



## FAIR TRADING COMMISSION

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BARBADOS

NO. 0002/12

### FAIR TRADING COMMISSION

**IN THE MATTER** of the Utilities Regulation Act, CAP. 282 and the Fair Trading Commission Act, CAP. 326B and the Telecommunications Act, CAP. 282B of the Laws of Barbados;

**IN THE MATTER** of the Utilities Regulation (Procedural) Rules, 2003 and the Utilities Regulation (Procedural) (Amendment) Rules, 2009;

**AND IN THE MATTER** of a Decision and Order of the Fair Trading Commission dated the 12<sup>th</sup> day of December 2011 on the Long Run Incremental Cost Guidelines (LRIC) to be followed by Cable & Wireless (Barbados) Limited;

**AND IN THE MATTER** of Digicel (Barbados) Limited's Application for a Review of the Decision dated the 12<sup>th</sup> day of December 2011;

### APPLICANT

Digicel (Barbados) Limited

### BEFORE:

Sir Neville Nicholls  
Professor Andrew Downes  
Mr. Gregory Hazzard  
Mr. Trevor Welch

Chairman  
Deputy Chairman  
Commissioner  
Commissioner

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### DECISION

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## **PART ONE - BACKGROUND**

1. The Fair Trading Commission (Commission) in its decision on Cable & Wireless (Barbados) Limited's (C&W) Consolidated Reference Interconnection Offer (RIO) dated February 22, 2010, determined that C&W should undertake a Long Run Incremental Cost (LRIC) study to determine interconnection costs and tariffs. The Commission also indicated that it would design guidelines which C&W would be required to follow when developing the LRIC study.
2. The LRIC Guidelines Decision and Order were issued on December 12, 2011 by the Commission for implementation by C&W.
3. The said Guidelines represent a general guide to the principles to be used within the model and the assumptions and processes which provide the basis for the development of the LRIC model. They are intended to provide a broad structure that can then be adjusted during the specification/modelling stage.

### **Filing of the Motion for Review**

4. Following the issuance of the LRIC Guidelines Decision, Digicel (Barbados) Limited (Digicel) filed with the Commission a Notice of Motion for Review supported by the Affidavit of Ms. Helga McIntyre, the former Head of Legal & Regulatory Eastern Caribbean, on January 13, 2012. Digicel contended that the Decision and Order of the Respondent (the Commission) was reached in breach of the rules of natural justice in that the Respondent (Commission) was and is under a duty to act judiciously, in an open, transparent and non-discriminatory manner and in accordance with the principles of natural justice. Digicel also contended that the Respondent (Commission), *inter alia*,:-

- i. Failed to provide Digicel with the details and specifics of the Enhanced Allocation Model (EAM) (and other documents, information and material) submitted to the Respondent (Commission) by C&W.
  - ii. Failed to provide Digicel with a copy of the report on the EAM.
  - iii. Failed to disclose that a review of the EAM had been undertaken and completed "in conjunction with C&W".
  - iv. Failed to provide Digicel with copies of documents and materials submitted by C&W which were relevant to the decision-making process.
  - v. Failed to provide Digicel with an opportunity to comment upon or respond to submissions made by C&W where such submissions were relevant and germane to the decision-making process.
  - vi. Failed to provide all documents, information and material relating to the LRIC process on an on-going basis.
  - vii. Failed to provide Digicel with an opportunity to engage in separate consultation processes in respect of the Weighted Average Cost of Capital (WACC), Instantaneous Build Assumption and the Tilted Annuity in order to estimate capital cost.
5. In addition to these grounds, Digicel further addressed within the Affidavit of Ms. Helga McIntyre other technical issues including the network assumptions on which it believes the Commission has erred.

6. Digicel also stated the following as a ground for review:

“As regards to the remaining matter as set out in this Notice of Motion herein as supported by the Affidavit of Helga McIntyre as sworn herein on 13 January, 2012, the Respondent was under a duty to conduct the decision-making process in accordance with the principles of natural justice. The Respondent is also under a duty not to act irrationally and/or unreasonably. The Respondent has acted irrationally and unreasonably in making a decision based on factual errors as well as decisions which are contrary to international best practice and which cause improper hardship and prejudice to the Applicant.”

7. On the basis of these grounds Digicel seeks a variation of the terms of the LRIC Decision and Order.

8. Based on a review of Digicel’s motion many of the issues raised by Digicel can be classified by the Commission under the following review grounds:-

- a. Error of law or jurisdiction; and
- b. Error of fact.

9. The Commission’s analysis of the grounds raised by Digicel is provided in Part Two of this decision.

**Duty of the Commission**

10. By virtue of Section 36 of the Fair Trading Commission Act, CAP. 326B (FTCA), the Commission has jurisdiction on an application from a party or on its own motion to review, vary or rescind any decision given by it. In instances where the Commission allows a review it is prescribed by the Utilities Regulation (Procedural) Rules, 2003 and the Utilities Regulation

(Procedural) (Amendment) Rules, 2009 (the Rules). The Commission's discretion to review and vary or rescind a decision or order is exercised with a view to ensuring that there is consistency, transparency and predictability of the Commission's decision-making process.

### **Burden of Proof**

11. By virtue of Section 14 of the Utilities Regulation Act, CAP. 282 (URA) the onus rests on Digicel to prove its case.

### **Evidence before the Commission**

12. Rule 54 (1) of the Rules states that Digicel as the Applicant must comply with Rule 8 of the Rules and file an Affidavit setting out the relevant facts it relies on in support of its Motion. Digicel filed an Affidavit of Ms. Helga McIntyre, dated January 13, 2012 setting out the facts on which it relies in support of its Motion for Review.
13. Digicel was invited to file with the Commission any additional written submissions to support its Motion for Review but it declined to do so. Following this, CARITEL and C&W were invited to submit responses to Digicel's Motion for Review. CARITEL filed its written response with the Commission on March 23, 2012 and C&W filed its written response on March 30, 2012. Both CARITEL and C&W in their responses directly address the Affidavit of Ms. Helga McIntyre and the issues raised by Digicel in its Motion for Review. After receipt of CARITEL's and C&W's responses Digicel was invited to submit its final set of written submissions and it did so on April 20, 2012. In determining this matter, the Commission took into consideration the written submissions of Digicel, CARITEL and C&W.
14. A review is not a vehicle for applicants to re-argue their submissions made at an earlier proceeding simply because they do not agree with the decision. Under the FTCA, the authority of the Commission to allow a review is

discretionary. An applicant must first demonstrate, on a *prima facie* basis, the existence of the permissible grounds of review, this is referred to as the threshold question. Rule 54 (1) of the Rules sets out specific grounds on which the Commission can review a decision made in a utility regulation proceeding. Rule 54 (1) states that:-

*“(1) Every Notice of Motion made under Rule 53(2), in addition to the requirements of Rule 8 shall*

*(a) Set out the grounds upon which the motion is made sufficient to justify a review or raise a question as to the correctness of the order or decision and the grounds may include*

*(i) Error of law or jurisdiction;*

*(ii) Error of fact;*

*(iii) A change in circumstances;*

*(iv) New facts that have arisen;*

*(v) Facts that were not previously placed in evidence in the proceedings and could not have been discovered by reasonable diligence at the time;*

*(vi) An important matter of principle that has been raised by the order or decision;”*

15. Rule 55 (1) of the Rules states that:-

*“(1) The Commission shall determine with a hearing, in respect of a motion brought under Rule 53 the threshold question of whether the matter should be reviewed or whether there is reason to believe the order should be rescinded or varied.”*

16. In accordance with Rule 55(3) the Commission decided that it would combine the consideration of the threshold question and a review on the merits and would hold a consolidated written hearing. Rule 55 (3) of the Rules states that:-

*“(3) the Commission may adopt whatever procedures it deems to be just and expeditious in the individual circumstances of each motion including providing for the combining of consideration of the threshold question and the review on the merits.”*

17. To discharge its first task *vis-à-vis* the threshold question of whether a review should be granted, the Commission considered Digicel’s Motion for Review and the Affidavit of Ms. Helga McIntyre dated January 13, 2012.

### **The Threshold Question**

18. Digicel’s Motion for Review and accompanying Affidavit contained the reasons why it believed that the Commission’s decision should be reviewed.
19. The Commission reviewed these documents and approached the threshold question by considering whether Digicel had established on a *prima facie* basis that any of the grounds set out under Rule 53 of the Rules exist.
20. According to Black’s Law Dictionary, a *prima facie* case is:-
  - (a) *the establishment of a legally required rebuttable presumption;*
  - (b) *a party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favour.*
21. The Commission in this review hearing utilised the written hearing process to determine the matter. With the body of arguments before it, the Commission examined the allegations of error and all the grounds submitted in support of the Motion for Review, to first determine whether Digicel produced enough evidence to infer the existence of a ground for review.
22. **The Commission determined that there is a paucity of evidence contained in the Affidavit of Ms. Helga McIntyre to substantiate Digicel’s Motion for**

review on a *prima facie* basis. However, the Commission has chosen to examine these issues because it considers that the questions raised by Digicel are significant ones which may appear to affect fundamental and central parts of the decision. Therefore, even though there is not sufficient evidence submitted by Digicel to substantiate the threshold question, the Commission nevertheless examined the issues raised.

## PART TWO - THE SUBMISSIONS

### Issue 1 - Transparency

23. Digicel has alleged that there has been an overall absence of transparency in the LRIC modelling process. Digicel's main reason for making this assertion seems to be the fact that it would be prevented from having access to information including the EAM and the fully populated C&W LRIC model. In Digicel's view, it appeared that the LRIC modelling process was bilateral and between C&W and the Commission. Legally, these allegations by Digicel give rise to the implication that an error of law has been made by the Commission because the process is alleged to have failed to be open and clear to all of the parties. This type of error, if substantiated by the evidence, would be a procedural defect because it suggests that the Commission, by failing to be transparent, has denied Digicel the opportunity to have a fair hearing.
24. CARITEL in its submissions supported this point raised by Digicel. CARITEL believed that the parties to the consultation with the exception of C&W had access to very little data and information and were therefore disadvantaged and could not participate fully in the process.
25. Cable & Wireless (Barbados) Limited on the other hand asserted that complaints of procedural unfairness in relation to transparency and providing Digicel with all of the information and documents of Cable & Wireless (Barbados) Limited are unsupported by presentation of any evidence or legal argument by the Applicant. C&W is of the view that Digicel has no legal right



to be provided with the material from C&W in the consultation. It believes that the Commission has a duty under Section 11 of the FTCA to hold information in confidence once a person makes claims of confidentiality over such information unless disclosure is necessary or required for the determination of the matter before it. Cable & Wireless (Barbados) Limited is of the view that if the Commission can make a determination in a matter without disclosing the confidential information then the Commission is compelled by law to keep the information confidential.

26. The Commission is of the view that transparency generally requires that substantive and procedural information that is relevant to the proceeding is available and accessible to all parties. Moreover, the process must also be understood by all and the procedure must be set out in a manner so that any party looking on can clearly establish and understand what is occurring at each stage. The Commission, ever cognisant of the necessity of upholding this principle, sought to do so by undertaking a public consultation on the LRIC Guidelines in an effort to, *inter alia*, satisfy the requirement for transparency.
27. However, it would appear that Digicel has incorrectly equated transparency with full disclosure. On this basis, therefore, Digicel's submissions seek to justify the request for the provision of information including the EAM itself, the report on the EAM (EAM Report) and the LRIC model. The Commission is of the view that this exceeds what was necessary to facilitate participation in the public consultation.
28. Moreover, even though the Commission acknowledges that transparency is a fundamental principle which must be generally upheld as part of the regulatory mandate of the Commission, it must also be recognised that this principle is not always unqualified. In fact, the application of this principle may require that other considerations such as confidentiality are balanced against it.

29. When the Commission weighed these interests, it took into consideration, Rule 13 of the Utilities Regulation (Procedural) Rules and Section 11 of the FTCA. The Commission also considered the extent of the harm that would occur if the EAM model, the EAM Report and the LRIC model were publicly disclosed and the extent to which it would create a competitive disadvantage for any party to the process. Also the Commission holds the view that it is significantly more harmful for C&W's raw data to be exposed than for the parties to be denied full disclosure of the documents. In the decision making process, the Commission as the regulator is solely responsible for considering all information that is placed for its consideration. The Commission had access to all of the information that was so placed and undertook the process of considering all of the information.
30. It is submitted that when both interests are examined, the Commission does not consider that the EAM and the populated LRIC model referred to by the Applicant is a requirement for the Applicant to respond to a consultation paper dealing with the guidelines. This is especially the case considering that the said paper primarily addressed the principles and assumptions on the LRIC Guidelines.
31. **The Commission determines that the process was a transparent one for all involved. In this case Digicel and other parties were invited to contribute and participate in the LRIC Guidelines consultation process and as such the Commission does not believe that Digicel or any other party experienced hardship or prejudice. This therefore is not a ground for review.**

## **Issue 2 - Jurisdiction**

32. Digicel contended that the Commission erred in law by going beyond its jurisdiction when the Commission indicated in the LRIC Guidelines Decision that any existing network sharing needed to be accounted for in the LRIC

model. Moreover, Digicel contended that this decision is an attempt by the Commission to make a regulatory decision that has implications for countries other than Barbados and by extension an attempt to regulate assets and businesses situated and operating outside Barbados. Digicel had therefore asked the Commission to vary its decision in respect of this issue.

33. CARITEL in its submissions **stated** that it agrees that the Commission should vary its decision in respect of the shared costs between different networks. It believed that this was very critical to ensure a proper allocation of costs.
34. C&W in its submissions stated that Digicel offered no evidence to justify its request for variation on this issue. C&W further stated that the fact that one switch is able to serve the entire Eastern Caribbean region underlies how important it is to take transnational assets into account.
35. In determining this issue, the Commission considers that the modelling of an efficient network operator should attempt to consider network sharing as this would reflect an efficient approach. Thus only a proportion of the estimated costs of network elements and activities would need to be recovered as they are shared across jurisdictions. As stated in the LRIC Guidelines Decision, the Commission's understanding is that there is some sharing of resources by the operators who operate in a number of Caribbean jurisdictions. This would demonstrate an efficient approach when the small size of the Caribbean markets is considered as well as the existence of fixed minimum costs for some activities and network elements leading to economies of scale. Digicel's statement in this matter demonstrates a misunderstanding of the issue and a misunderstanding of the Commission's views on this matter.
36. **The Commission determines that it has not sought to decide any matters that are outside of its jurisdiction, rather it was considering that resources are shared across jurisdictions. If the Commission fails to take this into account the operator will be unable to recover a proportion of cost involved.**

### **Issue 3 – Breach of the Rules of Natural Justice**

37. Digicel contended that the Commission breached the rules of natural justice in that the Commission was and is under a duty to act judiciously in an open, transparent and non-discriminatory manner. Digicel in its motion alleged that in accordance with the principles of natural justice the respondent failed to provide Digicel, *inter alia*, with the details and specifics of the EAM submitted to the Commission by C&W. Digicel also claimed that the Commission failed to provide it with a copy of EAM and the EAM Report, failed to disclose that it had undertaken and completed a review of the EAM in conjunction with C&W.
38. CARITEL shared no views on this issue in its submissions.
39. Cable & Wireless (Barbados) Limited's submissions dealt extensively with this issue. Cable & Wireless (Barbados) Limited discussed the tenets of natural justice and cited several authorities on the issue. Cable & Wireless (Barbados) Limited concluded that Digicel could only assert an interest in the consultation leading to the LRIC Modelling process rather than a legal right. This notwithstanding, C&W generally does not believe that Digicel has shown that its interests would be gravely impacted by the LRIC Guidelines decision.
40. Cable & Wireless (Barbados) Limited also believed that Digicel's interest in the consultation had to be balanced against factors such as protection of C&W's confidential information generally (and specifically the EAM), the LRIC Guidelines decision's preliminary nature and the relative importance of facilitating Digicel's desires versus the administrative costs in time and money of such facilitation. The Commission believes that there is merit in C&W's submissions in relation to these issues.

41. The Commission in its analysis of Digicel's motion also examined closely the principles of natural justice. The principles of natural justice concern procedural fairness and ensure that a fair decision is reached by an objective decision-maker. The term natural justice in recent times is extended by the more general term "*duty to act fairly*".
42. However, there are two tenets that natural justice is concerned with. These are the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*).

### **The Rule against Bias**

43. The basis for the rule against bias is the need to maintain public confidence in the legal system. Bias can take the form of actual bias, imputed bias or apparent bias.
44. In order to prove bias it must be shown that there is a case of having a pecuniary interest or that the party had proprietary interest in the outcome of the decision or it can be proven that the decision-maker had a personal interest in the case.
45. The test that a court would normally apply to prove bias is "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*"
46. To support its claim that the rules of natural justice were breached Digicel would have to prove that the Commission was biased in its proceedings during the consultation and at the decision-making stage of the LRIC Guidelines Decision. Digicel would have to provide sufficient evidence and actual instances to show that the Commission acted with bias. It is the Commission's view that Digicel has failed to show any evidence of the Commission being biased during the LRIC Guidelines consultation or

decision-making process. The Commission at all times gave due and equal consideration to all of the submissions of the parties involved.

### **The Right to a Fair Hearing**

47. It is fundamental to fair procedure that both sides should be heard. The right to a fair hearing requires that individuals are not penalised by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case against them, a fair opportunity to answer it and the opportunity to present their own case.
48. Digicel contended at many instances throughout its Motion that it was not privy to certain documents, including the EAM, and to discussions between the Commission and C&W and as such it was not given the opportunity to make full representation and be a part of all aspects of the LRIC Guidelines consultation. By this allegation, Digicel is implying that an error of law has been made by the Commission.
49. Based on the manner in which the consultation process was conducted by the Commission, Digicel had ample opportunity to and did submit its views on the issues raised by the Commission and participated in the process.
50. The Commission encouraged Digicel and the other parties (C&W and CARITEL) to engage in full participation and allowed all parties enough time to make representations and to be heard.
51. Specifically on the issue of providing Digicel with a copy of the EAM, Digicel's arguments here are not justified. The Commission's development of the LRIC Guidelines did not as Digicel is claiming, rely on the information contained in the EAM. Cable & Wireless (Barbados) Limited itself in its submissions is of the view that Digicel is exaggerating the role of the EAM in the LRIC Guidelines.

52. Moreover, the C&W EAM is a confidential cost model which contains highly sensitive commercial information. As such, it is unnecessary for Digicel to receive such information. In fairness, the Commission would not be able to share this information with Digicel, who is a competitor with C&W as the information and data from the EAM reveals and gives insight into C&W's business activities. The sharing of such information may result in harm to C&W.
53. Digicel must also be cognisant that the LRIC Guidelines are assumptions and principles to guide the modelling process. These Guidelines are useful in providing a sufficiently broad structure to guide the LRIC modelling process that would result in a consistent, principled model. The intent behind utilising guidelines as opposed to any specific mechanism was to provide a sufficiently flexible framework that could accommodate changes that may become necessary as the LRIC modelling process evolves.
54. **The Commission determines that Digicel has been unable to prove that the rules of natural justice had been breached during the LRIC Guidelines Consultation and thus this ground is unsubstantiated.**

#### **Issue 4 – Failure to Consult**

55. Digicel claimed that the Commission erred in failing to conduct separate consultation processes in respect of:-
- a. Weighted Average Cost of Capital (WACC);
  - b. Instantaneous Build Assumption; and
  - c. Tilted Annuity to estimate Capital Costs.
56. The Commission is required under Section 4(4) of the Fair Trading Commission Act, CAP. 326B to consult on various matters:-
- “4. (4) The Commission shall, in performing its functions under subsection (3)(a), (b), (d) and (f) consult with the service providers, representatives of*

*consumer interest groups and other parties that have an interest in the matter before it.”*

57. CARITEL in its submissions stated that it agrees with the submissions made by Digicel in relation to separate consultations being done in relation to each of the above areas.
58. Cable & Wireless (Barbados) Limited on the other hand generally did not support Digicel’s arguments and believed that Digicel had failed to make out a case to justify the conduct of a separate consultation for the WACC, Instantaneous Build Assumption and Tilted Annuity to estimate Capital Costs. In their view the Commission must be careful not to prejudice the rights of C&W, the party directly affected by the LRIC process by conducting additional and unwarranted proceedings that serve to prolong the LRIC development process.

### **Weighted Average Cost of Capital (WACC)**

The WACC is one of the inputs into the LRIC Model which will be used to determine interconnection rates and there are many assumptions that are made when calculating a WACC value.

59. The Commission stated its position in paragraph 33 of its LRIC Guidelines decision.

*“The Commission determines that C&W must submit a WACC estimate but does not believe that consultation on the WACC will be required as the WACC estimate will be reviewed by the Commission. The Commission also invites respondents to submit their own estimates of the WACC. The Commission would then consider all of the information provided.”*



60. **The Commission remains of the view that during the development of the LRIC Guidelines it is not necessary to engage in discussion on how the level of the WACC is determined. The parties would be invited to submit their own estimates of the WACC which would be requested at the specification stage.**

### **Tilted Annuity**

61. Tilted Annuity is a way of deriving the capital charge to be included in the LRIC model.
62. Digicel argued that the tilted annuity approach should be consulted on separately and that the Commission had not properly explained this approach. Digicel considered that this signals a failure by the Commission to carry out its statutory duty to consult. Digicel also complained about hardship based on the lack of specifics and detail on how tilted annuity would be practically applied. These allegations by Digicel give rise to the implications that an error of law has been made by the Commission. Therefore the Commission considered these issues raised by Digicel to see if they had any merit.
63. The Commission examined two (2) questions:-
- a. Before choosing this approach, should the Commission have consulted on which approach to use?
  - b. Did the Commission give adequate reasons for why it chose this method over other methods such as the straight line method of depreciation as suggested by Digicel?
64. The Commission is of the view that it is not necessary to consult separately on every single component or concept surrounding the building of the LRIC model since this would be a very time-consuming process.

65. In its LRIC Guidelines Consultation the Commission included and dealt with certain matters that it considered to be pertinent and sought the parties' views on these matters. Tilted Annuity was one of them. Therefore, the Commission sought to discharge its statutory duty to consult by dealing with this issue within the Public Consultation on the Guidelines. As such, a separate consultation on this issue is not considered necessary.
66. Digicel's response to the Public Consultation on this issue was limited to the suggestion that the straight line depreciation should be applied and did not refer to the need for any further information on the Tilted Annuity approach. However, Digicel has now sought to expand this issue within its motion for review. It is the Commission's view that such expansion would have been more appropriately placed in Digicel's submissions to the Public Consultation.
67. Although the Commission did not share Digicel's view on this issue, it gave adequate consideration to the matter.
68. In relation to the second question, and the reasons for choosing Tilted Annuity, the Commission believes that the Tilted Annuity approach gives a more accurate reflection of the rate of capital recovery.
69. The Commission considered all of the various methods of calculating depreciation and determined that Tilted Annuity was the preferred approach.
70. Digicel has been unable to justify why the Commission should consult separately on this issue. The Commission considers that its level of consultation on this issue as a part of the general consultation on the LRIC Guidelines was sufficient to provide information for consideration of the method of capital recovery to be used in the LRIC model.

71. **The Commission considers that its level of consultation on this issue as a part of the general consultation on the LRIC Guidelines was sufficient.**

### **Instantaneous Build Assumption**

72. Instantaneous Build Assumption refers to modelling the network dimensions in each year independent of the previous years. Digicel argued that this was another issue that required a separate consultation.
73. However, the Commission is of the view that this issue does not warrant a separate consultation as it was only stated as an example of a possible approach that could be utilised by C&W for modelling the network.
74. **Based on the foregoing, the Commission determines that there will be no separate consultation in relation to the Instantaneous Build Assumption.**

### **Issue 5 – Sharing of Responses**

75. Digicel alleged that it was deprived of proper participation in the decision-making process as it did not have sight of copies of any submissions made by C&W and CARITEL.
76. Digicel believed that the nature of a public consultation is such that with the exception of responses submitted under confidential cover, all responses from all parties ought to be circulated by the Commission and where necessary, if they wish, be allowed to respond. This ensures transparency of the process. Digicel was also of the view that responses may be uploaded on the Commission's website for ease of reference.
77. CARITEL in its submissions also had similar views on the sharing of information and believed that there should be more disclosure and openness in relation to access to data and information.

78. Cable & Wireless (Barbados) Limited did not believe that Digicel had a right to have access to all of its responses and information but merely was entitled to be informed of the essence/substance of the case. Cable & Wireless (Barbados) Limited cites the cases of *R. V. Secretary of State for the Home Department ex. P Doody [1994] 1 AC 531* and *R. V. Secretary of State for the Home Department ex p Harry [1998] 1 WLR 1737, 1748 B-D*). Cable & Wireless (Barbados) Limited believed that there was no fundamental right at stake for Digicel. Therefore C&W asserts that it was enough for a summary of the matter to be provided to them in order for the rules of natural justice to be satisfied.
79. The Commission is of the view that every situation must be assessed on a case by case basis to determine whether or not sharing is warranted. In order to make this assessment, the sharing of responses has to be weighed against considerations including the need to make decisions without unwarranted delay and the amount of harm done to parties if they are deprived of the opportunity to see all of the responses to the Public Consultation.
80. In this instance, it was considered that there was no harm done to the parties for two main reasons. First, the fact that the responses to the public consultation were not shared did not prevent persons from submitting responses to the public consultation. Second, all submissions filed were considered and deliberated on by the Commission. The Commission, as the regulator and sole decision-maker in the process is ultimately responsible for reviewing responses and thereafter to decide on the matters therein.
81. **The Commission determines that no harm accrued to Digicel as they were not prevented from making a meaningful contribution during the consultation process to the LRIC Guidelines Decision. The Commission is satisfied that it received all of the relevant information to allow it to make its decision on the LRIC Guidelines.**

### **Issue 6 – Full Modelling of the Fixed Access Network**

82. **The Commission determines that the current approach of modelling as set down in the decision is appropriate. It is necessary that only those elements of the network whose costs are recovered from interconnection services be considered as this is in keeping with the objectives of the model. Digicel has failed to substantiate its claim of an error being made in this regard.**

### **Issue 7 – Current and Progressive Technologies**

83. Digicel contended that the Commission failed to consider that newer technology such as 3G/HSPA + network ought to be considered in the mobile modelling process. Digicel also stated that the Commission regarded current technology in Barbados to only encompass up to a 2.5G network. Moreover, Digicel argued for the progressive roll out of technologies to be taken into account, presumably through a changing mix of technologies over time. Further, Digicel questioned how efficiency gains are expected to be derived based on a constraint of static technology.
84. It is the Commission's belief that Digicel has misstated the Commission's views on this issue. The Commission indicated that the LRIC model should not be based entirely on fibre and 4G technologies. Rather, the Commission stated that the LRIC model should utilise an approach based on the current technology used to deliver voice services. This will be assessed at the time that the model is developed. This is likely to provide a more accurate view of the cost of an efficient operator.
85. While the Commission referred to 2.5G technology in its public consultation, when making the LRIC Guidelines decision the Commission was cognisant of the launch of C&W's 4G network. Therefore, in the said decision, the Commission determined that C&W should use in the model the current

technologies that are installed. The Commission believes that it did not err as suggested by Digicel.

86. **In reviewing the specifications that are to be submitted by C&W, the Commission will ensure that the appropriate technology is being modelled.**

#### **Issue 8 – Five-Year Modelling Period for the LRIC Process**

87. Digicel wants the Commission to adopt a five-year modelling period for the LRIC process and wants outputs of the LRIC process to be produced for each of those five years. CARITEL defers to the Commission on this issue. Cable & Wireless (Barbados) Limited believes that Digicel has failed to provide any evidence that the Commission’s decision in this regard is unfair to Digicel or otherwise unlawful.
88. Digicel does not provide strong evidence of why an increase in time to five (5) years would be necessary. This is a matter that falls within the discretion of the Commission. Nothing in the laws compels the Commission to have a particular set time. There does not appear to be any compelling practical or commercial reason why a shorter modelling period cannot be used. Additionally, the shorter time period will not prejudice any of the parties.
89. **The Commission determines that no error of law or fact was made in its decision on the modelling period and therefore no variation or modification of this decision is merited.**

#### **Issue 9 – Access to the LRIC Model**

90. Digicel believes that it ought to be provided with all the relevant documents and materials which the Commission received as part of the LRIC process and Digicel also believes that it should be permitted to be fully involved in the LRIC modelling process.
91. The Commission must balance the desire of Digicel against the harm that C&W will incur if information contained in the model is shared with Digicel.

The model will be built using certain specifications and may be a combination of assumptions, hypothetical and actual data. This therefore means that some of C&W's commercially sensitive information will be contained within. The approach to allow Digicel to have access to all such material or data could be deemed one-sided as Digicel is not required to share similar information with C&W. Digicel has further accused the Commission of having surreptitious dealings with C&W.

92. The approach to model disclosure between market participants differs between jurisdictions and between fixed and mobile networks. In Trinidad there is a common model framework for both fixed and mobile, although the actual model inputs and assumptions are specific to each operator and not shared with other operators due to confidentiality issues.
93. The Commission believes that it is reasonable for the LRIC model to be kept largely confidential and not disclosed to third parties. However the Commission determines that it will allow Digicel to comment on C&W's LRIC Specification subject to any confidentiality claims made to the Commission.
94. **The Commission wishes to state that the references to clandestine and surreptitious actions are an unjustified attack on the Commission's integrity. The Commission wishes to reiterate that C&W is required to carry out a study in accordance with the LRIC Guidelines and as such interaction with C&W is fundamentally required in order to give effect to the process. Moreover, the Commission would be unable to carry out its function if such interaction were not undertaken. This did not impair the process as suggested by Digicel.**

**Issue 10 - Did the Commission err in how it defined Total Service Increments for the TSLRIC Model?**

95. Digicel appears to agree with the definition of the total service increments for the TSLRIC Model. The definition will determine how the network is modelled. Digicel however believes that the whole of the fixed network should be modelled to ensure greater transparency and proper allocation of cost.
96. **The Commission determines that this approach from Digicel is unnecessary as the modelling of the network should concern services which will directly affect interconnection only.**

### **PART THREE - THE COMMISSION'S RULING**

97. The Commission is of the view that Digicel's grounds as set out in its Motion for Review and Written Submissions do not support a variation or modification of the Commission's Decision. Digicel was given an opportunity to be a part of the process. The correct process was followed by the Commission and thus the rules of natural justice were not breached and Digicel suffered no prejudice and/or hardship.
98. The Commission considers the existence of alleged errors being raised by Digicel to be unsubstantiated for the following reasons:-
- Alleged errors of fact and/or law were not adequately demonstrated or specified by reference to evidence to allow them to be assessed by the Commission;
  - Arguments presented by Digicel were at some points inconsistent and seemingly contradictory with respect to the nature and extent of the Commission's process and Digicel's involvement in such.
99. Based on the foregoing and on the reasons expressed in this decision, the Commission finds that Digicel in its Motion for Review and Written Submissions, has not demonstrated that errors of fact or law exist. As such,



Digicel has not properly supported a modification of the Commission's decision.

100. **The Commission, having regard to all of the submissions made by Digicel and the provisions of the legislation governing this matter denies Digicel's application for a review of the Commission's decision dated the 13<sup>th</sup> day of January 2012.**

Dated this 11<sup>th</sup> day of June 2012

*Original Signed by*

.....

Neville V. Nicholls  
Chairman

*Original Signed by*

.....

Andrew S. Downes  
Deputy Chairman

*Original Signed by*

.....

Gregory F.M. Hazzard  
Commissioner

*Original Signed by*

.....

Trevor T. Welch  
Commissioner



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## FAIR TRADING COMMISSION

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BARBADOS

NO. 0002/12

### FAIR TRADING COMMISSION

**IN THE MATTER** of the Utilities Regulation Act, CAP. 282 and the Fair Trading Commission Act, CAP. 326B and the Telecommunications Act, CAP. 282B of the Laws of Barbados;

**IN THE MATTER** of the Utilities Regulation (Procedural) Rules, 2003 and the Utilities Regulation (Procedural) (Amendment) Rules, 2009;

**AND IN THE MATTER** of a Decision and Order of the Fair Trading Commission dated the 12<sup>th</sup> day of December 2011 on the Long Run Incremental Cost Guidelines (LRIC) to be followed by Cable & Wireless (Barbados) Limited;

**AND IN THE MATTER** of Digicel (Barbados) Limited's Application for a Review of the Decision dated the 12<sup>th</sup> day of December 2011;

#### APPLICANT

Digicel (Barbados) Limited

#### BEFORE:

Sir Neville Nicholls  
Professor Andrew Downes  
Mr. Gregory Hazzard  
Mr. Trevor Welch

Chairman  
Deputy Chairman  
Commissioner  
Commissioner

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**ORDER**

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**PART FOUR - ORDER**

In recognition of the issues that have been considered and determined arising out of Digicel (Barbados) Limited's (Digicel) Application for a review of the Decision dated December 12, 2011.

**UPON READING** the Motion for Review from Digicel dated January 13, 2012;

**AND UPON READING** the Affidavit of Ms. Helga McIntyre dated January 13, 2012;

**AND UPON READING** the submissions of CARITEL dated March 23, 2012;

**AND UPON READING** the submissions of Cable & Wireless (Barbados) Limited dated March 30, 2012;

**AND UPON READING** the submissions of Digicel dated April 20, 2012.

**IT IS HEREBY ORDERED AS FOLLOWS THAT:-**

1. Digicel's Application and other accompanying requests contained therein for a review of the Commission's decision dated December 12, 2011 are denied.

**Dated this 11<sup>th</sup> day of June 2012**

*Original Signed by*

.....

Neville V. Nicholls  
Chairman

*Original Signed by*

.....

Andrew S. Downes  
Deputy Chairman

*Original Signed by*

.....

Gregory F.M. Hazzard  
Commissioner

*Original Signed by*

.....

Trevor T. Welch  
Commissioner