



**CABLE & WIRELESS**

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Our Ref: GRCR/GR 15.24  
7th November, 2006

Mr. David Archbold  
Managing Director  
Information and Communications Technology Authority  
P.O. Box 2502  
3<sup>rd</sup> Floor Alissta Towers  
George Town  
Grand Cayman, KY1-1104

Dear Mr. Archbold,

**Re: Cable & Wireless Determination Request dated 25 October 2006**

1. C&W writes further to our letter to the Authority dated 2 November 2006, in which we responded to Digicel's argument that C&W's Determination Request dated 25 October 2006 (the "Determination Request") does not constitute a valid determination request within the meaning of the Dispute Resolution Regulations. In C&W's letter of 2 November 2006 we stated that C&W would be prepared to enter into good faith negotiations with Digicel, if Digicel confirmed within two working days that it is prepared to enter negotiations on the precise issues raised in the Determination Request. Digicel responded by letter dated 6 November 2006 in which it refused to enter into negotiations as proposed by C&W. C&W now, therefore, addresses Digicel's argument that the Authority should decline jurisdiction to consider the C&W's Determination Request.<sup>1</sup>

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<sup>1</sup> As stated in C&W's letter to the Authority dated 2 November 2006, C&W's Determination Request dated 25 October 2006 is procedurally distinct from the application made by C&W, also dated 25 October 2006, pursuant to section 68(3) of the Law and regulation 6(h) of the Interconnection Regulations, for a determination of a cost-oriented rate. C&W responds to Digicel's arguments in response to that application in a separate letter of today's date copied to all other telecommunications licensees in the Cayman Islands.

## **The Authority has jurisdiction to consider C&W's Determination Request**

2. The Authority has jurisdiction to consider the Determination Request on the following grounds:
  - (a) As a matter of the general law and public policy of the Cayman Islands the Authority has jurisdiction and is obliged to resolve all disputes between telecommunications service providers regarding interconnection;
  - (b) The specific requests made by C&W in its Determination Request all relate to whether the MTR agreed between C&W and Digicel is cost-oriented. The Authority has clear jurisdiction under the Law and the Interconnection Regulations to determine whether an MTR agreed between ICT licensees is cost-oriented;
  - (c) The Authority's jurisdiction to determine whether an MTR is cost-oriented supersedes any agreement regarding an MTR entered between ICT licensees;
  - (d) The present dispute between C&W and Digicel, which relates to the issue of the cost-orientation of the MTR agreed between C&W and Digicel, is not a dispute arising under the Interconnection Agreement<sup>2</sup> and cannot properly be resolved by resort to the dispute resolution procedures asserted by Digicel under the Interconnection Agreement; and
  - (e) Even if there existed between C&W and Digicel any question which may properly be resolved by resort to the dispute resolution provisions of the Interconnection Agreement, the Determination Request would constitute a valid referral of a dispute to the Authority in accordance with clause 34.1.5(c) of the Interconnection Agreement.

### *The Authority has jurisdiction to resolve all interconnection disputes*

3. It is clear from the express provisions of the Law that it was the intention of the Legislature to confer on the Authority not only the power but the obligation to resolve all interconnection disputes which may arise between telecommunications service providers. The broad power of the Authority is stated in section 9(1) of the Law which provides:

“Subject to this Law, the Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law.”

4. Section 9(2) outlines, *inter alia*, the following functions of the Authority:

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<sup>2</sup> The “Interconnection Agreement” unless otherwise specified means the Interconnection Agreement between C&W and Digicel dated 29 January 2004 as supplemented by the Settlement Agreement between C&W, Digicel and Wireless Ventures Ltd dated 29 July 2004.

“(c) to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks;

(g) to resolve all disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;

(h) to promote and maintain an efficient, economic and harmonised utilisation of ICT infrastructure.”

5. This general jurisdiction contained in the Law is specifically reinforced by regulation 6(l) of the Interconnection Regulations which provides:

“any disputes relating to interconnection and infrastructure sharing shall be referred to the Authority under the Dispute Resolution Regulations.”

6. The Authority’s jurisdiction under the Law was expressly acknowledged by the Authority in ICT Decision 2006-2, where the Authority states at paragraphs 18 and 19:

“18. ...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 the 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 by entering into contractual arrangements concerning interconnection.”

7. Further, it is clear that this jurisdiction applies to all disputes relating to interconnection, regardless of whether the dispute arises prior to the commencement of contractual negotiations between ICT service providers, during such negotiations, or indeed, after a contract has been entered by ICT service providers. For example, section 67(1) of the Law empowers a party engaged in negotiations for the provision of interconnection to refer “pre-contact disputes” to the Authority for resolution; section 66(1) of the Law gives the Authority the power, where parties to an interconnection agreement are unable to agree upon interconnection rates, to impose such rates; section 69(2) of the Law provides that the Authority, in order to promote the efficient, economic and harmonised utilisation of infrastructure may, *inter alia*, “inquire into and require modification of any agreement or arrangements entered into between licensees and another person or licensee which has the effect of limiting either the efficient and harmonised utilisation of infrastructure or the promotion of competition in the provision of ICT services or ICT networks”; and, regulation 6(b) of the Interconnection Regulations sets out, as part of the general principles and guidelines applicable to the provision of interconnection and infrastructure sharing

services, the ability of a party, after attempting to reach agreement on interconnection, to refer disputes to the Authority for resolution.

*The Authority has jurisdiction to determine whether MTR is cost oriented*

8. The specific determinations sought by C&W in the Determination Request are as follows:
  - (a) an MTR of CI\$0.1845 per minute ... is not a cost-oriented rate as required by [the Law] and the [Interconnection Regulations];
  - (b) an MTR of CI\$0.11 per minute would be ... a cost-oriented rate under current regulations;
  - (c) all mobile ICT Licensees ... [should be required by the Authority] to charge CI\$0.11 per minute for the termination on their mobile networks of calls originating in the Cayman Islands, until ... a new rate based on the [FLLRIC]<sup>3</sup> methodology to be developed by the Authority.
9. Each determination relates to the issue of cost-orientation of the MTR. The Authority has clear jurisdiction under the Law and the Interconnection Regulations to determine the issue whether the MTR is cost-oriented. The jurisdiction exists by virtue of section 9(1) and (2) of the Law; section 65(5) and (6) of the Law; section 68(3) of the Law; regulation 6(f) of the Interconnection Regulations; regulation 6(h) of the Interconnection Regulations; and regulation 10(1) and (2) of the Interconnection Regulations.
10. Section 9 subsections (1) and (2) have already been referred to above. Section 65 subsections (5) and (6) of the Law provide:
  - “5. Any interconnection provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to –
    - (a) any non-affiliated supplier;
    - (b) any subsidiary or affiliate of the licensee; or
    - (c) any other part of the licensee’s own business.
  6. Without prejudice to subsection (5), the Authority shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms and conditions of the interconnection will be determined.”

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<sup>3</sup> Forward-looking long-run incremental cost as defined by regulation 10 of the Interconnection Regulations.

11. Section 68(3) of the Law provides:

“The cost [of making any interconnection] shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting interconnection service does not have to pay for any network components that are not required for the interconnection service to be provided.”

12. Regulation 6(f) of the Interconnection Regulations provides:

“costs and tariffs shall be sufficiently unbundled so that the requestor shall be obliged to pay the responder only for the network elements or infrastructure sharing services that it requires...”

13. Regulation 6(h) of the Interconnection Regulations provides:

“interconnection and infrastructure sharing rates shall be cost-oriented and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder’s fixed and common costs...”

14. Regulation 10(1) and (2) of the Interconnection Regulations provide:

- (1) A responder’s charges for interconnection or infrastructure sharing shall be -
  - (a) determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;
  - (b) non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;
  - (c) reciprocal for the same service in order that the responder and the requestor pay the same rate for providing each other the same services, except for any applicable contribution towards an access deficit that may be approved by the Authority;
  - (d) preferably such that non-recurring costs shall be recovered through non-recurring charges and recurring costs shall be recovered through recurring charges;
  - (e) such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and
  - (f) based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.

- (2) In accordance with section 53 of Annex 5 to [C&W's] licence, until the development of an approved FLLRIC model, [C&W] shall use its fully allocated cost model with the following adjustments (adjusted FAC model)-  
...

*Jurisdiction to determine cost-orientation of MTR supersedes interconnection agreements between ICT licensees*

15. The jurisdiction to determine questions relating to whether an MTR is cost-oriented is exclusive to the Authority. ICT licensees may not abrogate this jurisdiction to themselves, nor can the Authority's jurisdiction in this regard be excluded by an interconnection agreement between ICT licensees. To the contrary, the MTR agreed between parties to an interconnection agreement is required to comply with the requirements of the Law and the Interconnection Regulations as to cost-orientation, and in the absence of such compliance, the Authority may reject the MTR agreed, or direct the parties to amend their interconnection agreement so that the MTR complies with the requirements of the Law and the Interconnection Regulations as to cost-orientation.
16. Regulation 25 of the Interconnection Regulations provides:  
"Interconnection and infrastructure sharing agreements and the procedures for arriving at such agreements shall be based upon the terms of the Law, conditions of the licence, relevant regulations, regulations, (*sic*), decisions, directives or standards and other guidelines that the Authority may prescribe."
17. Regulation 22(2) of the Interconnection Regulations provides:  
"The Authority may reject any interconnection or infrastructure sharing agreement, or any portion thereof, if it determines that the agreement does not comply with the Law, conditions of the licence, relevant regulations, regulations, (*sic*), decisions, directives or standards and other guidelines that the Authority may prescribe."
18. Regulation 7(3) of the Interconnection Regulations provides:  
"Interconnection and infrastructure sharing agreements shall be based upon the Law and the terms of the responder's legal framework document<sup>4</sup>."

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<sup>4</sup> The legal framework document is required to be filed under regulation 7(1) of the Interconnection Regulations. The legal framework document filed by C&W in accordance with this regulation is the Legal Framework of the Interconnection Agreement between C&W and each of the other telecommunications operators including Digicel.

19. Regulation 7(2) provides:

“The Authority may, in its discretion, direct a licensee to amend the legal framework document to reflect the terms of its licence, relevant rules, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe...”

20. Even though regulation 22(2) provides that the Authority “may reject” any portion of an interconnection agreement which fails to comply with the requirements of the Law and the regulations, it is C&W’s submission that in light of the provision in regulation 25 that interconnection agreements “shall comply” with the Law and the regulations, in the event an MTR agreed in an interconnection agreement is found not to be cost-oriented, the Authority would be obliged to reject such an MTR.

*Dispute relating to issue of cost-orientation of MTR does not arise under the Interconnection Agreement*

21. Digicel in its letter to the Authority of 31 October 2006 asserts that the dispute between C&W and Digicel regarding the MTR is a contractual dispute. The categorisation of the dispute by Digicel as contractual ignores the specific requests for determination made by C&W in the Determination Request. As previously shown, these requests all relate to the issue whether the MTR agreed between C&W and Digicel is cost-oriented. This dispute does not arise from the Interconnection Agreement. A resort to the dispute resolution provisions of the Interconnection Agreement is therefore incapable of resolving the dispute referred to the Authority by C&W in the Determination Request.

22. Save for reference to the historical fact that an MTR was agreed between Digicel and C&W, the Authority may determine the issues arising under the Determination Request without reference to the Interconnection Agreement. In any event, if upon considering the Determination Request, the Authority concludes that the MTR agreed under the Interconnection Agreement is not cost-oriented<sup>5</sup>, by virtue of regulations 25 and 22(2) of the Interconnection Regulations, the Authority would be obliged to reject the MTR agreed in the Interconnection Agreement on the ground that it fails to comply with the requirements of the Law and the Interconnection Regulations that interconnection rates must be cost-oriented.<sup>6</sup>

*C&W may validly refer disputes arising under Interconnection Agreement to Authority for resolution*

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<sup>5</sup> It is interesting that to date Digicel has not asserted that the MTR of CI\$0.1845 is cost-oriented as required by the Law and the Regulations.

<sup>6</sup> See paragraph 20 above.

23. Even if the current MTR dispute between C&W and Digicel could be said to have arisen under Interconnection Agreement, the dispute resolution provisions under the Interconnection Agreement asserted by Digicel are not exclusive. Clause 34.1.5 of the Interconnection Agreement provides unconditionally that either party to the Interconnection Agreement may refer any dispute arising under the Agreement to the Authority for resolution. In the circumstances, C&W's Determination Request would constitute a valid reference for the purposes of clause 31.4.5 of the Interconnection Agreement.
24. The validity and force of such a provision was recognised and confirmed by the Authority in ICT Decision 2006-2. At paragraph 17, the Authority states:
- “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 ... that one avenue open to a party in the event of a dispute concerning the Agreement should be to the regulatory authority charged with the statutory responsibilities to ensure that the appropriate interconnection regimes are established in Cayman.”
25. A determination by the Authority upon considering C&W's Determination Request would, in the circumstances, have at least the same binding force upon C&W and Digicel as that of any arbitration panel of the ICC appointed pursuant to clause 34.1.4 of the Interconnection Agreement.

### **Conclusion**

26. The Authority has not only clear, exclusive jurisdiction to consider the Determination Request, but it has an obligation under the Law and the Interconnection Regulations to do so. This jurisdiction supersedes the provisions of the Interconnection Agreement. Should the Authority determine that the MTR agreed between C&W and Digicel is not cost-oriented, that MTR would be contrary to the Law and the Interconnection Regulations and ought to be rejected or ordered to be amended by the Authority. The questions raised in the Determination Request do not constitute a contractual dispute capable of resolution by reference to the dispute resolution provisions of the Interconnection Agreement and, even if a contractual dispute has properly arisen under the Interconnection Agreement, the Determination Request constitutes a valid reference to the Authority under the dispute resolution provisions of the Interconnection Agreement.
27. In the circumstances the Authority should overrule Digicel's objections to the Determination Request on the grounds of jurisdiction and should consider the Determination Request on its merits.

Yours faithfully,  
Cable & Wireless (Cayman Islands) Limited

“Signed”

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Rudy B. Ebanks  
Chief Executive (Acting)

- cc Mr. Timothy Adam, Chief Executive, Cable & Wireless (CI) Ltd.  
Mr. Frans Vandendries, Vice President, Regulatory Affairs, Cable & Wireless  
Mr. Lawrence McNaughton, Executive Vice President Carrier Services, C&W  
Mr. Hector Robinson, Quin & Hampson, Attorneys-at-Law  
Mr. John D. Buckley, Chief Executive Officer, Digicel (Cayman) Ltd.