



## FAIR TRADING COMMISSION

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BARBADOS

NO. 0003/10

### 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 Utilities Regulation (Procedural) (Amendment) Rules, 2009;

**AND IN THE MATTER** of a Decision and Order of the Fair Trading Commission dated the 22<sup>nd</sup> day of February 2010 on the Consolidated Reference Interconnection Offer;

**AND IN THE MATTER** of Digicel (Barbados) Limited's Application for a Review of the Decision dated the 22<sup>nd</sup> day of February 2010;

#### APPLICANT

Digicel (Barbados) Limited

#### BEFORE:

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

Chairman  
Deputy Chairman  
Commissioner  
Commissioner  
Commissioner

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DECISION

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## **PART ONE - BACKGROUND**

1. On September 25, 2008 the Fair Trading Commission "Commission" requested that Cable & Wireless (Barbados) Limited "C&W" file a Consolidated Reference Interconnection Offer (RIO).
2. In keeping with the provisions of the Telecommunications Act, CAP. 282B "TA" specifically Section 27 (3), the Commission conducted a public consultation. Section 27 (3) of the TA states, inter alia, that the Commission shall:-

*"(a) consult with the carrier providing the RIO and any other carriers likely to seek interconnection to that carrier's network:"*

3. Submissions on the Consolidated RIO were received from TeleBarbados Inc., Blue Communications Inc., Digicel (Barbados) Limited "Digicel" and CARITEL (as an interested party). Subsequently, C&W responded to the parties' submissions. The Commission also invited parties to an oral presentation on June 19, 2009. Presentations on the Consolidated RIO were made by all of the parties named above including C&W.
4. Many of the carriers in the referenced submissions were of the view that the interconnection charges were too high. C&W subsequently proposed that in the absence of a Long Run Incremental Cost (LRIC) study and until this exercise is completed it would reduce domestic interconnection tariffs for PSTN Termination Access Service, PLMN Termination Access Service and PSTN Transit Service by 5% at the time the new Consolidated RIO is adopted and by another 5% on the next two anniversaries of that date.
5. All parties to the consultation were given an opportunity by the Commission to comment on C&W's proposed rates through written submissions. The Commission examined the proposal and considered all of the submissions

made by the various parties along with the other factors set out at Section 27 (3) of the TA before deciding whether to approve or refuse the Consolidated RIO.

6. After conclusion of the public consultation the Commission consulted with the carrier that filed the Consolidated RIO in order to resolve any inconsistencies relating to the parts of the Consolidated RIO that had been refused. The Commission concluded that a onetime 15% reduction in interconnection rates for the specified services should be implemented as these rates had not changed since 2003 and there was general information which supported that the costs of telecommunications had decreased. As such, the Commission directed C&W by letter dated November 10, 2009 to make certain amendments to the Consolidated RIO. In addition to the changes to the interconnection charges the Commission directed C&W to amend the Consolidated RIO by removing references to the Access Deficit Charge (ADC) and amending the language for the international call termination, Clause 3.2.2 as well as inclusion of a footnote in Section 2 for alternative technologies.
7. C&W subsequently submitted a revised Tariff Schedule along with a revised Consolidated RIO on December 15, 2009. Between January 14 and February 03, 2010, there was an exchange of correspondence between C&W and the Commission regarding some further inconsistencies in the tariffs. After being directed by the Commission, C&W then submitted a revised tariff schedule on February 15, 2010.
8. The Commission issued its Decision on the C&W Consolidated RIO on February 22, 2010.

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

9. Following receipt of the Commission's Decision, Digicel filed a Notice of Motion for Review on March 16, 2010.

### **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 and predictability of the Commission’s decision-making process.

### **Burden of Proof**

11. Under 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, Head of Legal and Regulatory, Eastern Caribbean dated March 16, 2010 setting out the facts on which it relies in support of its Motion for Review.
13. Additionally, Digicel filed with the Commission a set of written submissions dated April 23, 2010. Following this, C&W was invited to submit a response to Digicel’s written submissions. C&W filed with the Commission its written response on May 14, 2010. C&W in its response addressed the Affidavit of Ms. Helga McIntyre and indicated that C&W is of the view that the process which was followed by the Commission for determining the Consolidated RIO is the same as that set out under the TA and that all parties were given an opportunity to be heard. After receipt of C&W’s response Digicel was invited

to submit its final set of written submissions and it did so on June 01, 2010. In determining this matter, the Commission took into consideration the written submissions of both Digicel 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) of the Rules 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 March 16, 2010.

### **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 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. The Commission considers that Digicel must place before the Commission specific references to aspects of its decision to demonstrate or justify the existence of such grounds.
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 took the opportunity to examine 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 determines that despite the fact that there is a paucity of evidence contained in the Affidavit of Ms. Helga McIntyre to substantiate Digicel's contention on a *prima facie* basis, the allegations raised an important matter of principle. Digicel is contending that the Commission should communicate to Digicel any changes made, no matter how minor, to the Consolidated RIO. This is not required under the legislation. If Digicel's interpretation of the process is followed it would result in an unending consultation process between the Commission and the parties. The Commission however believes that it would be remiss of it to fail to allow this important matter of principle to pass the threshold. As such, the threshold question has been met by Digicel.**

## **PART TWO - THE SUBMISSIONS**

23. In its Notice of Motion and Written Submissions, Digicel contends that the Decision and/or Order of the Commission was reached in breach of the rules of natural justice specifically:-
  - (1) The Commission was under a duty to act judiciously and it did not when it failed to follow the correct process before approving the Consolidated RIO;
  
  - (2) The Commission failed to provide Digicel with the details and specifics of each and every amendment made to the Consolidated RIO submitted by C&W or by the Commission since the submission

of the Consolidated RIO to the Commission in December 2008 by C&W;

(3) The Commission failed to disclose to Digicel that the Commission was having discussions with C&W in relation to the Consolidated RIO and to invite Digicel to contribute to those discussions;

(4) The Commission failed to give Digicel a fair opportunity to correct or contradict or challenge any relevant statement prejudicial to its interest and/or comment on material put forward by C&W and other material which the Commission acted upon in arriving at its decision but which had not been previously disclosed to Digicel by the Commission;

(5) Digicel was not provided with the amended drafts of the Consolidated RIO which C&W submitted to the Commission and to which Digicel was making comments.

24. Throughout their submissions Digicel contends that the Commission erred in law as it followed an incorrect process in determining the Consolidated RIO.

25. Digicel sets out at paragraph 3 of its Notice of Motion the process which it believes the Commission should follow:-

*“(i) The Respondent would request and receive responses from C&W, its draft of the RIO.*

*(ii) The Respondent would request and receive responses to C&W’s draft of the RIO from the industry.*

*(iii) The Respondent would hold a meeting with the industry to discuss the RIO, as drafted by C&W.*

*(iv) The Respondent would then present for comments its draft of the RIO to the industry.*



- (v) The Respondent would receive the industry's comments on the Respondent's draft of the RIO; and*
- (vi) The Respondent would issue its final determination on the RIO.*

26. Digicel further submits at paragraph 21 of its Written Submissions dated April 23, 2010 the process which it believes that the Commission should follow in determining the Consolidated RIO:-

- (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."*

27. It is submitted that under the Telecommunications Act, the process which the Commission should follow in determining the Consolidated RIO is set out at Sections 27 (1) - (6) and is as follows:-

- (a) The Commission requests and receives the RIO from C&W as the dominant carrier. This is set out at Section 26 (1) of the TA;*
- (b) Section 27 (3) (a) of the TA sets out, inter alia, that the Commission must convene a public consultation on the RIO and invite and receive comments from carriers;*

- (c) The Commission has the discretion as part of the consultation to convene a meeting to allow parties to the consultation to make oral presentations on the RIO;
- (d) After the Commission concludes the consultation, it reviews the written responses along with the oral presentations and also has regard to those factors set out at Section 27 (3) (b) (i) - (v) which are as follows:-
- (i) the interconnection principles set out in Section 25;
  - (ii) the interconnection policy specified by the Ministry under paragraph (i) of subsection (2) of section 4;
  - (iii) the need to promote competition;
  - (iv) the long term interest of end users; and
  - (v) the submissions, whether oral or written of the carriers providing and seeking interconnection.
- (e) Thereafter the Commission has to decide whether to approve or refuse the RIO in whole or in part. This is set out at Section 27 (3) of the TA;
- (f) Pursuant to Section 27 (4) of the TA, if the Commission approves the RIO or part of the RIO, then it must make a declaration as to the approval specifying the date the approval takes place;
- (g) Under Section 27 (2) of the TA, the Commission may also refuse to approve the RIO wholly or in part by outlining the inconsistencies and give reasons for its decision;
- (h) Where the Commission refuses the RIO or part of the RIO, the Commission in accordance with Section 27 (5) has to consult with the

relevant carrier in order to resolve the inconsistencies. Thereafter the carrier may amend the RIO to remedy the inconsistencies and file the amended RIO with the Commission;

- (i) Where the Commission is satisfied that an amendment of a RIO satisfies the interconnection principles it shall approve the amended RIO and the carrier shall file the amended RIO with the Commission. This is set out at Section 27 (6) of the TA.

**28. The process set out above is in keeping with the TA and is the one which the Commission followed in relation to the Consolidated RIO.**

29. A review of the section of C&W's Written Submissions which addressed the Affidavit of Ms. Helga McIntyre shows that C&W was of the view that the process for determining the Consolidated RIO as set out under the TA was followed and that all parties were given an opportunity to be heard during the public consultation.

30. The process the Commission followed is materially different from that which Digicel set out in its submissions and argues ought to have been followed by the Commission. Further, the process which Digicel initially sets out in its Motion for Review and argues should be followed, varies when compared to what it sets out in its submissions of April 23, 2010. It is therefore not clear to the Commission which interpretation Digicel is relying upon. This is a weakness in their submissions.

31. In its Motion for Review, Digicel indicates that after the Commission holds a meeting with the industry to discuss the Consolidated RIO, it is envisaged that the Commission would then present for comments the Commission's draft of the Consolidated RIO to the industry. Thereafter, the Commission

would receive the industry's comments on the Commission's draft of the Consolidated RIO.

32. In its Written Submissions however, Digicel's views of the procedure differ significantly from that set out in its Motion for Review and Digicel no longer sets out that the Commission should present a Consolidated RIO. Instead Digicel places on the Commission an obligation to provide comments to the industry on the Consolidated RIO and to request C&W to provide a new Consolidated RIO based on these comments. It also places on the Commission an added obligation not supported in statute of a second round of public consultation on the amended Consolidated RIO from C&W. Steps (d) - (f) at paragraph 21 of Digicel's submissions dated April 23, 2010 is not in keeping with what is set out under the TA.
33. The Commission is not required to "present" a Consolidated RIO to the industry, the only party that presents a Consolidated RIO is C&W. This part of the process as interpreted by Digicel is not contemplated by Section 27 of the TA. After considering the parties' submissions and oral presentations, the Commission's next responsibility was approving or refusing the Consolidated RIO in whole or in part and the Commission had no statutory obligation to revert to the parties. The Commission decided to issue a decision on the Consolidated RIO which contained the parts of the RIO that were approved and those areas of the Consolidated RIO that were amended.
34. The Commission believes that Digicel misinterpreted the relevant provisions of the TA that dealt with the process for determining the Consolidated RIO. Further, Digicel has failed to set out any relevant legislation that supports their processes.
35. **The Commission determines that although this issue passed the threshold question, Digicel's grounds and evidence in respect of the process for**

**determining the Consolidated RIO which the Commission followed do not raise any identifiable errors of law or fact.**

36. Digicel further contends that the Commission prevented them from having the opportunity to make representations and comment on all aspects of the Consolidated RIO. This comment was made with specific reference to the charge being asserted by Digicel that changes were made to the Consolidated RIO of which they had no record. Digicel stated in paragraph 25 of their Written Submissions dated April 23, 2010 that *“we submit that we were not approached in relation to the proposed reduction of C&W of 5% reduction every year for 3 years and that we should have been consulted on this proposed change and been permitted to make submissions on its feasibility”*.
37. Prior to determining whether or not to approve or refuse the Consolidated RIO, the Commission is required by the legislation to consult on the Consolidated RIO and consider the submissions of carriers such as Digicel. Any failure of the Commission to do so may result in a breach of the legislation.
38. This notwithstanding, an administrative tribunal such as the Commission is under an administrative duty to ensure that even in the absence of any legislative scheme, it complies with the legal requirement of the right to be heard as it relates to administrative proceedings, such as the Consolidated RIO.
39. Therefore, it stands to reason that when examining the merits of Digicel’s contentions, the question that needs to be answered is whether or not the Commission failed to act in accordance with Section 27 of the Telecommunications Act and whether or not Digicel had the opportunity to make representations before the Commission as it relates not only to the entire Consolidated RIO document but specifically to the proposed 5% per

annum reduction for 3 years in interconnection rates before a final decision in the Consolidated RIO was made.

40. It is submitted that the Commission acted in accordance with the Telecommunications Act and with the rules of natural justice by affording to Digicel every opportunity to make representations before reaching a decision as it relates to the Consolidated RIO as a whole as well as on C&W's proposed reduction in the interconnection rates.

41. In accordance with Section 27 of the TA, the Commission sought to consult with the carriers including Digicel on the Consolidated RIO at every stage. The Commission commenced public consultations on the Consolidated RIO and submissions were received from participants including Digicel. The Commission also convened an oral presentation on June 19, 2009 at which Digicel participated. Emanating from this oral presentation, certain issues were raised including that interconnection rates were too high. As such, C&W (trading as LIME) submitted to the Commission a further document entitled "*LIME Final Comments on Consolidated Reference Interconnection Offer (RIO)*" dated July 20, 2009. In this document C&W addressed the following issues:-

- (a) Interconnection rates;
- (b) ADC References;
- (c) Indirect Access;
- (d) Direct Mobile Termination; and
- (e) Other Matters.

42. With regard to the level of interconnection rates C&W suggested two approaches, either adopt a costing methodology such as benchmarking (C&W stated in its final comments on the Consolidated RIO dated July 20, 2009 that benchmarking is very difficult to apply properly, because "differences in terms among the countries, for example Gross Domestic Product (GDP),

population, teledensity, traffic levels, regulatory regimes and so on, need to be taken into account before one can be confident that two given rates are being compared on equivalent basis”) or a LRIC study which would be a long term exercise. C&W further suggested that the best approach would be to undertake a LRIC study. However, due to the length of that process, C&W proposed a 5% reduction at the time the new Consolidated RIO is adopted and another 5% on the next two anniversaries of that date. The Commission sent this C&W document to all interested parties including Digicel on September 01, 2009. Digicel responded by E-mail through their servant and/or agent, Mr. Greg van Koughnett, Head of Legal & Regulatory, Eastern Caribbean dated 14 September, 2009. This demonstrates that Digicel was given every opportunity to make representations before the Commission as it relates to C&W’s offer.

43. Based on the foregoing, when the actions of the Commission are considered in light of its legislative and administrative requirements, it is submitted that the Commission acted judiciously and in accordance with the correct procedure as set out in the Telecommunications Act and in accordance with the rules of natural justice.
44. The responses received were taken into consideration when the Commission decided to reject the C&W offer and to direct C&W to institute a one-time 15% reduction on selected interconnection rates.
45. **This ground postulated by Digicel that it was not given an opportunity to participate fully in the Consolidated RIO consultations and subsequent discussions has no merit as it is not properly supported.**

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

46. The Commission is of the view that Digicel’s grounds as set out in their Motion for Review and Written Submissions do not support a variation or modification of the Commission’s Decision. Digicel was at all times given an

opportunity to be heard and 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 they suffered no prejudice and/or hardship.

47. The Commission generally 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.

48. 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 or any other grounds for review exist. As such, Digicel has not properly supported a modification of the Commission's decision.

**49. 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 22<sup>nd</sup> day of February 2010.**



**Dated this 18<sup>th</sup> day of August 2010**

*Original Signed by*

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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

*Original Signed by*

.....  
Monique C. Taitt  
Commissioner



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## FAIR TRADING COMMISSION

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BARBADOS

NO. 0003/10

### 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;

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**AND IN THE MATTER** of a Decision and/or Order of the Fair Trading Commission dated the 22<sup>nd</sup> day of February 2010 on the Consolidated Reference Interconnection Offer;

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### APPLICANT

Digicel (Barbados) Limited

### BEFORE:

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

Chairman  
Deputy Chairman  
Commissioner  
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 February 22, 2010.

**UPON READING** the Motion for Review from Digicel dated March 16, 2010;

**AND UPON READING** the Affidavit of Ms. Helga McIntyre dated March 16, 2010;

**AND UPON READING** the submissions of Digicel dated April 23, 2010;

**AND UPON READING** the submissions of Cable & Wireless (Barbados) Limited dated May 14, 2010;

**AND UPON READING** the submissions of Digicel dated June 01, 2010.

**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 February 22, 2010 are denied.

**Dated this 18<sup>th</sup> day of August 2010**

*Original Signed by*

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Neville V. Nicholls  
Chairman

*Original Signed by*

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Andrew S. Downes  
Deputy Chairman

*Original Signed by*

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Gregory F.M. Hazzard  
Commissioner

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Commissioner