



**Cayman Corporate Centre, Fourth Floor
Box 704GT, George Town, Cayman Islands
Tel: (345) 769-1000 Fax: (345) 769-0999**

2 August 2006

Mr. David Archbold
Managing Director
Information and Communications Technology Authority
PO Box 2502 GT
Grand Cayman

Dear Mr. Archbold,

**Re: Investigation Relating to Anti-competitive Practices /
Agreement between C&W, Digicel and Wireless Ventures 23 July
2004 (the Agreement)**

Please accept this as an Application by TeleCayman Limited (TeleCayman) pursuant to section 41 of the Information and Communication Technology Authority Law (2004 Revision) (the Law) that the Authority undertake an investigation under Part IV of the Law as there is reasonable grounds for suspecting that the above referenced Agreement infringes the section 36 prohibition.

Open and healthy competition is good both for consumers and for businesses. If businesses compete on a level playing field, they will flourish and consumers are more likely to pay lower prices, and get better quality and more choice. TeleCayman submits that it is on this premise upon which Part IV of the Law is premised.

Agreements between licensees which may affect trade in the Cayman Islands and have as their effect the prevention, restriction, or distortion of competition are prohibited (see section 36 of the Law).

As a general principle agreements will only be caught by the competition rules where they have or would have an appreciable effect on competition. Whether this is the case can depend, amongst other things, on the market shares of the parties to the agreement, the content of the agreement and the relevant market in which the parties operate. In general, market share of over 25% means the competition rules will apply.

In this particular instance the relevant market is the mobile market in the Cayman Islands of which the parties control 100%. The Agreement in question seeks to set rates as between the mobile operators, the mobile operators and the fixed wireless operators and retail rates set to consumers. The Agreement, and its impact upon competition, will be examined in greater length below.

Despite the general principle noted above, competition authorities, as supported by case law, have taken the view that certain types of agreements, by their very nature, always restrict competition to an appreciable extent and so are prohibited outright. This includes agreements which have as their object or affect direct or indirect price fixing.¹ TeleCayman submits that the Authority should adopt a similar view as its own anti-competitive provisions are modeled upon the UK and EU legislation and the competition authorities for both jurisdictions subscribe to this view. The Agreement signed by Cable & Wireless and Digicel, whose object is directly or indirectly to fix prices, or the resale price to consumers (as noted below) almost invariably infringe the section 36 prohibition. The Office of Fair Trading considers that such price-fixing agreements, by their very nature, restrict competition to an appreciable extent.²

Turning to the Agreement in question TeleCayman notes the following:

1. Section 5 sets the Mobile Termination Rate (MTR) as between the mobile providers at CI\$.1845.

TeleCayman takes no issue with the mobile providers deciding amongst themselves what they will charge one another.

¹ Section 2.17, Competition Law Guideline 2004, Agreements and concerted practices, Office of Fair Trading

² Section 3.4, Competition Law Guideline 2004, Agreements and concerted practices, Office of Fair Trading

2. Section 5 goes on to state that “there should be only one mobile termination rate that applies as between the Parties, as specified herein, which will apply to all calls delivered by any one of the Parties to the mobile network of any of the others...”

TeleCayman submits that there is a direct anti competitive issue with the parties deciding amongst themselves what they will charge third parties. TeleCayman, on the basis of the comments made below, submits that this particular provision of the Agreement constitutes direct price fixing contrary to the anti-competitive provisions contained in the Law. As will be further noted below it also applies dissimilar conditions to similar transactions putting the Fixed Wireless providers at a competitive disadvantage.

As noted above, TeleCayman takes no issue with the Agreement in question to the extent that it sets the MTR as between C&W and Digicel, who collectively control 100% of the mobile market in the Cayman Islands. However, to the extent that the Agreement attempts to set the MTR price for Fixed Wireless providers in the Cayman Islands it is anti competitive. Firstly, this Agreement, effectively, takes away from TeleCayman the ability to negotiate more competitive final MTR rates with the Mobile Providers. Another competitive reality is that Fixed Wireless providers need to factor this rate into the pricing of its products to their own customers. This rate is viewed by TeleCayman as exorbitantly high. Nonetheless, Telecayman is required to pass it on to its own customers who end up paying more for services which involve terminating on Digicel and C&W mobile networks.

“Whether an agreement has the object of restricting competition does not depend so much on the purpose of the parties. They may have had a legitimate purpose but taken steps than went further than necessary”.³

TeleCayman submitted a request to Digicel requesting interconnection and whether it could negotiate the MTR rate. Digicel refused to move on the MTR stating to do so would be discriminatory (see attached). It may be assuming too much on the part of TeleCayman that Digicel also had in mind its Agreement with C&W. Arguably, it was a factor in the response provided as Digicel should be well aware (as noted below) discrimination does exist with respect to the MTR.

TeleCayman submits that there is in fact discrimination on the MTR as against the Fixed Wireless providers. The MTR rate varies significantly in the Cayman Islands, depending upon the category of provider. The following is illustrative:

- Neither Digicel not C&W need to pay an MTR for on net calls from their respective fixed wireless or fixed wire line networks.

³ NV IAZ International Belgium et al v. Commission [1983] E.C.R 3369

- The MTR for an incoming international call to a Digicel or C&W mobile is likely around CI\$0.15 per minute. (This is an international incoming call which does not traverse the TeleCayman network.)
- The MTR for an incoming international call over the TeleCayman network to either a Digicel or C&W mobile is CI\$0.086 per minute. (See attached e-mail from Lawrence Davies of C&W and ICT Decision 2006-2).
- The MTR for a domestic TeleCayman subscriber to a Digicel subscriber is CI\$0.185 per minute. The Authority made the distinction between these two later rates abundantly clear in ICT Decision 2006-2.

A few conclusions can be arrived at from the above illustration. Firstly, TeleCayman, as a Fixed Wireless provider pays a far greater MTR than any other category of provider. Secondly, any rate set by TeleCayman for terminating domestic mobile calls to Digicel for the people of the Cayman Islands needs to recognize the CI\$0.185 and be predicated on a higher cost structure. Ultimately this results in higher rates for the people of the Cayman Islands. This is not what the anti competitive provisions were designed to achieve.

TeleCayman submits that of all categories of service providers having to pay an MTR rate, the Fixed Wireless providers should be treated more equitably in order to pass on better rates to consumers in the Cayman Islands. At the very least, Fixed Wireless providers should pay no more than the MTR rate for an incoming international call over the TeleCayman network terminating on the mobile networks of Digicel or C&W. This is in keeping with the fact that the same network facilities are utilized for completing incoming international calls transiting the TeleCayman network and terminating on C&W and Digicel mobiles. Arguably, the cost of such calls may be even more as an international facility component is being utilized. This is also in keeping with the mandate stipulated for the Authority in subsections 9 (3) (a) wherein it states that one of the Authority's "principal functions is to promote competition..." Arguably permitting a TeleCayman originated call destined for C&W or Digicel's mobile network at rates to TeleCayman which are twice as expensive as an incoming international call to a C&W or Digicel mobile which transits the TeleCayman network is not promoting competition within the spirit of the Law.

It is noteworthy that the facilities utilized by both TeleCayman and the mobile providers for an incoming international call to a mobile provider over the TeleCayman network and for a domestic TeleCayman call to a mobile provider are exactly the same. However, the MTR rate for the domestic TeleCayman call is 115% more than the incoming international call over the TeleCayman network. TeleCayman submits that rates for calls utilizing the same facilities should not be

discriminatory and be treated similarly. TeleCayman submits that both types of calls should be set at CI\$0.086.

TeleCayman submits that the anti competitive provisions of the Law were introduced specifically to ensure that service providers competed on a level playing field so that consumers of the Cayman Islands are more likely to obtain the best prices possible. The rate of CI\$0.185 provided for in the Agreement, and charged to TeleCayman, is anti competitive in nature as it constitutes price fixing contrary to the Law, anti competitive as against the Fixed Wireless providers in applying dissimilar conditions (pricing) to equivalent transactions (use of same facilities).

There exists a "backdrop" to the Telecayman Application which merits some mention. Under the Law, the MTR can either be negotiated between the parties and/or be a cost oriented rate. The CI\$0.185 rate is not a rate negotiated or agreed to by Telecayman. This is clear from the interim rate existing in the C&W Agreement and the position taken by TeleCayman in its various submissions surrounding ICT Decision 2006-2. TeleCayman was never of the view that it would have to pay the CI\$0.185 rate to a Third Party. Further the Authority has never pronounced on the appropriate cost oriented rate or, for that matter, whether the rate in the Agreement is cost oriented. The FLLRIC proceedings were to produce an MTR rate (perhaps not the ultimate rate) by June of this year. This has not happened and is not likely to happen until next year. Further, the Agreement provides in section 6 that there is to be a 30 month transition to the rate derived from the FLLRIC model. Section 6 is clearly designed to supersede the legislative framework without first seeking approval from the Authority thereby usurping the Authority's jurisdiction and mandate. In the face of this backdrop and its intention to be successful in the marketplace TeleCayman can no longer sustenance a provision in an Agreement which is clearly anti competitive.

TeleCayman notes that within sections 46 and 47 of the ICTA Law there is ample jurisdiction for the Authority to interpret whether an agreement infringes the section 36 prohibition.

TeleCayman submits that in light of the above comments there are reasonable grounds for suspecting that the section 36 prohibition has been infringed and would request that the Authority conduct an investigation under Part IV of the Law. As between C&W and Digicel, these parties agreed to the rate to be charged amongst themselves. This rate should be permitted to stand. However, the Fixed Wireless providers were not a party to the Agreement. TeleCayman respectfully requests, on the basis of the above submissions, that the Authority assess the merits of making a modification to the Agreement in line with the rate of CI\$0.86 to further the competitive environment. Such rate would recognize the facilities being utilized and be in line with the rate for international incoming over the TeleCayman network to the mobile provider which utilizes the same facilities.

Further it would apply similar conditions to equivalent transactions. This request is made pursuant to subsection 48 (1) of the Law.

Respectfully yours,

A handwritten signature in blue ink, appearing to read 'Philip Brazeau', with a large, stylized flourish extending to the right.

Philip Brazeau

Cc Mr. Rudy Ebanks, Chief Regulatory Officer, C&W
Mr. J.D. Buckley, General Manager, Digicel

Philip Brazeau

From: Davies, Lawrence [Lawrence.Davies@cwjm.cwplc.com]
Sent: Thursday, June 08, 2006 4:12 PM
To: Philip Brazeau; Gordon, Courtney; Bob Kanner
Cc: Raul Nicholson-Coe; McNaughton, Lawrence; Nelson, Derrick; Barnes, Paul R; Tom Kinstler
Subject: RE: Additional E1s

Philip,
the rate to terminate on mobile networks for an international originated call is CI\$ 0.0864 (under bill heading "Third party int'l incoming to mobile")

The rate to terminate on mobile networks for a domestic originated call is CI\$ 0.1845 (under bill heading "Other Nat'l to mobile incoming")

I appreciate you are disputing the latter rate. The rate that you are have been settling at is still higher than the rate for termination from international.

regards

Lawrence Davies

VP Billing - Carrier Services
Cable & Wireless West Indies

Office - (876) 936-2608

Mobile - (876) 997-1081

Fax - (876) 511-7143

-----Original Message-----

From: Philip Brazeau [mailto:philip.brazeau@javelinbermuda.com]

Sent: 08 June 2006 14:17

To: Gordon, Courtney; Bob Kanner

Cc: Raul Nicholson-Coe; McNaughton, Lawrence; Nelson, Derrick; Barnes, Paul R; Davies, Lawrence; Tom Kinstler

Subject: RE: Additional E1s

Courtney,

I did have a conversation with Lawrence on this issue but did not come to an agreement. Any agreement arrived at was to work on and resolve the issue.

I have reviewed our Interconnection Agreement and have not identified any language in the Joining Services, or elsewhere, to split the routes between domestic and international traffic. Telecayman only needs to provide a forecast of its requirements for Joining Services.

Additionally, (although not an accountant) I cannot identify the referenced "disparity between domestic and international rates". In reviewing the attached bill received from C&W the rates for terminating and transiting a domestic or international call from TeleCayman to C&W (landline or mobile) appear to be the same. If this is the case there should be no problem with proceeding with the request from Bob Kanner as submitted. If it's not the case please call me at 769-1000 so we can discuss.

Regards,

8/1/2006

Philip Brazeau

From: John D. Buckley [John.Buckley@digicelgroup.com]
Sent: Friday, June 16, 2006 8:37 AM
To: Philip Brazeau
Cc: Peter-Paul de Goeij
Subject: RE: Interconnection/MTR

Philip

Of course, we are very willing to discuss interconnect with you. However, I have to advise you that Digicel will not discriminate with it's interconnect rates (MTR is set at CI\$0.185).

If you are interested in pursuing interconnection discussions please contact Peter-Paul de Goeij who handles Legal & Regulatory affairs for Cayman. His contact details are:

m +1.876.470.7463
p +1.876.511.5298 Ext. 5951
f +1.876.920.4626

I have also copied Peter-Paul above for ease of reference.

Regards

JD

From: Philip Brazeau [mailto:philip.brazeau@javelinbermuda.com]
Sent: 07 June 2006 07:25
To: Digicel - JD Buckley
Subject: Interconnection/MTR

JD,

TeleCayman is interested in pursuing interconnection discussions with Digicel if it could result in a lower MTR. Can you advise as to what rate Digicel would be willing to offer for MTR if TeleCayman were to interconnect with your company?

Regards,

Philip

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7/27/2006