitted to the Authority, and that is, one which has not been resolved after a notice of grievance has been served, and has not been resolved after good faith attempts at resolution for a period of at least 30 days. An aggrieved licensee has the option of submitting a grievance notice to the notified licensee, but the Authority has no power to entertain a determination request until and unless the dispute resolution process is complied with. The Authority has no basis under the Dispute Resolution Regulations to request the documents which are the subject of the Authority's request. In the circumstances there is also no other basis other than under the Dispute Resolution Regulations for the Authority to entertain a determination request.

16. There being no proper investigation of anti-competitive conduct and no proper determination request before the Authority, there is no lawful basis on which the Authority is entitled to request the documents. Alternatively, the Authority's request is an unreasonable exercise by the Authority of its powers under the ICTA Law and Article 4.1 of the C&W Licence.

**Documents requested not relevant to TCL's "determination request"?**

17. It is clear that no proper investigation of anti-competitive conduct has been launched by the Authority, as the statutory conditions for the launch of such an investigation have not been met. C&W reserves its position on the question whether the documents requested would in any event be relevant to any proper investigation of anti-competitive conduct.

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<sup>9</sup> ICTA letter dated 29 August 2006



18. Without prejudice to C&W's position that there is before the Authority no proper determination request, it is C&W's position that had a proper determination request been made, the documents requested are irrelevant to any of the three questions raised by TCL which could be the subject of a determination request. These are items (a), (c) and (e) listed under paragraph 7 above, but are well worth repeating here (as (a), (b) and (c)).<sup>10</sup>
- (a) TCL requests from the Authority an order that C&W's MPLS offering is a Category 2 service and should be provided in accordance with the rules for categorization under the C&W Licence (i.e. the rates for MPLS should be published);
  - (b) TCL requests that it be provided by C&W with E1 capacity and pricing on the CFJS cable system at a price which is the lesser of a cost oriented rate or 20% less than that offered by C&W in response to MPLS bids.
  - (c) TCL requests that the Authority issue a determination that Carrier Relations in C&W has an obligation to advise carriers of price reductions in the facilities and services required by carriers at the time [the reductions] take place or when C&W's retail department is advised.
19. The first item raises the issue as to how MPLS should properly be classified with respect to the categories of services under the C&W Licence. TCL argues that MPLS is a Category 2 service,<sup>11</sup> or, alternatively, a Category 1 service,<sup>12</sup> or, alternatively a Category 3A service<sup>13</sup> which, in each case, requires that C&W publishes the rates at which MPLS is offered. C&W argues that MPLS is not a "service" but an Internet Protocol-based technology<sup>14</sup> which, when deployed, will support or enhance C&W's IP-VPN services to customers.<sup>15</sup>
20. There is no dispute that the service/technology in question is MPLS. The Authority is being asked to determine the nature of MPLS and to determine first, if it is to be deemed a service, second, if a service, in which of the categories of service under the C&W Licence does it fall, and thirdly, is C&W required to publish the rates at which it is to be

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<sup>10</sup> The statutory procedure under s. 42 of the ICTA Law for an investigation of an allegation of anti-competitive conduct is different from that of a determination request under the Dispute Resolution Regulations and therefore items (b) and (d) under paragraph 7 cannot properly be treated as a determination request under the Dispute Resolution Regulations.

<sup>11</sup> TCL letter dated 11 July 2006, p.1

<sup>12</sup> TCL letter dated 7 August 2006, p. 4

<sup>13</sup> TCL letter dated 7 August 2006 p. 4

<sup>14</sup> C&W letter dated 31 July 2006 p. 2

<sup>15</sup> C&W letter dated 31 July 2006, p. 2. Note it is C&W's position that C&W Cayman does not now provide MPLS-based IP-VPN services to customers.



offered? These appear to be all technical questions to which the documents requested would have no relevance whatsoever.

21. Item (b) under paragraph 18 raises the question as to the price at which C&W must offer E1 capacity to other carriers. This is again governed by the terms of C&W's Licence. The Authority is quite capable of determining this question by reference to the nature of the service/technology and without resort to any documents related to any particular RFP which may have been received or responded to by C&W.
22. Item (c) under paragraph 18 raises a similar question to that raised in item (b) which is, how should C&W offer Cable Capacity Leases to carriers? This question may also be determined by the Authority without reference to any specific RFP from any customer or to any response by C&W to any such RFP.
23. It will become clear later in this submission that the Authority should not request the disclosure (even to itself without proper cause) of documents containing confidential information belonging to or in relation to a licensee's customers. Consequently, the Authority should strive to determine all questions capable of determination without resorting to a request for disclosure of this type of confidential information.
24. In our submission, all the issues which could properly be the subject of a determination request may be determined by the Authority without reference to any of the documents requested. If the Authority feels that there are other issues which require these documents for proper determination,<sup>16</sup> the Authority should first determine as preliminary issues the questions raised by TCL and listed as items (a), (b) and (c) under paragraph 18.
25. There is at present no pressing urgency for any of these questions to be determined, even if one recognises that the Authority has a duty to act expeditiously. There is no impending or continuing harm to TCL, any other carrier, any customer or to the public. TCL has been quoted prices by C&W for Cable Capacity Lease with which TCL now appears to be satisfied. Its complaint appears to be in relation to what it claims has occurred when the quotes were first requested.

#### **Confidential customer information not always disclosable to the Authority**

26. The nature of the documents requested is such that they would contain information confidential not only to C&W but to the customers involved. C&W would have a duty by contract or at common law to protect any information disclosed to it by its customers in confidence.

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<sup>16</sup> C&W is not aware of these other possible issues which should therefore be defined either by the Authority or by TCL.



27. It is recognised that C&W's common law and contractual duty of confidentiality may be overridden by compulsion of law.<sup>17</sup> However, in the present case C&W would have an additional duty of confidentiality imposed by both the terms of C&W's Licence and the ICTA Law.
28. Article 12.1 of the C&W Licence obliges C&W to maintain the confidentiality of any confidential, personal and proprietary information obtained in the course of its business from any subscriber and any information regarding usage of a licensed ICT Network or ICT Service. No specific exception is made in relation to disclosure to the Authority, although it would be a reasonable interpretation to expect that disclosure to the Authority pursuant to a lawful and reasonable request from the Authority, would not constitute a breach of this provision.
29. Section 76 of the ICTA Law goes further. It makes it a criminal offence the intentional disclosure by a licensee of "personal data" of a subscriber or end user. The section exempts disclosure to the Authority for purposes connected with the execution of its functions under the Law. It is submitted that based on the overriding principle that the Authority may only exercise its powers reasonably, one could safely interpret this to be saying that what is exempt is disclosure to the Authority for purposes connected with "the proper execution of its functions."
30. It is submitted that both the Law and the C&W Licence envisage situations where even the ICTA may not be entitled to confidential customer information - i.e., where there is no reasonable ground for the Authority requesting the document. To that extent C&W would be quite justified in refusing to produce a document to the Authority where the Authority has no reasonable ground for requesting the production of the document.
31. The Authority has suggested that C&W could file the documents in confidence, with redacted copies to be served on TCL. This presumably is pursuant to the ICTA (Confidentiality) Regulations, 2003 (the Confidentiality Regulations). It is submitted that the Confidentiality Regulations offer protection only in respect of confidential information belonging to C&W. They offer no protection with respect to information which C&W may have received in confidence from a customer, or which relates to a customer. In those circumstances, by section 76 of the ICTA Law, the information may not be disclosed without the customer's written consent except in the circumstances set out under section 76(3). C&W is incapable of determining for the customer what part of the information should be redacted, and may in certain circumstances be compelled to keep confidential even the fact of the existence of the customer, the fact that the customer may have a particular need, or the transaction in question. The fact that TCL has seen it fit to be playing fast and loose with confidential customer information does not alter C&W's legal obligation to protect its customers' confidentiality.

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<sup>17</sup> See *Bertoli v. Malone* 1990-91 CILR 58



32. It is primarily for these reasons why all the points raised above in this submission are of such significance. C&W has a legal duty to protect its customers' confidential information. This duty may only be overridden by a proper and reasonable request made by the Authority in the proper exercise of its functions. It is C&W's position that, for the reasons set out in this submission, no proper request for the production of the documents has been made by the Authority.

**Confidential customer information not disclosable to public or TCL in present circumstances**

33. There is no exception to the prohibition against disclosure of confidential customer information contained in section 76 of the ICTA Law which permits disclosure in the present circumstances to TCL or to the public. The prohibition is absolute, save for the exceptions set in section 76(2). Whereas section 76(2)(f) permits disclosure to the Authority in certain circumstances, it does not permit disclosure to any other licensee or to the public, even at the direction of the Authority. Such disclosure, even at the direction of the Authority, would constitute a criminal offence. Consequently, even if any of the documents in the possession of C&W are properly disclosable to the Authority, in no circumstances are they disclosable to TCL, even in redacted form, especially where any redaction capable of protecting confidential customer information would render the documents quite useless to anyone viewing them.

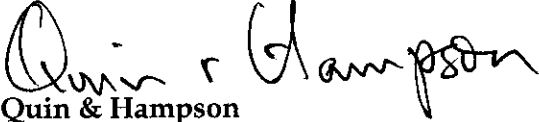
**C&W's responses to the specific request by the Authority**

34. In the e-mail from Mr. Greg van Koughnett dated August 23, 2006 C&W was requested to produce to the ICTA the following documents:
- "copies of the relevant RFPs issued by Maples and Calder and by Appleby's [sic]";
  - "the C&W responses to these RFPs"; and
  - "copies of all contracts that have been entered into between C&W and these two firms which flow from these RFPs".
35. For the reasons set out in this submission, there are no reasonable or lawful grounds for the production to the Authority, or to any other person, any document capable of revealing the existence of any particular customer, the identity of any customer who may have submitted an RFP to C&W, the terms of any RFP submitted by a customer, or the terms of any agreement which may have been entered with any customer.
36. Consequently, C&W formally objects to the production of any documents in its possession which may fall within the request of the Authority dated 23 August, 2006 and is incapable of complying with the Authority's request.



37. We respectfully submit that in all the circumstances the Authority should withdraw the request.

Yours faithfully,

  
Quin & Hampson

Copy: Cable & Wireless (Cayman Islands) Ltd.  
TeleCayman Limited