

RECEIVED BY THE  
COMMISSION SECRETARY  
FAIR TRADING COMMISSION  
MAR 16 2010  
*M. Walcott*

**NOTICE OF MOTION**

IN THE MATTER OF SECTION 105 (4) OF THE  
TELECOMMUNICATIONS ACT 2002

IN THE MATTER OF THE SECTIONS 36 OF  
THE FAIR TRADING COMMISSION ACT 2002

IN THE MATTER OF SECTIONS 8, 53(2) & 54  
OF THE UTILITIES REGULATION  
(PROCEDURAL RULES) 2003

IN THE MATTER OF A DECISION AND/OR  
ORDER OF THE FAIR TRADING COMMISSION  
DATED THE 24<sup>TH</sup> DAY OF FEBRUARY 2010  
ON THE REFERENCE INTERCONNECT OFFER

AND IN THE MATTER OF A REQUEST FOR  
REVIEW AND VARIATION BROUGHT UNDER  
SECTION 36 OF THE FAIR COMPETITION ACT



**BETWEEN**

**DIGICEL (BARBADOS) LIMITED**

**APPLICANT**

**AND**

**FAIR TRADING COMMISSION**

**RESPONDENT**

**TAKE NOTICE THAT** the Fair Trading Commission will be moved ON THE DAY OF 2010, OR as soon thereafter as an Attorney-at-Law can be heard on behalf of the Applicant **DIGICEL (BARBADOS) LIMITED** for the following relief: -

1. An Order that the Decision and/or Order of the Fair Trading Commission ('hereinafter referred to as 'the Respondent') dated February 24 2010 on the Reference Interconnect Offer (hereinafter called "the Decision and/or Order") be reviewed and varied by the Respondent.
2. An Order that the Respondent erred in law by misdirecting itself on the procedure to be followed before the Respondent can approve a Reference Interconnect Offer.
3. An Order that the procedure which was followed was incorrect and that the failure of the Respondent to follow a procedure such as the one outlined below, puts the Respondent in breach of their obligations under the Act:
  - i. The Respondent would request and receive from C&W, its draft of the RIO.
  - ii. The Respondent would request and receive responses to C&W's draft of the RIO from the industry.
  - iii. The Respondent would hold a meeting with the industry to discuss the RIO, as drafted by C&W.
  - iv. The Respondent would then present for comments its draft of the RIO to the industry.
  - v. The Respondent would receive the industry's comments on the Respondent's draft of the RIO; and
  - vi. The Respondent would issue its final determination on the RIO
4. An Order that the Decision be varied to for the Applicant and other potential stakeholders to review the Reference Interconnect Offer and to comment on the proposed changes suggested by C&W.
5. An Order that the Applicant must be a part of the process, at every step of the way, in order for the process to be transparent and due process to take place.
6. An Order that during such a process, leading to the approval of a Reference Interconnection Offer, the Respondent shall engage all parties, throughout the process and not one entity, to the exclusion of others.
7. An Order staying the Decision and/or Order of the Respondent until final determination of this matter or further determination.
8. An Order restraining the Respondent from taking any further action against the Applicant in relation to the Decision and/or Order whether such action is under the provisions of the Fair Competition Act 2002 or under the Fair Trading Commission Act 2000 or otherwise.

**AND FURTHER TAKE NOTICE** that the grounds of this request for review and variation are: -

1. That the Decision and/or Order of the Respondent was reached in breach of the rules of natural justice in that: -
  - i. The Applicant was not provided with the amended drafts of the Reference Interconnection Agreement which C&W was submitting to the Respondent and to which the Respondent was making comments and returning to C&W for review and subsequently approved in the Decision ;
  - ii. The Respondent was under a duty to act judiciously and in accordance with the principles of natural justice and that the Respondent failed to act judiciously in that it failed to: -
    - a. Did not follow the correct process, as is outlined in the Act for the approval by the Respondent of a RIO
    - b. Provide the Applicant with the details and specifics of each and every amendment made to the RIO by C&W or by the Respondent since the submission of the RIO to the Respondent in December 5, 2008 by C&W
    - c. Disclose to the Applicant that the Respondent was having discussions with C&W in relation to the RIO and to invite the Applicant to contribute to those discussions
    - d. Give the Applicant a fair opportunity to correct or contradict or challenge any relevant statement, prejudicial to its interests and/or comment or material put forward by C&W and other materials which the Respondent acted upon in arriving at its Decision but which had not been previously disclosed to the Applicant by the Respondent.

DATED THE 16<sup>TH</sup> DAY OF MARCH 2010

  
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ATTORNEY AT LAW FOR THE APPLICANT - DIGICEL (BARBADOS) LIMITED

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**RESPONDENT**

**AFFIDAVIT**

I, HELGA MCINTYRE of the Courtyard, Hastings in the parish of Christ Church, Barbados,  
MAKE OATH and say as follows: -

1. THAT I am the Head of Legal & Regulatory for the Eastern Caribbean of the Applicant and have been in this position since January 2010 and I am authorized to prepare this affidavit on behalf of the Appellant and to swear to the matters

herein deposed from my own personal knowledge, from information provided to me as well as from records of the Applicant Company to which I have access.

2. THAT the Applicant was incorporated in Barbados and came into existence in January 2004 pursuant to a Licence granted by the Government of Barbados to the Applicant to provide voice, data and international Telecommunications.
3. THAT the Respondent is a statutory body established under the Fair Trading Commission Act 2000 with its principal place of business located at Manor Lodge, Lodge Hill, St. Michael. It is a body corporate within Section 21 of the Interpretation Act of the Laws of Barbados and its functions are, inter alia, to exercise its regulatory and other functions in respect of telecommunications in accordance with, inter alia, the Fair Trading Commission Act 2001 and to enforce any laws, including the Fair Competition Act, relating to the promotion and maintenance of fair competition.
4. THAT, in Competition Law, the Regulator declares a player in the market, a dominant provider on the basis of its position in the market and its ability to impact the market by its actions.
5. THAT one of the obligations of the dominant provider is that, under law, it shall be responsible for producing an offer document which sets out the terms and conditions under which the dominant provider is willing to offer its services to the industry, namely to new entrants into the market and other providers who would wish to have interconnection with the dominant provider.
6. THAT such a document is a template which is used and relied upon by all new entrants into the market when they seek to initiate discussions for service with the dominant provider and amongst themselves.
7. THAT the RIO is a starting point for commercial negotiations between parties seeking to interconnect and forms the basis of final interconnection agreements signed between operators in the market seeking interconnection.
8. THAT up until a few years ago, the Interconnection process was regulated by three separate Reference Interconnection Offers ('RIO'), one for mobile, one for domestic fixed wireless and another for international.

9. THAT new entrants into the market would therefore have to negotiate the terms of three (3) separate documents to obtain interconnection with the dominant provider.
10. THAT the Respondent determined that it was necessary to implement a consolidated RIO to streamline the process of interconnection among all telecommunications providers.
11. THAT Cable & Wireless Ltd. ('C&W') was declared the dominant provider in the market of Fixed Telephony Services, on April 24, 2003 and as the dominant provider is required under law to file with the Respondent a RIO.
12. THAT C&W did file such a RIO on December 5, 2008.
13. THAT on the 11<sup>th</sup> day of January 2009, the Respondent commenced a public consultation on the RIO. Parties were invited to review the RIO and to submit written comments, which included the Applicant. The parties were also invited to make oral submissions on the RIO.
14. THAT the Applicant, along with other operators in the market made both written submissions as well as oral presentations to the Respondent on June 19, 2009.
15. THAT there were no further consultations between the Applicant and the Respondent in relation to the RIO or any part of the process being undertaken by the Respondent, since June 19, 2009.
16. THAT the Applicant was made aware by C&W that C&W had discussions with the Respondent in relation to the RIO but was not invited to take part in any such discussions.
17. THAT on the 24<sup>th</sup> day of February 2010, the Respondents handed down their decision.
18. THAT the Applicant was surprised to note that in its decision the Respondent, on several occasions, referred to the fact that they "*consulted further with Cable & Wireless and the other parties on these issues through written correspondence*" (paragraph 12, pg.4 of the Decision); and also that "*the Commission closely examined Cable & Wireless' offer of 5% reductions every year for three years as*

well as the responses received from the respondents who were also given an opportunity to comment on the offer” (paragraph 21, pg. 7 of the Decision).  
[Emphasis ours]

19. THAT the Applicant maintains that they have no record of the Respondent seeking to discuss any issues, or contacting the Applicant to ask the Applicant for comments in relation to the RIO. In fact the Applicant has had no contact in relation to changes or comments on the RIO with the Respondent between when the Applicant made its presentation on June 19, 2009 and the day on which the decision was handed down on February 24, 2010.
20. THAT the Applicant wrote to the Respondent on January 11 2010, a copy of which is annexed hereto and marked Exhibit #, having heard from C&W that the Respondent had been in discussions with them in relation to the RIO. The Respondent responded by letter dated January 14, 2010, a copy of which is annexed hereto and marked as Exhibit #. We spoke with a representative of the Respondent, in relation to their response, as the Applicant felt that its concern that it had not been included in discussions between the Respondent and C&W, since the oral presentations of June 19, 2009, had not been properly addressed. The Respondent’s representative stated that the Respondent felt that they had not acted incorrectly by having discussions with C&W because C&W was a regulated entity.
21. THAT the Applicant pointed out at that time to the Respondent’s Representative that, its experience with Regulators throughout the Caribbean was that Regulator in general go to great pains to ensure that all parties are present during discussions which will have an impact on more than one operator and that the fact that this had not happened, in this instance, was of concern to the Applicant.
22. THAT the Applicant submits that the Respondent was under a duty to act judiciously and in accordance with the principles of natural justice and that the Respondent failed to act judiciously in that it failed to did not follow the correct process, as is outlined in the Act, for the approval by the Respondent of a RIO.
23. THAT the Respondent did not give the Applicant the opportunity to be part of the discussions on the Reference Interconnect Offer, at every step of the process, **before** it was approved by the Respondent.

24. THAT the Applicant had an expectation that since it had had no word of any further discussions from the Respondent that there had been none and that if there were to be any further discussion that they would have been approached by the Respondent to be advised of same and to be a part of that process.

25. THAT section 27 (3) of the Telecommunications Act 2002 provides that : -

(3) *In deciding whether to approve or refuse an RIO the Commission shall: -*

(a) *consult with the carrier and any other carrier likely to seek interconnection that carrier's network.*

26. THAT having read this provision in the Act, it is the Applicant's understanding that the Respondent should consult with the carriers **before** deciding whether the Respondent is going to approve or refuse a RIO especially in such an important aspect as rates.

27. THAT although section 27 does not seem to add the carrier seeking interconnection in the final process of approval, we submit that it is implied by the tenets of clause 27(3)(b) which provides that in deciding whether to approve or refuse an RIO the Commission shall also: -

(b) *have regard to...*

(iii) *the need to promote competition;*

(iv) *the long term interests of the users; and*

(v) *the submissions, whether oral or written, of the carriers providing and seeking interconnection.*

28. THAT the Applicant believes based on this clause that the intention of the legislators was for the Respondent to consult with both carriers providing interconnection and those seeking interconnection throughout the entire process. We say this because only then could they be having regard to "the need to promote competition" and "the long terms interests of users" in the proper sense.

29. THAT the Applicant maintains that there is no competition if the market is determined by the terms and conditions of solely one provider in the market and



the consumers – who are the users – cannot truly benefit in the long term, if only the view of one carrier is taken and on that a decision is based and determined.

30. THAT the Applicant believes that the process should involve the following steps and have followed the below sequence: -

- a. The Respondent would request and receive from C&W, its draft of the RIO.
- b. The Respondent would request and receive responses to C&W's draft of the RIO from the industry.
- c. The Respondent would hold a meeting with the industry to discuss the RIO, as drafted by C&W.
- d. The Respondent would then present for comments its draft of the RIO to the industry.
- e. The Respondent would receive the industry's comments on the Respondent's draft of the RIO; and
- f. The Respondent would issue its final determination on the RIO

31. THAT the Applicant believes that the Respondent's failure to follow the steps outlined in (c) through (f) place the Respondent in breach of its obligations under the Act, in relation to the steps which should be followed before the Respondent approved the RIO.

Sworn to by the deponent the said )

**HELGA MCINTYRE**, at The Registry )

, St. Michael, )

On the 16<sup>th</sup> day of MARCH 2010 )



Before me:

Helga

Legal Assistant (as)

This affidavit is filed on behalf of the Applicant

