

SUBMISSIONS

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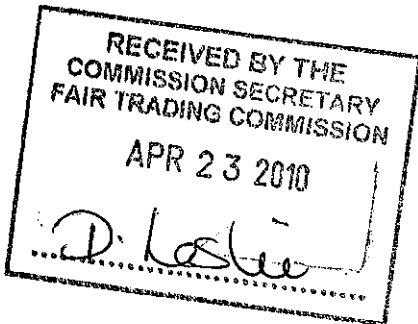
IN THE MATTER OF SECTION 105 (4) OF THE TELECOMMUNICATIONS ACT 2002

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 24TH 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

BACKGROUND

1. When the Telecommunications market was liberalized in 2003, this presented an opportunity for new providers to enter the Barbadian telecommunications market ('the market'). Digicel entered the market in 2004.
2. The market for telecommunications was, at the time of Digicel's entrance into the market, comprised of Cable & Wireless ('C&W') solely, now trading as LIME.

3. Section 26(3) of the Telecommunications Act ('the Act') defines a 'dominant carrier' as *"a carrier that the Minister determines to be dominant based on that carrier not being effectively constrained by competitive forces in a particular telecommunications market and such other criteria as the Minister prescribes"*.
4. Under section 16(2) of the Fair Competition Act, Cap 326(c) explains the significance of 'dominance of an enterprise' as a situation in which: - "*an enterprise holds a dominant position in a market, if by itself, or together with an affiliated company, it occupies such a position of economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors."*
5. C&W was declared dominant in April 2003.
6. Section 26(1) requires a dominant carrier to file a Reference Interconnection Offer ('RIO') with the Commission *"that sets out the terms and conditions upon which other licensed carriers will be permitted to interconnect with the interconnection provider's public telecommunications network"*.
7. In September 2008, the Respondent requested that C&W file a RIO.
8. On December 5, 2008, C&W filed the RIO.
9. On January 11, 2009, the Respondent commenced public consultations on the RIO, consultations ended on March 10, 2009 and during that time submissions were received from the operators in the market including Digicel.
10. The Respondent invited the parties to an Oral Presentation on June 19, 2009 and at that time presentations were made by C&W, Digicel and other providers in the market.
11. On February 24, 2010, the Respondent handed down a decision in which it implied that Digicel had been consulted, at all stages of the discussion and on all issues.

ISSUES

12. The following issues are before the Respondent: -
 - a) Whether the Respondent misdirected itself on the procedure to be followed by it, before the Respondent can approve a RIO

- b) Whether the procedure followed by the Respondent was incorrect and whether that failure to follow the procedure set out, under the Act meant that the Respondent was in breach of its obligations to Digicel and other stakeholders, under the Act; and
- c) Whether this meant that the Respondent had in effect breached the rules of Natural Justice.

ARGUMENTS

- 13. The Act, under section 27(3)(a) provides that the Respondent, in deciding whether or not to approve the RIO, is to consult any other carriers likely to seek interconnection with C&W.
- 14. The Act sets out the principles which the Respondent must have regard to, in deciding whether or not to approve the RIO, namely, the interconnection principles, the interconnection policy, the need to promote competition, the long term interests of end users and any submissions made, whether oral or written of the carriers providing or seeking interconnection.
- 15. We submit that the RIO serves as the starting point for negotiations and sets out the basic terms and conditions for interconnection of mobile, domestic fixed wireless and international service providers, amongst other things. These are terms which would be considered acceptable by C&W, the interconnection giver, in relation to an interconnection seeker.
- 16. The process that the Respondent must follow before approving the RIO is also fairly straight forward.
- 17. The Respondent must consult with other carriers likely to seek interconnection with C&W.
- 18. We submit that we seek to review the Respondent's decision on the basis that Digicel was not consulted on all aspects of the RIO. Changes were made and discussions were had between the Respondent and C&W, to which Digicel has no record of being a part of, being invited to be a part of, or referred to for comment on an issue.

19. We submit that the Respondent should have approached Digicel on each and every issue impacting the RIO which they had before them, in determining whether or not the RIO is to be approved.
20. We also submit that there should be a record for all parties concerned of each party's input on the issues on which there was division.
21. We submit further that the Respondent should follow a process, along the following lines: -
 - a) Respondent requests and receives RIO from C&W
 - b) Respondent requests and receives comments to C&W's draft from the industry
 - c) Hold a meeting with the industry to discuss RIO
 - d) Respondent will provide its own comments to the industry and C&W on the RIO
 - e) Respondent requests and receives new revised RIO from C&W based on the industry's and Respondent's comments
 - f) Respondent will receive industry's comments on new revised C&W's draft RIO
 - g) Respondent will based on Industry comments and own view direct C&W on wording of new RIO which would be approved by the Respondent.
22. Digicel has no record of being consulted on the issue of the 15% reduction in Interconnection Rates.
23. We find it difficult to believe that Digicel would have been approached on an issue of such importance and would not have either replied or not remembered that such an issue had been raised with it. The feasibility of this happening would be near impossible especially since we are dealing with an issue which would be revenue impacting.
24. On February 24, 2010, the Respondent handed down a decision in which it stated that when it "closely examined C&W's offer of 5% reductions every year for three years as well as the responses received from the respondents who were also given the opportunity to comment on the offer."
25. We submit that we were not approached in relation to the proposed reduction of C&W of 5% reduction every year for three years and that we should have been consulted on this proposed change and been permitted to make submissions on its feasibility.

26. Once the RIO has been approved by the Respondent, the assumption would be based on the guidelines in the Act that this would be a document which the parties could rely on as being reasonable, unbiased and 'Respondent approved'.
27. C&W would provide the RIO to an operator, wishing to interconnect with C&W and the operator would then return to C&W with its questions and comments on the RIO and the negotiations would then begin. Once the terms agreed between the parties, the Interconnection Agreement would be submitted to the Respondent for its approval.
28. The Respondent stated in its decision that it "considered these submissions and consulted further with C&W and the other parties on these issues through written correspondence."
29. We submit that not only were we not a part of these further consultations but we were not made aware that this had taken place.
30. We also submits that in such a situation, where the outcome of these consultations has a direct impact on Digicel, Digicel should have been either made a part of or alerted to the fact that this was happening and be given the ability to share in these discussion or comment on the issue at the base of such discussions.
31. We submit that the Respondent misdirected itself on the procedure to be followed before the Respondent can approve a RIO.
32. We also submit that the procedure followed was incorrect and that the Respondent's failure to follow procedure puts the Respondent in breach of its obligations under the Act.
33. On that basis, we submit that the following Orders should be made :-
 - a. THAT the decision of the Respondent be quashed and that procedure outlined by the Applicant in paragraph 21 above be followed; OR in the alternative
 - (i) 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; and

(ii) 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.

- b. Staying the Decision and/or Order of the Respondent until final determination of this matter or further determination.
- c. 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.

D. Alleyne

Legal Counsel for Digicel

