



The Bigger, Better Network.

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January 22, 2010

The Managing Director  
The Information Communication & Technology Authority  
P.O. BOX 2502  
3<sup>rd</sup> Floor Alissta Towers  
Grand Cayman

**Attention: Mr. David Archbold**

Dear Sir;

**Re: Reply to LIME response on Request for Reconsideration of Interim Determination December 24<sup>th</sup> 2009.**

We have reviewed the response of LIME to our Request for Reconsideration to ICTA Determination of December 24<sup>th</sup> 2009 and have the following comments.

The expiration of the period set out in the Agreement of January 29, 2004 i.e. at July 28<sup>th</sup> 2009 does not mean there are no terms and conditions for interconnection thereafter. The parties carry out the services as were provided for under the written agreement and are allowed to negotiate terms for a new period.

The ICA therefore cannot conceivably be extended indefinitely and the referral of the sole remaining disputes to ICTA is designed to bring that new ICA into being in short order. The contract continues in force until such time as the already agreed new terms and the terms determined by ICTA are ready for incorporation into a New ICA for execution. If it were otherwise, LIME would be able as a strategy to negotiate terms right up to July 28<sup>th</sup> 2009 and then simply impose any terms it deems appropriate thereafter. In lieu of acceptance by Digicel it would withdraw services.

Notwithstanding the fact that the Regulations provide for disputes resolution of pre-contract issues, LIME believes it is by the November 27<sup>th</sup> 2009 letter able to issue a take it or leave it position in the middle of the negotiations. It cannot unilaterally change the existing terms and condition of interconnection on one month's notice simply because negotiations have continued past at the expiration of the six month period after January 27<sup>th</sup> 2009.

We are confident that ICTA will understand that either party could have referred the disputes to determination at a point where they feel good faith negotiations have taken place but failed. At any point, where it was allowable under the Regulations, LIME itself could have started the disputes resolution process through ICTA and therefore bring the

formation of a new ICA closer to conclusion. Their silence, even when it was tacitly agreed they would prepare the request, was deafening. We have paid no regard to the assertion that, at the time we have filed the request, they were in the process of preparing their own. This is hardly the behaviour of a party racing to having a conclusion of a matter.

## **The Negotiation Meeting.**

We repeat that there is a distinction between ‘discussions subject to corporate validation and approval’ and discussions that are to be ‘reduced to writing and signed on behalf of both parties.’ We agreed that our discussions were subject to the former. However the records clearly indicate that the corporate approval was communicated to the parties in the meeting by the agent Vice President Vandandries. The records should indicate that contrary to the format of the usual business meetings, this meeting commenced with an express question from Digicel to LIME’s representative querying his powers to bind LIME whereupon he confirmed that he had such authority and on matters which he may not have, he could excuse himself from the meeting (which he did) and seek the necessary corporate approval to bind his company. This ostensible and apparent authority to proceed with the meeting and to make a binding agreement was unequivocally declared before the start of the meeting which we would not have proceeded with otherwise. There is and continue to be no requirement that agreement on those specific aspects of the ICA being negotiated needed to be reduced to writing and signed. If this were otherwise it would be open to LIME to say ALL the other aspects of the ICA which we are negotiated and settled between us should have been incorporated in a partial and incomplete ICA and signed. Effectively they would be saying we have **NOTHING** agreed between us at this stage thereby making section 67(3) of the Law an administrative monster.<sup>1</sup> We sent agents who were clothed with the authority to bind Digicel in Law and the authority of the LIME agent at that crucial meeting was warranted to us. At this point we have referred six **OUTSTANDING** issues to ICTA on the joint understanding that all the others (as yet unreduced to writing) were resolved and **AGREED**. If LIME is now by its last paragraph under “**The Negotiation Meeting**” saying they have no aspects of the ICA agreed with us then this assertion is new and beyond reasonable comprehension.

We reiterate that in this case, we are clear that the parties in the presence of the Authority made an interim agreement covering the matter raised in paragraph 19 of the Determination Request. This agreement was brokered in the presence of the Authority and while not in writing, does in law satisfy the preconditions for being a legally binding agreement. The fact that it was not reduced to writing then and there does not in our view, make it a thing writ in water, a non-existent agreement. The Authority having had knowledge of the agreement between the parties can and is required to take note of same and ought to, where the parties fail to do so within seven days of the date of the agreement or a reasonable time thereafter, direct that the oral agreement be reduced to

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<sup>1</sup> S67(3) “A decision of the Authority in relation to any pre-contract dispute shall be consistent with any agreement reached between the parties as to matters that are not in dispute.”

writing and filed with the Authority. It cannot be the intention of the law that the Authority should give no weight or value to an oral agreement or to go further and make a ruling in absolute contradiction of the agreement made by the parties and known to the Authority on the basis that the agreement has not yet been filed with them.”

## **The Expired ICA**

The situation when an existing interconnect agreement is to be replaced by a new interconnection agreement is clearly different from the situation when a new operator is about to enter the market. A new entrant cannot launch until the physical interconnection is up and running. To Digicel's knowledge, LIME has objected to provide interconnection in any of its Caribbean operations until an agreement is signed by both parties. In other words there will not be a situation when interconnection is up and running without an existing interconnection agreement, hence all involved parties will at all instances know what the applicable terms and conditions are. The existing ICA only provided an option to stop providing services, which from a contractual standpoint would make sense, i.e. if there is no service there is no need for an agreement. However this is a situation which the ICTA (understandably) would not allow to happen, which it clearly said in its determination of December 24, and as a consequence the existing ICA should still be applicable. In any event, if the January 29<sup>th</sup> 2004 ICA comprehensively set terms and conditions for our interconnection and services continue to be carried out there under whilst negotiations take place for a new period, a one month notice dated November 27<sup>th</sup> 2009, is ineffective to bring this longstanding agreement to an end.

## **The Settlement Agreement**

Our reliance on the signed agreement cannot be construed as unreasonable or anything other than what prudent commercial persons acting on legal advice might do. Denial of the Imputation Agreement repeatedly or even early in the tenure of the agreement does not reduce its credibility or legal standing where reasonable legal interpretation supports its authenticity. In fact at an earlier occasion in 2007, when LIME challenged the validity of the Imputation Agreement Digicel was forced to take them to arbitration, where LIME eventually conceded and paid Digicel's costs. Digicel having signed the Imputation Agreement with parties fully aware of its significance and having the power to agree, is entitled to proceed in its commercial business on the basis that the agreement is binding and that its validity will be supported completely by the Law and ICTA.

Digicel does not deny that LIME at some point prior to the Determination Request began asserting that the Imputation Agreement was not in force. We reiterate that we know of no provision of law which allows a denial of an agreement written and signed by the parties, to automatically act to terminate the agreement. A repeated and vociferous denial of the agreement does no more to diminish its legal status than the initial denial. It is also trite law that where the parties are perfectly capable of carrying out the terms of the agreement, albeit with unforeseen economic prejudice to one or more of the parties, this

does not amount to a frustration of the agreement. We submit that it is reasonable corporate behaviour to hold LIME to the Agreement and to operate on the basis that there being a strong legal case for us to do so, we should expect a glide path to be put in place at the point of determination or agreement of the new MTR.

## Retroactivity

Where the parties fail to agree and have JOINTLY decide to refer set issues to ICTA for resolution under the Law, it is even more illogical for one party to give notice of termination and then unilaterally impose new terms as a pre-condition for maintaining the services.

Nothing in the responses of LIME to our Reconsideration Request in our view alters or impacts on the submissions have made in the Request and we urge the Authority to give due regard to all the matters we have raised therein.

Yours truly,  
**Digicel (Cayman) Limited**



**Victor Corcoran**  
**CEO**