



## FAIR TRADING COMMISSION

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BARBADOS

FTC/URD/MTNLRIC 2015-01

### 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;

**AND IN THE MATTER** of the Utilities Regulation (Procedural) Rules, 2003, S.I 2003 No. 104 and the Utilities Regulation (Procedural) (Amendment) Rules, 2009, S.I 2009 No. 82 of the Laws of Barbados;

**AND IN THE MATTER** of a Decision of the Fair Trading Commission dated the 27<sup>th</sup> day of March 2015 on the Long Run Incremental Cost Interconnection Rates;

**AND IN THE MATTER** of Digicel (Barbados) Limited's Application for a Review and Variation of the Decision dated the 27<sup>th</sup> day of March 2015;

### APPLICANT

Digicel (Barbados) Limited

### BEFORE:

Sir Neville Nicholls	- Chairman
Professor Andrew Downes	- Deputy Chairman
Ms. Herma Griffith-Ifill	- Commissioner
Mr. Errol Humphrey	- Commissioner
Ms. Monique Taitt	- Commissioner

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DECISION

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## **PART ONE - BACKGROUND**

1. The Fair Trading Commission (“Commission”), in its Decision on the Long Run Incremental Cost (“LRIC”) Interconnection Rates (“LRIC Decision”) of March 27, 2015, determined interconnection rates based on fixed and mobile LRIC models. These models derived the costs that an efficient operator would incur in providing interconnection services in a competitive market. The resulting costs for fixed and mobile termination and transit services were used to inform the rates that would be applied for interconnection purposes.
2. In its LRIC Decision, the Commission determined that the interconnection rates for Fixed Transit, Fixed Termination, Mobile Transit and Mobile Termination Interconnection Services in \$BDS/min would be reduced and would be as follows:
  - Fixed Transit - \$0.010;
  - Fixed Termination - \$0.011;
  - Mobile Transit - \$0.011;
  - Mobile Termination - \$0.055
3. The rate structure for interconnection services is based on a single, per minute tariff and will replace relevant rates in the Consolidated Reference Interconnection Offer 2010 (“RIO 2010”).
4. The said rates are to be adopted using a glide path, whereby 60% of the decrease will be effective from May 1, 2015 and the remaining 40% from April 1, 2016.

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

5. Following the issuance of the LRIC Decision, Digicel (Barbados) Limited (“the Applicant”) filed a Notice of Motion for Review and Variation (“Motion for Review”) with the Commission on April 23, 2015. The Motion for Review was supported by the Affidavit of Ms. Nadia Alleyne, the Legal & Regulatory Manager of the Applicant.
6. The Applicant also sought an order staying the LRIC Decision until final determination of the Motion for Review. A Stay of the LRIC Decision was granted by the Commission on June 3, 2015.
7. In its Motion for Review, the Applicant proposed that the Commission vary the LRIC Decision by extending the period of the glide path for the

implementation of the new LRIC interconnection rates from twelve (12) months to three (3) years.

8. In the Motion for Review and its submissions of June 1, 2015, the Applicant relied on the following grounds in support of its application:
  - A. The Commission failed to conduct the LRIC process in a transparent manner in that the costing exercise engaged in by the Commission, in tandem with Cable & Wireless (Barbados) Limited, was prejudicial to the Applicant.
  - B. The Commission failed to act in accordance with the rules of natural justice, since it did not provide the Applicant with a reasonable time frame within which to adjust to the new rates which subjected the Applicant to hardship and prejudice.
  - C. There were procedural deficits in the setting of the rates for the Applicant.
  - D. There were procedural flaws and an overall absence of transparency.
  - E. The Commission failed to meet the mandatory requirements of the Utilities Regulation Act.
  - F. There were procedural deficits in the setting of the glide path.
  - G. There were substantive deficits in the analysis regarding the setting of the glide path.
  - H. There was a material difference between the preliminary position and final position of the Commission in respect of the glide path.
  - I. There was a material change in circumstances and new facts.
9. The Commission's analysis of the grounds raised by the Applicant is provided in Part Two and Part Three of this Decision.

### **Duty of the Commission**

10. By virtue of Section 36 of the Fair Trading Commission Act, CAP. 326B of the Laws of Barbados (“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, S.I 2003 No. 104 of the Laws of Barbados (“the Rules”) and the Utilities Regulation (Procedural) (Amendment) Rules, 2009, S.I 2009 No. 82 of the Laws of Barbados (“the Amendments Rules”).
11. The Commission’s discretion to review and vary or rescind a decision or order is exercised with a view to ensure that there is consistency, transparency and predictability in the Commission’s decision-making process.

### **Standard of Proof**

12. With regard to the standard of proof, Section 133 of the Evidence Act, CAP. 121 of the Laws of Barbados, stipulates that:  
*“In a civil proceeding, the court shall find the case of a party proved if it is satisfied that the case has been proven on a balance of probabilities.”*

### **Evidence before the Commission**

13. Rule 54 (1) of the Rules states that the Applicant must comply with Rule 8 of the Rules and file an Affidavit setting out the relevant facts that it relies upon in support of its Motion.
14. The Applicant filed the Affidavit of Ms. Nadia Alleyne, dated April 23, 2015 setting out the facts on which it relies in support of its Motion for Review. The Applicant was invited to file additional written submissions to support its Motion for Review with the Commission on or before June 1, 2015. The Applicant filed these additional submissions on June 1, 2015.
15. Thereafter, CARITEL, Columbus International Inc. (“FLOW”) and Cable & Wireless (Barbados) Limited (“C&W”), the parties to the LRIC Decision, were invited to submit responses to the Applicant’s Motion for Review and further submissions. CARITEL filed its written response with the Commission on June 10, 2015. FLOW and C&W filed their joint submissions on June 10, 2015.
16. After receipt of the responses from CARITEL, FLOW and C&W, the Applicant was invited to submit its final written submissions, which it did on June 17, 2015. On June 16, 2015, the Commission requested supporting

financial information from the Applicant to substantiate Ground B. The Applicant responded to the Commission's request on June 19, 2015.

17. In determining this matter, the Commission took into consideration all of the written submissions which it received from the Applicant, CARITEL, FLOW and C&W.

## **Jurisdiction**

18. 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".

19. Rule 54 (1) of the Rules stipulates that every Notice of Motion must contain grounds on which the Commission can review a decision made in a utility regulation proceeding. Rule 54 (1) states *inter alia* 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;"*

20. 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."*

21. In determining the threshold question, the Commission must consider whether the Applicant established on a *prima facie* basis that any of the grounds it relies on satisfies the test.

22. 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.*
23. According to the Canadian Radio-Television Telecommunications Commission (CRTC) 78-7 Bell Canada Request to Review Part of the Telecom Decision, the purpose of the threshold question is to determine whether the grounds put forward by the party applying for the Motion raised a question as to the correctness of the decision and whether there was enough substance to the issues raised, such that a review based on those issues could result in the CRTC varying, cancelling or suspending the decision. The CRTC also stated that 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.
24. The CRTC further highlighted that if the Applicant is unable to satisfy the criteria, then there is no purpose in proceeding with the Motion for Review and the Motion can be dismissed at this stage.
25. In accordance with Rule 55(3) of the Rules, the Commission determined that it would consolidate the consideration of the threshold question and a review on the merits in a 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."*

## **PART TWO - THE THRESHOLD QUESTION**

26. On receipt of the Applicant's Motion for Review and its subsequent submissions, the Commission analysed the grounds relied upon by the Applicant to determine whether the threshold question was met.

#### **GROUPS A & D:-**

- **The Commission failed to conduct the LRIC process in a transparent manner in that the costing exercise engaged in by the Commission in tandem with Cable & Wireless (Barbados) Limited was prejudicial to the Applicant.**
- **There were procedural flaws and an overall absence of transparency.**

27. In its Motion for Review, the Applicant submitted that it had serious concerns about the overall level of transparency within every phase of the LRIC modelling process. The Applicant argued that the Commission failed to conduct the LRIC process in a transparent manner. This included a failure by the Commission to provide sufficient information to the Applicant to enable it to fully understand the process, as well as a failure to take the Applicant's submissions into account. The Applicant further argued that the Commission failed to give its reasons for not taking the Applicant's submissions into account, particularly in relation to the decisions the Commission made throughout the process.

28. On an assessment of the Applicant's arguments under these grounds, the Commission is of the view that the Applicant has set out a legally rebuttable presumption on the issue of transparency and natural justice which *prima facie* raises a question as to the correctness of the LRIC Decision. As a result, it is necessary that the Commission conducts an analysis on the merits of the arguments of the Applicant.

**29. In view of the foregoing, the Commission determines that the Applicant has met the threshold question as it relates to these grounds.**

#### **GROUND B:-**

- **The Commission failed to act in accordance with the rules of natural justice since it did not provide the Applicant with a reasonable time frame within which to adjust to the new rates which subjected the Applicant to hardship and prejudice.**

30. The Applicant argued that it has been physically and contractually interconnected with C&W since 2004. This contractual interconnection relationship sets out, *inter alia*, the tariffs which are received from and paid to C&W for the mutual provision of interconnection services as between the parties to the Interconnection Agreement.
31. The Applicant claimed that a reasonable time frame was not provided by the Commission to allow it to adjust to the new rates which caused it hardship and prejudice.
32. In considering this ground, the Commission requested that the Applicant provide supporting evidence to corroborate the hardship and prejudice that it claimed to have suffered. The Applicant responded to this request by letter dated June 19, 2015. On an analysis of the Applicant's submissions, the Commission is of the view that the Applicant failed to provide adequate information sufficiently supported by corroborating evidence to substantiate this ground on a *prima facie* basis. As a consequence, the evidence presented to the Commission was not sufficient to allow it to infer the fact at issue that the Applicant indeed suffered hardship and prejudice as a result of the time frame stipulated in the LRIC Decision to adjust the rates.
33. Furthermore, the Commission noted that the Applicant was made aware by the Stakeholder Note of September 12, 2014 that the Commission proposed the implementation of the interconnection rates by way of a one (1) year glide path which would be effective one (1) month from the date the LRIC Decision was issued.
34. The Applicant was therefore aware of the timelines for the implementation of the reduced rates well in advance of the issuing of the LRIC Decision. Consequently, the Applicant had adequate time to consider the same in its financial planning process and to commence the necessary procedures to facilitate implementation of these new rates as set out in the said Stakeholder Note as any prudent business would.
35. **Therefore, the Commission determines that the Applicant has not met the threshold question as it relates to this ground.**

#### **GROUND C:-**

- **There were procedural deficits in the setting of the rate for the Applicant.**



36. The Applicant argued that procedural deficits in the setting of the rate occurred because the Commission applied the rate modelled for C&W to the Applicant. The Applicant claimed that the simple application of the modelled C&W rate without "*substantive analysis*" as to the reason this rate was also relevant to the Applicant "*fails to discharge the Commission's burden of proof for the more intrusive intervention into the Applicant's lawfully conducted business*".
37. The Commission considered the arguments of the Applicant and determined that it had adopted all measures necessary so as to reflect the costs of an efficient operator. In particular, the Commission set out the specifications and guidelines of the models and commissioned C&W to develop the same. The decision of the Commission to require C&W to develop the models was based on the fact that C&W is the dominant carrier in Barbados and is therefore obliged to offer interconnection services in accordance with Section 26 of the Telecommunications Act CAP. 282B of the Laws of Barbados (TA).
38. The Commission also requested all parties who would be impacted by the rates determined from the LRIC models, including the Applicant, to provide specific data to be populated into the models. The Commission submitted a spreadsheet specifying the key input data that was required for the LRIC models by letter dated January 15, 2014. The Commission also informed the Applicant in this letter that the information provided by stakeholders would be treated as confidential and would be used by the Commission to cross-check the input data and results obtained from the models.
39. The Applicant responded to this request in its submissions dated March 11, 2014 by stating that it was not willing to provide such data while the Commission continued to refuse to make even a redacted version of the model available to stakeholders.
40. Therefore, in light of the Applicant's refusal to provide the requested data, the Commission proceeded with the model building process utilising all available data sources and benchmarks from other jurisdictions which were used to substantiate the data provided by C&W. This was done by the Commission in order to ensure that the data used in the models and the results obtained were within established parameters set in other jurisdictions.
41. Considering the fact that the Applicant did not provide the relevant information as requested, the Commission considers it disingenuous for the Applicant to argue that there were procedural deficits in the setting of the rates.

42. Furthermore, it must be reiterated that the models developed by C&W, pursuant to the Commission's specifications and guidelines, resulted in the formulation of a proprietary document which contained the company's commercially sensitive information. Consequently, neither the models nor a redacted version thereof could have been shared with Stakeholders, since doing so would have resulted in a breach of confidentiality on the part of the Commission.
43. The Applicant further raised the issue of reciprocity of the interconnection rates, whereby it argued that the LRIC Decision had embedded in it the assumption that symmetric rates are an appropriate regulatory intervention.
44. The principle of reciprocity or symmetry stipulates that the termination fees set by one service provider are equal to the termination fees set by the other provider. This is a well-established principle in many jurisdictions. In fact, jurisdictions such as Austria, Belgium, Denmark and the United Kingdom had all moved towards symmetry in their mobile termination rates since 2013.
45. Therefore, the Commission is of the view that the Applicant's argument on this ground was not properly substantiated to prove that the Commission was required to do otherwise. Furthermore, the Commission notes that the Applicant did not provide the necessary input data or evidence during the consultation process to establish that interconnection rates should not be symmetrical.
46. No evidence was produced by the Applicant to refute that the Commission did not ensure at all stages that the rates were reflective of the costs of an efficient operator. The fact remains that the Commission requested pertinent information from the Applicant for the purposes of maintaining fairness and transparency in the process; however, the Applicant chose not to comply with this request.
47. Accordingly, these grounds, on a prima facie basis, did not satisfy the threshold question, as the applicant did not produce evidence that there was a procedural deficit committed by the Commission in the setting of interconnection rates.
48. **As a consequence, the Commission determines that the Applicant has not met the threshold question.**

**GROUND E:-**

- **The Commission failed to meet the mandatory requirements of the Utilities Regulation Act.**

49. The Applicant contended that the Commission failed to meet the requirements of section 10(b)(ii) and (v) of the Utilities Regulation Act CAP. 282 of the Laws of Barbados (URA), which invalidated the legal basis for the Commission's intervention to modify an existing approved and lawful rate. The Applicant further contended that this had implications for both the setting of the rate itself and for the setting of the glide path.

50. The Applicant supported its argument with case law which addressed the setting of LRIC based Mobile Termination Rates (MTR). In Vodafone Ireland Limited v Commissioner for Communications Regulation [2013] IEHC 382 the Irish High Court stated that:

*"In the view of the Court, it is important to bear in mind that the Price Control Decision is not akin to an infringement decision on the part of a competition authority which condemns a measure or agreement as breaching one of the competition rules. ComReg's function is to intervene when necessary to regulate operations and activities in a market which will otherwise be governed by the forces of the free market and those competition rules. It is not therefore, for the service providers to prove why the regulators proposed intervention is unjustified or wrong; it is for the regulator to justify the necessity of its intervention within the terms of the statutory conditions which govern the exercise of its competence."*

51. Based on the foregoing, the Commission is of the view that this ground *prima facie* raises questions as to the correctness of the LRIC Decision.

**52. Consequently, the Commission determines that the Applicant has met the threshold question as it relates to this ground.**

**GROUND S F, G & H:-**

- **There were procedural deficits in the setting of the glide path;**
- **There were substantive deficits in the analysis regarding the setting of the glide path;**
- **There was a material of the difference between the preliminary position and final position of the Commission in respect of the glide path.**

53. The Applicant claimed that the reasoning given for the Commission's choice of a "foreshortened" glide path was partial and failed to adequately take into account all of the material issues that would be necessary to reach a properly

reasoned decision on the appropriate length of the glide path. The Applicant further claimed that the lack of this analysis represented a substantive gap in the examination of the issue by the Commission and led the Commission to an unsafe decision.

54. In addition, the Applicant made use of sections of the Stakeholder Notes to demonstrate that there was a material difference between the preliminary position and the final position of the Commission in respect of the glide path when the Stakeholder Notes are compared to the LRIC Decision. In its submissions, the Applicant stated *“that at page 10 of the Stakeholder Note, the Commission itself stated that ‘Most regulatory authorities implement significant interconnection rate changes within a multi-year glide path where rate decreases are phased in over a period of several years. This reflects best practice to minimise the impact of sudden changes in termination rates on operator’s pricing structures and on retail markets’”*. The Applicant further adduced that at page 13 of the Stakeholder Note *“the Commission also recognizes that ‘adopting a two to three year glide path may be warranted’”*.
55. Upon consideration of the arguments submitted by the Applicant and a thorough review of the Stakeholder Note dated September 12, 2014 (“Note”) referred to by the Applicant, it is evident that the Applicant’s arguments are flawed, since they are based on selectively chosen sections of the Note which, if applied as quoted, take the LRIC Decision out of context.
56. The Note confirms that the Commission gave consideration to the practice in the international arena in relation to the transitioning process, as well as the difference between the interconnection rates at that time and the target rates based on the LRIC model. However, the Commission did not make a decision based on “international best practice” solely but rather it acted with prudence by considering all relevant factors before arriving at a decision that was based on the particularity of the matter before it, as it relates to the telecommunications sector in Barbados.
57. Additionally, the same can be said about the Applicant’s reference to page 13 of the Note on *“adopting a two to three year glide path may be warranted”* which again appears to have been selectively crafted so as to take the LRIC Decision out of context.
58. At page 13 of the Note, the Commission not only considered that adopting a two to three year glide path may be warranted, but it also considered other factors. Such factors included the impact of further delay expected for the consumer and for competition benefits due to low interconnection rates and

low operational costs. The Commission gave a very detailed reasoning of all of the factors that would be taken into consideration during the consultation process. Indeed, the Commission did not make any pronouncements, but rather gave specific arguments for and against a long glide path period.

59. Hence, the Applicant's contention that the Commission's decision was at variance with its Stakeholder Note is unfounded. Furthermore, there is no proof to suggest on a prima facie basis that the Commission considered any new or additional information that was not brought to the fore or was not consulted on with the affected parties. In fact it is evident that no procedural or substantive deficits existed in the Commission's analysis, since the deliberations in the Note did in fact lead to the reasoning in the LRIC Decision.
60. Further to the above, the Commission noted that the European Commission, while it supports the use of glide paths, it is of the view that these should be as short as possible and in many cases the National Regulatory Authorities (NRAs) in Europe have shortened glide paths which are over two years long. Therefore, based on the above trends and the particular circumstances in Barbados, there is no basis for the Applicant's argument that the glide path should be extended by the Commission from one (1) year to three (3) years.
61. **Therefore, the Commission determines that the Applicant has not met the threshold question as it relates to these grounds.**

#### **GROUND I:-**

##### **There was a material change in circumstances and new facts that have arisen**

62. The Applicant claimed that since the LRIC Decision and the issue of the glide path, there had been a material change in circumstances in the fixed retail market with the merger of Cable & Wireless Communications plc and FLOW. The Applicant also contended that this merger resulted in a market concentration rather than an increase of competition.
63. Although the Commission imposed a series of conditions to protect fixed retail competition, the Applicant argued that these conditions would impact the upstream markets but would have a lag before they were effective in the

retail space. It is for this reason that the Applicant inferred that this lag would yield a reduction in fixed retail competition. This means that there would be no “pass through” of the benefits of MTR reductions and the rationale for a short glide path would be even further undermined.

64. On considering this ground, the Commission is cognisant of the fact that it does not regulate retail prices as it pertains to ADSL or mobile services. Indeed, the Telecommunications (Regulated Services) Order, 2006 S.I. 2006 No. 5 of the Laws of Barbados, prescribes the regulated services of C&W, for which the Commission is responsible. These are, among other things, mobile wholesale interconnection; domestic fixed wholesale voice services, including fixed termination, fixed origination and fixed joining links of the dominant carriers; and international wholesale services of the dominant carrier.

65. Accordingly, the Commission is of the view that the Applicant has provided little or no evidence of a link between the merger and price in the fixed retail segment of the telecommunications market. Instead, the Applicant has juxtaposed retail rate reductions with increased competition and the extended glide path in the retail fixed line sector. The Applicant has also suggested that the interconnection rates may influence the rate in the fixed retail segment; however, there is no evidence of the substitution of fixed line services for mobile services in the telecommunications market in Barbados.

66. As a consequence, the Applicant did not proffer sufficient evidence that raised a question as to the correctness of the LRIC Decision.

**67. In light of the foregoing the Commission determines that the Applicant has not met the threshold question as it relates to this ground.**

### **PART THREE -REVIEW ON THE MERIT**

68. Having determined that the Applicant met the threshold question as it relates to Grounds A, D and E of its Motion for Review, the Commission will review the merits of the Applicant’s arguments as well as those of the parties, on these grounds in order to determine whether the LRIC Decision should be reviewed and varied accordingly.

### **GROUND A & D: -**

- **The Commission failed to conduct the LRIC process in a transparent manner in that the costing exercise engaged in by the Commission in tandem with Cable & Wireless (Barbados) Limited was prejudicial to the Applicant.**

- **There were procedural flaws and an overall absence of transparency.**

69. The tenets of transparency generally require that substantive and procedural information that is relevant to any proceedings is made available and accessible to all parties to those proceedings. Inasmuch as the Commission is ever mindful of the necessity of upholding these principles as expressed at common law, it held a public consultation with stakeholders on the LRIC modelling process (i.e. on the guidelines and the specifications) so as to ensure that there was transparency throughout the process.

70. The Commission examined the cases used by the Applicant to support its argument that the Commission failed to conduct a transparent process. However, the Commission is of the view that another leading case law on this issue as it relates to the consultation process did not support the position taken by the Applicant.

71. Indeed, according to Lord Woolf MR in R v North and East Devon Health Authority Ex parte Coughlan [2001] QB 23, the Commission “is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.” Lord Woolf MR further stated that “consultation is not litigation.”

72. The R v North and East Devon Health Authority Ex parte Coughlan case clearly supports the Commission’s position that the Applicant’s argument, in relation to the obligation of the Commission to disclose certain data received from C&W, is not well founded. The case also supports the position that the Commission is under no obligation to disclose every submission received by it. The case further informs that the same level of disclosure required by parties involved in litigation is not required by the Commission in consultations.

73. Support for the Commission’s position that it is not obligated to provide the Applicant with a report setting out which comments were taken into consideration, which of them were not considered or the reasons they were not considered can also be found in the case of R. (on the application of Edwards) v Environment Agency [2006] EWHCA Civ 877. In this case it was stated:

*“In general, in a statutory decision-making process, once public consultation has taken place, the rules of natural justice do not, for the*

*reasons given by Lord Diplock in Bushell, require a decision maker to disclose its own thought processes for criticism before reaching its decision."*

74. Lord Hoffman, in the appeal of the Environment Agency case at the House of Lords which is reported at [2008] UKHL 22 stated: *"If the Agency has to disclose its internal working documents for further public consultation, there is no reason why the process should ever come to an end."*
75. Moreover, the courts recognise that the application of the duty of fairness is intensely case-sensitive. According to the case law on the matter, this is not an area of law where it is possible to provide statements of general principle. As Sullivan J held in R(Greenpeace Limited) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) *"Judgments are not to be construed as though they were enactments of general application, and the extent to which judicial dicta are a response to the particular factual matrix of the case under consideration must always be borne in mind.... What is fair... must depend upon the particular circumstances of the case"*.
76. In addition, it must be noted that in the LRIC Decision, the Commission sets out in detail the key issues which it considered during the consultation process, some of which arose as a direct result of the Applicant's comments in its submissions. Therefore, the Commission did ensure that it upheld its duty
- to provide reasons for the significant issues decided upon in the LRIC Decision.
77. Furthermore, the Commission utilised the Stakeholder Notes dated February 2014 and September 12, 2014, as well as meetings held in February 2014, respectively, to keep all interested parties apprised of the issues being considered by the Commission and to allow these parties an opportunity to make recommendations prior to the Commission's determination of these matters.
78. Accordingly, the Commission did indeed maintain the principle of transparency throughout the consultation process which led to the LRIC Decision. Furthermore, notwithstanding the fact that transparency is germane to the consultation process along with the principles of natural justice, the Commission also recognises that these principles are not unqualified, since other considerations, such as confidentiality, must be taken into account.



79. Thus, the Commission weighed the Applicant's arguments in relation to the perceived lack of transparency and balanced the same against its legislative mandate under Rule 13 of the Rules and Section 11 of the FTCA. The Commission balanced the need to uphold the principles of transparency against the legal requirement to keep the commercially sensitive data of C&W, which formed the basis of the models, confidential. In its view, the Commission correctly considered the extent of the harm that would occur if the documentation was publicly disclosed and the extent to which it would create a competitive disadvantage for the party. As a consequence, the Commission determined that providing the Applicant with the commercially sensitive data in the populated models to satisfy the Applicant's demand for transparency would be unacceptably harmful to C&W.
80. Nevertheless, it must be recognised that the Commission provided the Applicant with redacted specifications of the costs of an efficient operator as a means of being as transparent as it could be in the circumstances. Again, the Commission must highlight that it requested pertinent information (under confidential cover) from the Applicant which would have allowed the Commission, as the independent regulator, to compare C&W's input data in the models before the determination on the LRIC rates was finalised, but the Applicant refused to do so.
81. **Consequently, the Commission finds no merit in the Applicant's arguments in relation to these grounds that would justify a variation or modification of the LRIC Decision.**

#### **GROUND E:-**

- **The Commission failed to meet the mandatory requirements of the Utilities Regulation Act.**

82. There are two issues to be addressed under this ground. The first is whether the Commission had the authority to commence the LRIC modelling process. The other issue is whether the Commission carried out the rate setting process in accordance with Section 10(b) of the URA.

#### **Issue No. 1**

83. The Commission reviewed the case of *Vodafone Ireland Limited v. Commissioner for Communications Regulation* which was submitted by the Applicant. This case stated that the Commissioner for Communications Regulation's (CCR)

*“function is to intervene when necessary to regulate operations and activities in a market which will otherwise be governed by the forces of the free market and those competition rules. It is not therefore, for the service providers to prove why the regulators proposed intervention is unjustified or wrong”.*

84. However, on a thorough examination of this case, the Commission found that the specific regulatory mandate of the CCR is distinct from the mandate of the Commission. It is evident that the CCR is required to conduct a market analysis to determine whether it is effectively competitive before imposing appropriate price control obligations, whereas the Commission is not obligated under its legislative framework to do the same.
85. With regard to the Commission’s jurisdiction to commence the LRIC modelling process, reference must be made to Section 16 of the URA. Section 16 states that where the Commission has not fixed a period for a review, the Commission may, on its own initiative, review rates of a utility service provider. Interconnection rates are regulated rates that can be reviewed by the Commission on its own initiative. Hence, the authority given to the Commission is both legislative and discretionary and therefore indisputable, thereby nullifying the argument which the Applicant sought to proffer using the *Vodafone Case*.
86. Additionally, although there is no legislative requirement that places the onus on the Commission to justify the reasons it should use its own initiative to review rates, the Commission has a duty to consult with the service providers and other parties that have an interest in accordance with Section 4(4) of the FTCA. This consultation process is required in instances when the Commission is establishing principles for arriving at rates or setting the maximum rates to be charged by service providers. This duty to consult is a measure necessary to ensure that any decision made by the Commission is reasonable, transparent and fair.
87. Furthermore, under Sections 26 and 27 of the TA, the Commission has a mandate to approve the RIO between the dominant carrier (C&W) and a licensed carrier (such as the Applicant) for interconnection to that dominant carrier’s public telecommunications network. One such term of the RIO that the Commission must approve is interconnection charges which, according to Section 25 of the TA, must be offered at rates that are cost-oriented.

88. The Applicant alleged that the Commission erred in not taking into account the prospective increases in productivity by the service provider or the standards of service being offered by the service provider and by the competing service providers.
89. In considering the rates arising from the LRIC, the Commission noted that whilst Section 10(b)(v) of the URA speaks to the prospective increases in productivity factor, this does not relate to the setting of interconnection rates. The increases in productivity specifically relate to the demand for regulated services and the expected costs of delivering these services, together with efficiency gains under a Price Cap Regime.
90. The Commission is therefore of the view that Section 10(b)(v) of the URA is not relevant under the rate of return type of regulation and as such, this factor is not applicable for the purposes of setting interconnection rates. As a result, the Commission did not consult on the prospective increases in productivity factor in the LRIC consultation.
91. Support for this approach by the Commission can be found in the following pertinent dictum of Auld LJ in R (Kidderminster and District Community Health Council) v. Worcestershire Heath Council [1999] EWCA Civ 1525 as follows:-  
*“[Regulation 18(1) which required consultation on certain proposals] did not require it to give focus to proposals which it no longer had under consideration.”*
92. Clearly the courts recognise that there is in general no obligation on a public body to consult on options it has discarded. Since 10(b)(v) of the URA is not relevant to determine interconnection rates or in a rate of return regulatory environment, it cannot be expected that the Commission should consult on the same.
93. Additionally, with regard to Section 10(b)(ii) of the URA, the term “standards of service” would generally relate to the service received by the retail customer. In the context of the RIO and interconnection rates, standards of service would refer to the service quality for interconnection services which, in accordance with the Section 25(c) of the TA, is expected to be of the same level as that provided to the service provider itself and similar entities. Consultations were held in relation to this service quality and a determination was made as part of the consultation on the RIO 2010. This is expressly set out in the specific terms and conditions of the Interconnection Agreements approved by the Commission. In fact, the Legal Framework title of the

Interconnection Agreements contains a section entitled “Service Performance and Standards”.

94. In this regard, the Commission is of the view that since the LRIC Process was a continuation of the RIO Decision of 2010, it was not required to consider the standards of interconnection services again in its determination of the Interconnection Rates derived from the LRIC. Furthermore, just as this matter was considered in the RIO 2010 consultation, it will be considered once again in the upcoming review of the revised RIO by the Commission.
95. **Consequently, the Commission determines that it has not erred in law in relation to this ground. Therefore a variation or modification of the LRIC Decision is not justified.**

#### **PART FOUR -THE COMMISSION’S RULING**

96. Having regard to all of the submissions made by the parties to the Motion for Review, its legislative framework and all relevant legal authorities, the Commission has found that the Applicant did not demonstrate that a modification or variation of the LRIC Decision is warranted. The Commission is satisfied that it followed the correct process during the consultation and the Applicant failed to demonstrate substantial doubt as to the correctness of the LRIC Decision.
97. **The Commission therefore denies the Applicant’s Application to review and vary the LRIC Decision of March 27, 2015.**
98. **The LRIC Decision dated March 27, 2015 shall therefore be effective from August 1, 2015, whereby the initial 60% reduction in the interconnection rates shall take effect from August 1, 2015 and the remaining 40% reduction in the interconnection rates shall take effect from April 1, 2016.**

**Dated this 6<sup>th</sup> day of July 2015**

*Original Signed by*

.....  
Neville V. Nicholls  
Chairman

*Original Signed by*

.....  
Andrew S. Downes  
Deputy Chairman

*Original Signed by*

.....  
Errol Humphrey  
Commissioner

*Original Signed by*

.....  
Monique Taitt  
Commissioner

