



CABLE & WIRELESS

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Our ref: GRRCR/GR 15.19

14 September 2007

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

Dear Mr. Archbold:

Re: FLLRIC Process (CD 2005-1) – Digicel Request to Reconsider

The following represents the comments of Cable and Wireless (Cayman Islands) Limited (“C&W Cayman”) to the request by Digicel Cayman Limited (“Digicel”) to the Authority that it reconsider its 16 August 2007 determination regarding disclosure of certain information filed in the FLLRIC proceeding (the “Reconsideration Request”).

C&W Cayman submits that the Authority does not have jurisdiction to reconsider its 16 August 2007 determination, either under sections 78 or 79 of the Information and Communications Technology Authority Law, 2006 Revision (the “Law”) or under its general, residual jurisdiction over its own procedures. C&W Cayman further submits that there is not substantive reason for reconsidering that determination.

Background

On 25 July 2007, Digicel submitted a request (the “Disclosure Request”) for disclosure of certain information redacted by C&W Cayman in its responses to the Authority’s 16 April 2007 interrogatories. By email dated 25 July 2007 to C&W Cayman and Digicel, the Authority indicated that it viewed this request as one made pursuant to

Regulation 4(1)(f) of the Information and Communications Technology Authority (Confidentiality) Regulations, 2003 (the “Regulations”), and requested comments.

C&W Cayman submitted its comments on 6 August 2007, refuting and opposing Digicel’s request for disclosure. In that submission, C&W demonstrated that its claims for confidentiality were properly made within the framework established by the Regulations. C&W admitted that one piece of information was incorrectly redacted. However, all the other redactions, C&W explained, were justified because they were actual confidential C&W demand figures, whose disclosure could not conceivably serve the public interest, or results from the confidential LRIC model.

Furthermore, C&W rejected Digicel’s assertion that output from the confidential model were no longer confidential because “the modeling exercise ha[d] moved beyond the inclusion of C&W specific inputs.” C&W emphasized that the outputs were based on specific actual costs incurred by C&W, which it consistently treats as confidential and which is not publicly available and, when taken together, with other information could provide actual and potential competitors details of C&W’s cost base.¹

Finally, C&W expressed its strong disagreement to Digicel’s proposal to include its staff and/or its consultants in the confidential model review process, as such an addition would be both superfluous and delay the review process.

On 16 August 2007, the Authority issued its determination on the Disclosure Request (the “Determination”), acknowledging the disclosure of the one piece of data inadvertently redacted but denying Digicel’s request for disclosure of the information and for a new process for review of the FLLRIC model.

On 30 August 2007, Digicel submitted the present request for reconsideration of the Determination, which the Authority distributed to interested parties on 3 September 2007 and establishing this proceeding.

Procedure

In its 3 September 2007 email, the Authority suggested that it was considering the Reconsideration Request pursuant to section 78 of the Law and set a timetable for comments and reply accordingly. The Authority also requested that parties address the following two questions (without prejudice to any other issues):

- whether the Authority has jurisdiction, under section 78 of the Law or otherwise, to reconsider the Decision;

¹ We note also that, while the fact that another operator may incur a similar cost to C&W for a piece of equipment does not make the cost “non-specific” to C&W, nor does it mean that the cost information is not confidential.

- assuming that the Authority has jurisdiction, whether the Decision should be confirmed, reversed or modified, and for what reason(s).

Jurisdiction

C&W Cayman submits that the Authority has no jurisdiction, or alternatively, no grounds for reconsidering the Determination. First, the Determination does not fall within one of the determinations enumerated at section 78(1) which the Authority may, by virtue of section 78(2) reconsider on an application by a party aggrieved by the determination, or, by section 79, on the application of a party referred to in the side notes to the statute as “a third party”. Second, no grounds exist upon which the Authority may reconsider the Determination pursuant to its general reserved powers to control its own procedures.

Section 78(1) sets out the types of Authority determinations that are subject to the terms and procedures set out in section 78:

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.

As far as C&W Cayman is aware, no other types of determinations have been prescribed pursuant to section 78(1)(l) to be included in section 78(1).



The Authority's jurisdiction to reconsider or vary its own determinations of the types listed under section 78(1) is derived from section 78(2) (in respect of an application by an aggrieved party and section 79 (in respect of a third party). That jurisdiction extends only to those determinations listed under section 78(1).

The Determination was a decision not to require disclosure of information and a decision not to modify the procedures applying to a public consultation on costing matters. It is, clearly, not a determination to which section 78(2) or section 79 applies.

C&W Cayman notes that, although the procedure set out in section 78(4) does not apply, the Authority chose to adopt it in this case. C&W Cayman is pleased that the Authority has chosen to address the Reconsideration Request as expeditiously as possible.

In the circumstances, this means that the Authority's jurisdiction to consider the Reconsideration Request exists purely by virtue of the Authority's general, residual jurisdiction over its own procedures, (as part of the general powers granted to the Authority under section 9 of the Law). In this regard, the Authority, as it is entitled to do, laid out the rules for reconsiderations in its 27 July 2006 ICT Decision 2006-2, Decision on TeleCayman Application to Reconsider Decision 2006-2 [sic].

Decision 2006-2

Decision 2006-2 concerned a request by TeleCayman Limited that the Authority reconsider a determination made in relation to interconnection rates. As such, that determination fell outside the scope of what is now section 78 of the Law. In denying TeleCayman's request, the Authority also noted the following:

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).

It is immediately obvious that the Authority, as a matter of policy, has placed a very high bar on applications for reconsideration of determinations that fall outside of section 78 of the Law,² and would not lightly interfere with one of its own decisions, where such

² While it is not necessary for a determination in the case of this Digicel Reconsideration Request, C&W Cayman notes that it is not clear whether the Authority intended the Decision 2006-2 procedures to also apply to section 79 applications for reconsideration.

decision was properly made at first instance. It would do so only where it could be demonstrated that there was “a fundamental flaw to the procedural or substantive approach adopted by the Authority”. In this case, C&W Cayman submits there were no such “fundamental flaws”, and that Digicel has not demonstrated that there were any such flaws.

No Fundamental Procedural Flaw

C&W Cayman submits that, in this case, there was no fundamental procedural flaw. As the discussion in the “Background” section above demonstrates, the Authority went to great lengths to ensure both C&W Cayman and Digicel had an opportunity to comment on the Disclosure Request. In the Determination, the Authority made it clear that it had considered all submissions and all relevant matters.

In summary, there is no flaw in the procedures adopted by the Authority that could justify the Authority revisiting and modifying its Determination.

No Fundamental Substantive Flaw

In its Disclosure Request, Digicel requested disclosure of information that was either C&W-specific data or else information generated from C&W-specific data (and from which the C&W-specific data could be derived). The Authority determined, on the basis of the evidence provided to it by all interested parties, that the data and information were in fact confidential and that “the specific direct harm likely to result from disclosure outweighs the public interest in disclosure in these instances.”

C&W Cayman provided the Authority with extensive evidence as to the nature of the data and its confidentiality. The Reconsideration Request is primarily a replay of previous arguments that had been dealt with completely in the Authority’s earlier decision. As such, C&W Cayman relies on its position in its 6 August 2007 comments on the Disclosure Request.

The only new argument that Digicel raises is that the Authority had previously indicated, in Principle 11 of its Decision 2005-4 regarding the FLLRIC model, a pre-disposition “to allowing parties to have sight of the final cost methodology, including the underlying actual data used.”

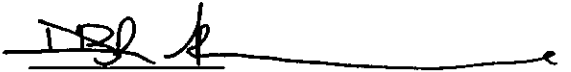
First, the Authority stated that it was “pre-disposed”. This means that the Authority had not yet made a final decision on the matter, which it could not have done in 2005 as it was not known how the proceeding would unfold. C&W Cayman submits that the Authority need not be bound by a statement that it was “pre-disposed”. Second, an enormous amount of analysis has been undertaken and enormous number of issues surrounding the inputs and structure of the model have been examined and will have been examined in this proceeding, such that the circumstances that applied in 2005 no longer apply. Further, the Authority has conducted an open and transparent

proceeding, and the release of the underlying data used is not necessary, particularly where such data is confidential to one of the parties to the proceeding. In this situation, it is not unreasonable for the Authority to revisit a prior position, particularly where that position was only a “pre-disposition”. Third, and more importantly, we note that the Authority state the final cost methodology, including the underlying actual data used may be disclosed. We are not yet at the stage of a final methodology nor draft final inputs, as the Authority has yet to make a determination on either the model itself or inputs.³ That statement in Decision 2005-2 cannot, therefore, properly be used as the base of a claim for disclosure of confidential information at this time.

Conclusion

C&W Cayman submits that the Authority does not have jurisdiction to reconsider the Determination, either under sections 78 or 79 of Law or under its general, residual jurisdiction over its own procedures. It is also clear that there is no substantive reason for reconsidering that determination, as there is no fundamental flaw in the procedural or substantive approach applied by the Authority in arriving at the Determination. Digicel’s Reconsideration Request should therefore be denied.

Yours faithfully,
Cable & Wireless (Cayman Islands) Ltd.



for Rudy B. Ebanks
Chief Regulatory and Carrier Relations Officer

cc: Timothy Adam, Chief Executive C&W
Ian Tibbetts, Chief Operating Officer C&W
Frans Vandendries, Vice President Regulatory Affairs C&W

Interested Parties to CD-2005-1

³ We also note that, in any case, the Authority limited the view to the underlying data used for services covered under the Interconnection and Access to infrastructure sharing regulations.