

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 62 OF 2007

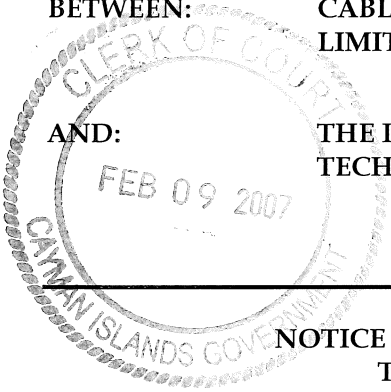
IN THE MATTER of an Application by CABLE AND WIRELESS (CAYMAN ISLANDS) LIMITED for Judicial Review Pursuant to Order 53 of the Grand Court Rules



AND IN THE MATTER of the Information and Communications Technology Authority Law (2006 Revision)

BETWEEN: CABLE & WIRELESS (CAYMAN ISLANDS) LIMITED APPLICANT

AND: THE INFORMATION AND COMMUNICATIONS TECHNOLOGY AUTHORITY RESPONDENT



NOTICE OF EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TO: THE CLERK OF THE COURT, Law Courts, George Town, Grand Cayman

1.0 The Applicant

Cable & Wireless (Cayman Islands) Limited, ("Cable & Wireless") a company incorporated in the Cayman Islands with its registered office at **One Technology Square, 19 Eastern Avenue, P.O. Box 293, Grand Cayman KY1-1104, Cayman Islands.**

2.0 Decision in respect of which relief is sought

ICT Decision 2006-6 made by the Information and Communications Technology Authority ("the Authority") on 14 December 2006

3.0 Relief sought

3.1 An Order of *Certiorari* removing ICT Decision 2006-6 into the Grand Court and to quash the said Decision.

3.2 An Order of *Mandamus* directing the Authority to hear, consider and properly determine on their merits the following applications by Cable & Wireless (Cayman Islands) Ltd. ("C&W"):

3.2.1 A Determination Request dated 25 October 2006 made pursuant to the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 for a determination that -

- (i) A mobile termination rate ("MTR") of CI\$ 0.1845 per minute in the Cayman Islands is not a cost-oriented rate as required by the *Information and Communications Technology Authority Law* (2006 Revision) (the "ICTA Law") and the *Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003* (the "Interconnection Regulations");
- (ii) an MTR of CI\$ 0.11 per minute would be such a cost-oriented rate;
- (iii) all mobile ICT Licensees in the Cayman Islands shall charge no more than CI\$ 0.11 per minute for the termination on their mobile networks of calls originating in the Cayman Islands, until such time as a new cost-oriented rate is determined based on a forward-looking long-run incremental cost methodology to be developed by the Authority.

3.2.2 An application dated 25 October 2006 pursuant to section 68(3) of the ICTA Law and section 6(h) of the Interconnection Regulations that the Authority determine forthwith a cost-oriented MTR rate applicable to all licensed providers of telecommunications services within the Cayman Islands.

3.3 A Declaration that the requirement imposed by regulation 10(1) of the Interconnection Regulations that interconnection charges charged (and chargeable) by a licensee (the "responder") must be both

(a) “non-discriminatory” (i.e. be identical in relation to each requestor for interconnection - regulation 10(1)(b)); and

(b) “reciprocal” so that “the responder and the requestor pay the same rate for providing each other the same services” (regulation 10(1)(c))

as a matter of law, requires that there be a single MTR applicable to all licensees for the provision of telecommunications services, and where, especially, such licensees have failed to agree among themselves such a single MTR, such MTR shall be fixed by the Authority.

3.4 A Declaration that until the Authority has completed the development and approval of a Forward Looking Long Run Incremental Cost (FLLRIC) model, the Authority shall determine the MTR applicable to all telecommunications licensees by applying C&W’s Fully Allocated Cost model with the adjustments set out in regulation 10(2) (a) to (f) of the Interconnection Regulations (“C&W’s adjusted FAC model”);

3.5 A Declaration that in accordance with paragraph 59 of Annex 5 to C&W’s Licence dated 10 July 2003 (“C&W’s 2003 Licence” or “C&W’s Licence”), the MTR determined by the Authority pending the completion of the development and approval of the FLLRIC model shall be no more than 25% higher or less than 25% lower than the MTR as determined by application of C&W’s adjusted FAC model as at 1 April 2004.

3.6 A Declaration that upon proper construction of the ICTA Law, the Interconnection Regulations and the terms of C&W’s Licence dated 10 July 2003, until the FLLRIC model is developed and approved by the Authority, where, especially, no single MTR has been agreed among all the telecommunications licensees, the Authority is not entitled to refuse to determine the MTR applicable to all telecommunications licensees, or to defer such determination to the completion of the development of the FLLRIC model, and any such refusal or deferment by the Authority is unlawful.

3.7 A Declaration that the question whether an MTR agreed as part of an Interconnection Agreement entered into between telecommunications licensees pursuant to the ICTA Law is cost-oriented, or is otherwise in compliance with the ICTA Law and the Interconnection Regulations, is a question within the sole jurisdiction of the

Authority, and should be determined by the Authority forthwith, in priority to, and without reference to, any alternative dispute resolution procedures to which the Licensees may be subject as parties to such an Interconnection Agreement in relation to such MTR .

3.8 Such further, consequential or other relief as to this Honourable Court seems just.

3.9 Costs.

THE GROUNDS UPON WHICH RELIEF IS SOUGHT

4.0 **Summary of General Facts**

4.1 The detailed facts are set out in and verified by the First Affidavit of Rudy B. Ebanks sworn on the 8 February 2007.

4.2 Cable and Wireless (Cayman Islands) Limited ("C&W") is a licensed telecommunications service provider pursuant to the Information and Communications Technology Authority Law, 2002, as amended and revised (now the 2006 Revision) (referred to herein as "the ICTA Law").

4.3 The Information and Communications Technology Authority ("the Authority") is a body corporate established under the ICTA Law with powers and duties, *inter alia*, to regulate the rates, prices, terms and conditions of all information and communication technology (including telecommunications) services and the providers of those services licensed under the ICTA Law.

4.4 Parties likely to be directly affected by this application include Digicel Cayman Limited ("Digicel"), TeleCayman Limited, ("TeleCayman"), WestTel Limited, Blue Sky Wireless Limited, E-Technologies Cayman Islands Limited d.b.a "caymanone", and Infinity Broadband Limited, all licensed providers of telecommunications services under the ICTA Law.

- 4.5 Interconnection is a critical element of any competitive telecommunications market. Interconnection is defined by the ICTA Law as the physical and logical connection of the public ICT (including telecommunications) networks of different ICT providers. It is interconnection which allows a telecommunications subscriber to, for example, complete a call to a subscriber on the network of another telecommunications Licensee.
- 4.6 The ICTA Law and the Information and Communications Technology Authority (Interconnection and Infrastructure Sharing) Regulations, 2003, (the **"Interconnection Regulations"**), prescribe the rules governing interconnection between telecommunications licensees. Under these, rules a request is made by one telecommunications licensee ("the requestor") to another ("the responder") for the provision of interconnection services. The licensees are required to enter into negotiations towards an interconnection agreement. If there are disputes between the licensees during or after the negotiations these disputes may be referred to the Authority for resolution in accordance with the Information and Communications Technology Authority (Dispute Resolution) Regulations, 2003 (**"the Dispute Resolution Regulations"**).
- 4.7 The ICTA Law and the Interconnection Regulations expressly require that interconnection services shall be provided based on charges and upon terms and conditions which are, *inter alia*, "cost-oriented" (s. 68(3) of the ICTA Law and regulation 6(h) of the Interconnection Regulations); "non-discriminatory", such that the responder applies equivalent conditions in equivalent circumstances, in providing equivalent services, as the responder provides itself, any non-affiliated licensee, or any subsidiary or affiliate of the responder, (s. 65(4) of the ICTA Law and regulation 10(1)(b) of the Interconnection Regulations); "reciprocal", such that the responder and the requestor pay the same rate for providing each other the same services, (regulation 10(1)(c) of the Interconnection Regulations); and determined in a transparent manner, (regulation 10(6)(d) of the Interconnection Regulations).
- 4.8 Regulation 10(1)(f) of the Interconnection Regulations further provides that interconnection charges shall be based on a Forward Looking Long Run Incremental Cost (FLLRIC model). Regulation 10(2) provides that until the development of an

approved FLLRIC model, C&W shall use its fully allocated cost model with certain adjustments set out under that regulation ("C&W's adjusted FAC model"). Regulation 10(3) provides for a one-time further adjustment of C&W's adjusted FAC model (in lieu of annual adjustments) after which no further adjustments shall be required until the FLLRIC model is developed.

- 4.9 C&W's Licence dated 10 July 2003 sets out the process for the development and approval of a FLLRIC model. Such process anticipated completion of the FLLRIC model within two years of the date of the Licence. To date the Authority has not completed the process for the development and approval of a FLLRIC model.
- 4.10 The interconnection charge for terminating a telephone call from the network of one telecommunications licensee on the mobile network of another telecommunications licensee is called the mobile termination rate ("MTR").
- 4.11 As permitted under the ICTA Law, on 29 January 2004 C&W reached agreement with Digicel and entered into an Interconnection Agreement on all terms and conditions relating to interconnection of Digicel's telecommunications network with C&W's network, save for the MTR.
- 4.12 Due to the pending launch of commercial operations by Digicel, which could not have been possible without a completed interconnection agreement with C&W on all terms, including the MTR, C&W agreed an "interim MTR" pending the determination by the Authority of the MTR applicable to all licensees pending the completion of the development and approval of the FLLRIC model. The dispute between C&W and Digicel relative to the MTR was submitted to the Authority on 29 January 2004 for resolution.
- 4.13 On 6 February 2004 C&W reached agreement with Wireless Ventures Cayman Islands Limited (operating as AT&T Wireless) ("Wireless Ventures"), also on all terms of interconnection, but again without agreement on the MTR. Similarly, due also to the pending launch of commercial operations by Wireless Ventures, which was not possible without a completed interconnection agreement with C&W, Wireless Ventures and C&W agreed an "interim MTR" pending the determination

by the Authority of the MTR applicable to all licensees pending the completion of the development and approval of the FLLRIC model. The dispute between C&W and Wireless Ventures was submitted to the Authority on 6 February 2004 for resolution. Digicel has since acquired the network and business formerly operated by Wireless Ventures in the Cayman Island.

- 4.14 The "interim MTR" agreed between C&W and Digicel and the "interim MTR" agreed between C&W and Wireless Ventures were not the same.
- 4.15 Under the terms of paragraph 59 of Annex 5 to C&W's Licence, the Authority was required to conduct a proceeding prior to 1 April 2004 to establish whether and to what extent the MTR should be amended until a FLLRIC model is created. The Authority failed to conduct any such proceeding whether before 1 April 2004 or at all.
- 4.16 On 3 March 2004 Digicel and Wireless Ventures both launched their commercial mobile telecommunications operations in the Cayman Islands thereby introducing for the first time competition in the market for the provision of telecommunication services.
- 4.17 On 19 May 2004 C&W entered into an Interconnection Agreement with TeleCayman, and again, agreed an "interim MTR".
- 4.18 Pursuant to the disputes submitted by C&W and Digicel, and by C&W and Wireless Ventures, the Authority commenced a single proceeding for the determination of a cost-oriented MTR. This proceeding will be referred to as the "2004 MTR Proceeding."
- 4.19 No determination was made by the Authority in the 2004 MTR Proceeding and no cost-oriented MTR has ever been determined by the Authority.
- 4.20 On 3 March 2004, C&W announced new rates for its mobile telephone services. This coincided with the launch of commercial operations by Digicel and Wireless Ventures. Digicel and Wireless Ventures filed complaints to the Authority alleging

that C&W priced its mobile packages below costs and was therefore guilty of anti-competitive conduct. The Authority conducted a proceeding to determine whether C&W's mobile rates were priced below cost. In order to do so the Authority applied an imputation test as provided by C&W's Licence. To determine the costs to be applied in the imputation test the Authority applied C&W's adjusted FAC model.

- 4.21 The Authority issued two Decisions, ICT Decision 2004-1 and ICT Decision 2004-2 in which it determined that C&W had failed the imputation test for determining whether the mobile services were priced below cost and that C&W was guilty of anti-competitive conduct in breach of the terms of its Licence.
- 4.22 C&W filed proceedings in the Grand Court to appeal against ICT Decision 2004-1 and ICT Decision 2004-2. Digicel and Wireless Ventures were granted leave to intervene in the Grand Court proceedings.
- 4.23 Whilst the Grand Court proceedings were pending C&W withdrew the mobile packages whose rates were impugned by the Authority in ICT Decision 2004-1 and ICT Decision 2004-2, replaced these packages with a new set of mobile packages and entered into negotiations with Digicel and Wireless Ventures on matters relating to the imputation tests to be applied to C&W's mobile services and the MTR. The result of these negotiations was a Settlement Agreement dated 23 July 2004 as amended on 27 July 2004 ("the Settlement Agreement"). The Settlement Agreement, among other things, provided that the MTR as between C&W and Digicel and C&W and Wireless Ventures would be set at CI\$0.1845 per minute pending the determination of a cost-based rate by the Authority applying the FLLRIC model.
- 4.24 The Settlement Agreement was however subject to the express condition that the Settlement Agreement would be submitted to the Authority for approval, and provided that, if such approval for any part of the Settlement Agreement was not obtained, the entire Agreement would be null and void. The effect of approval of the Settlement Agreement by the Authority, in the contemplation of the parties to the Settlement Agreement at the time, was that the MTR agreed would thereby become applicable to all other telecommunications licensees. In the absence of such approval there lay the possibility for the existence of more than one MTR in the market which

would render it impossible for licensees such as C&W to apply the MTR in a way which is non-discriminatory as required by the ICTA Law and the Interconnection Regulations.

- 4.25 The Settlement Agreement was also made based on the express assumption that the proceeding by the Authority for the completion of the FLLRIC model would have been complete by 30 June 2006.
- 4.26 Following the filing of the Settlement Agreement with the Authority the Grand Court proceedings were discontinued by consent and the disputes which were the subject of the 2004 MTR proceeding were withdrawn by C&W and Digicel and by C&W and Wireless Ventures respectively.
- 4.27 The Authority did not expressly approve the Settlement Agreement and stated that the Authority was not contractually bound by its terms.
- 4.28 The MTR of CI\$0.1845 in the Settlement Agreement is not a cost-oriented rate. This rate is also different from the Interim MTR agreed between C&W and TeleCayman. TeleCayman applied to the Authority for the determination of a cost-oriented MTR. The Authority, in ICT Decision 2005-6 given on 24 November 2005, declined TeleCayman's application, partly on the basis that it was in the process of developing the FLLRIC model which, according to the Authority was due to be completed by the third quarter of 2006.
- 4.29 The MTR of CI\$0.1845 in the Settlement Agreement and the Interim MTR agreed between C&W and TeleCayman means that there are two MTRs in the market which renders it impossible for C&W to meet the statutory requirement that interconnection charges be non-discriminatory.
- 4.30 On 5 April 2006, C&W applied to the Authority for a review and variation of ICT Decision 2005-6, sought a declaration by the Authority as to whether the MTR of CI\$0.1845 is cost-oriented, or alternatively, that the Authority fix the single cost-oriented MTR to be applicable to all telecommunications licensees pending the completion of the development and approval of the FLLRIC model. The Authority

has failed even to respond to that application. No determination has ever been made by the Authority on the question as to whether the MTR of CI\$0.1845 is cost-oriented.

4.31 The Authority has a statutory obligation to promote competition in the market for telecommunications services. An artificially inflated MTR creates a number of obstacles to the development of a competitive telecommunications market. Apart from maintaining prices for telephone calls to mobile telephones at an artificially high level for the consumer (with no reciprocal benefit), it places those service providers with a fixed line network (such as C&W) at a distinct disadvantage compared to those service providers who mainly operate a mobile network and without a significant fixed line network. The existence of more than one MTR in the market place also provides opportunities for some telecommunications service providers to engage in damaging acts of arbitrage to the detriment of others, and inconsistent with the maintenance of fair competition in the provision of telecommunications services.

4.32 The date for the completion of the development of the FLLRIC model has been extended by the Authority well beyond the date originally contemplated (July 2005) at the time C&W's exclusive telecommunications licence was terminated and the current non-exclusive licence granted, and also well beyond the time (June 2006) which was within the reasonable contemplation of the parties to the Settlement Agreement.

4.33 As a consequence of the above factors, in September 2006 C&W commenced the process for the determination by the Authority of a cost-oriented MTR as is required by the ICTA Law and the Interconnection Regulations. C&W has since September 2006 refused to charge or pay Digicel for interconnection charges based on the MTR of CI\$0.1845 per minute, on the basis that such an MTR is not cost-oriented as is required by the ICTA Law and the Interconnection Regulations. Arising from this dispute with Digicel, on 25 October 2006 C&W filed a Determination Request seeking a determination that the MTR of CI\$0.1845 per minute is not a cost-oriented MTR and that, at least pending the development and approval of the FLLRIC model, the MTR should be no more than CI\$0.11 per minute, which is the rate derived from the

application of C&W's adjusted FAC model until the FLLRIC model is developed and approved.

4.34 On 25 October 2006 C&W also filed an application to the Authority for the determination of a cost-oriented MTR which would be applicable to all telecommunications licensees pending the completion of the FLLRIC proceeding.

4.35 In Decision 2006-6 the Authority declined to consider C&W's applications and to determine a cost-oriented MTR.

5.0 Grounds for Judicial Review

5.1 *The Authority's decision to decline to consider the question whether the MTR of CI\$0.1845 per minute is a cost-oriented MTR, and if not, to determine a cost-oriented MTR for the Cayman Islands is an unlawful abdication by the Authority of its statutory duties and obligations under the ICTA Law and the Interconnection Regulations.*

5.1.1 Section 9 of the ICTA Law provides, *inter alia*,

"(1) Subject to this Law, the Authority has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Law."

...

"(3) Without prejudice to subsections (1) and (2), the principal functions of the Authority are

...

(c) to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services and ICT networks;

(g) to resolve disputes concerning the interconnection or sharing of infrastructure between or among ICT service providers or ICT network providers;

..."

“(4) The Authority may regulate the rate, prices, terms and conditions of any ICT service or ICT network that is required to be licensed where the Authority is of the opinion that it is in the interests of the public to do so.”

5.1.2 The ICTA Law and the ICTA Interconnection Regulations require that mobile call termination should be provided at rates which are reasonable, cost-oriented and upon terms which are transparent, non-discriminatory and reciprocal.

5.1.3 Section 65 subsections (5) and (6) of the ICTA Law provide:

“5. Any interconnection provided by a licensee under this section shall be provided at reasonable rates, terms and conditions which are not less favourable than those provided to –

- (a) any non-affiliated supplier;
- (b) any subsidiary or affiliate of the licensee; or
- (c) any other part of the licensee’s own business.

6. Without prejudice to subsection (5), the Authority shall prescribe the cost and pricing standards and other guidelines on which the reasonableness of the rates, terms and conditions of the interconnections will be determined.”

5.1.4 Section 68(3) of the ICTA Law provides:

“The cost [of making any interconnection] shall be based on cost-oriented rates that are reasonable and arrived at in a transparent manner having regard to economic feasibility, and shall be sufficiently unbundled such that the licensee requesting interconnection service does not have to pay for network components that are not required for the interconnection service to be provided.”

5.1.5 Regulation 6(f) of the Interconnection Regulations provides:

“costs and tariffs shall be sufficiently unbundled so that the requestor shall be obliged to pay the responder only for the network elements or infrastructure sharing services that it requires...”

5.1.6 Regulation 6(h) of the Interconnection Regulations provides:

“interconnection and infrastructure sharing rates shall be cost-oriented and shall be set to allow the responder to recover a reasonable rate of return on its capital appropriately employed, all attributable operating expenditures, depreciation and a proportionate contribution towards the responder’s fixed and common costs...”

5.1.7 Regulation 10(1) and (2) of the Interconnection Regulations provide:

- (1) A responder’s charges for interconnection or infrastructure sharing shall be -
 - (a) determined in a transparent manner, subject to any confidentiality claims under the Confidentiality Regulations to which the Authority may agree;
 - (b) non-discriminatory in order to ensure that a responder applies equivalent conditions in equivalent circumstances in providing equivalent services, as the responder provides itself, any non-affiliated licensee or any subsidiary or affiliate of the responder;
 - (c) reciprocal for the same service in order that the responder and the requestor pay the same rate for providing each other the same services, except for any applicable contribution towards an access deficit that may be approved by the Authority;
 - (d) preferably such that non-recurring costs shall be recovered through non-recurring charges and recurring costs shall be recovered through recurring charges;
 - (e) such that charges that do not vary with usage shall be recovered through flat charges and costs that vary with usage shall be recovered through usage-sensitive charges; and
 - (f) based on a forward-looking long-run incremental cost methodology once it is established by the Authority following a public consultative process.
- (2) In accordance with section 53 of Annex 5 to [C&W’s] licence, until the development of an approved FLLRIC model, [C&W] shall use its fully allocated cost model with the following adjustments (adjusted FAC model)-
...”

5.1.8 The Authority, as part of its duty under section 9 (4) of the ICTA Law to regulate the rates, prices, terms and conditions of ICT services, and as part of its duty under section 9(3)(c) of the ICTA Law to investigate and resolve complaints from consumers and service providers concerning the provision of ICT services, has a duty to ensure that interconnection rates, including the

MTR, are cost-oriented, non-discriminatory and reciprocal as is required by the ICTA Law and the Interconnection Regulations. The refusal by the Authority to determine a cost-oriented MTR pursuant to C&W's applications dated 25 October 2006 constitute a failure on the part of the Authority to discharge these duties under the ICTA Law.

5.2 *Upon proper construction of the ICTA Law and the Interconnection Regulations, the requirement imposed by regulation 10(1) of the Interconnection Regulations that interconnection charges charged (and chargeable) by a licensee (the "responder") must be both*

(a) *"non-discriminatory" (i.e. be identical in relation to each requestor for interconnection – regulation 10(1)(b)); and*

(b) *"reciprocal" so that "the responder and the requestor pay the same rate for providing each other the same services" (regulation 10(1)(c))*

as a matter of law, requires that there be a single MTR applicable to all licensees for the provision of telecommunications services, and where, especially, such licensees have failed to agree among themselves such a single MTR, such MTR shall be fixed by the Authority.

5.3 *Upon proper construction of the ICTA Law and the Interconnection Regulations, until the Authority has completed the development and approval of a FLLRIC model, the Authority shall determine the MTR applicable to all telecommunications licensees by applying C&W's adjusted FAC model;*

5.3.1 Up to 10 July 2003 C&W was the sole licensed provider of telecommunications services in and for the Cayman Islands under an exclusive operating licence granted by the Government of the Cayman Islands ("the Government") in the form of an Agreement between the Government and C&W dated 13th December, 1991 ("C&W'S 1991 Licence"). As part of the policy of the Government to liberalise the provision of telecommunications services, the Government and C&W entered into an Agreement dated 10 July 2003 ("the Agreement dated 10 July 2003"), the purpose of which was to replace C&W's exclusive licence with a non-exclusive licence and to introduce a new regulatory framework to govern the

liberalised market for telecommunications services. C&W was granted a new non-exclusive licence on 10 July 2003 (“C&W’s 2003 Licence or C&W’s Licence”) which licence was annexed to and therefore formed part of the Agreement dated 10 July 2003.

- 5.3.2 Section 11 of the ICTA Law empowers the Minister to give to the Authority “directions of a general character as to the policy to be followed in the exercise and performance of the functions of the Authority in relation to matters appearing to the Minister to affect the public interest, and the Authority shall give general effect to any such directions.” By a Directive dated 10 July, 2003, (“the Ministerial Directive”) the Minister directed the Authority to “make decisions consistent with, and give effect to” the Agreement dated 10 July 2003. To that extent therefore, the Agreement dated 10 July 2003, including C&W’s Licence, has the force of law.
- 5.3.3 A regulatory regime which was fair to C&W, and certain in its future application was a key element of the consideration to C&W for relinquishing its exclusive 1991 Licence and was therefore at the core of the Agreement dated 10 July 2003. The terms of C&W’s 2003 Licence formed part of the Agreement dated 10 July 2003 and are therefore binding on the Authority and, by virtue of the Ministerial Directive has statutory force.
- 5.3.4 The basis on which costs of interconnection services, including the MTR, would be determined after C&W’s exclusive licence was relinquished is set out in C&W’s 2003 Licence as part of the regulatory framework which constituted part of the consideration to C&W for relinquishing its exclusive 1991 Licence.
- 5.3.5 Paragraph 49 of Annex 5 to C&W’s Licence provides that interconnection rates shall be determined by the application of the FLLRIC model, when that model is developed by C&W and approved by the Authority.

- 5.3.6 Paragraph 50 of Annex 5 of C&W's Licence sets out a detailed process estimated to last 2 years for the development and approval of the FLLRIC model.
- 5.3.7 Paragraph 53 of Annex 5 to C&W's Licence provides that until the FLLRIC model is built, interconnection costs shall be based on C&W's Fully Allocated Cost (or FAC) model adjusted as set out in the said paragraph 53.
- 5.3.8 Paragraph 54 of Annex 5 to C&W's Licence prescribes a one time further adjustment which may be made to the C&W's adjusted FAC model, in lieu of annual updates, after which no further adjustments shall be made until the FLLRIC model is implemented.
- 5.3.9 The terms of paragraph 49 of Annex 5 of C&W's Licence in so far as they relate to interconnection charges are incorporated into the Interconnection regulations by regulation 10(1)(f); the terms of paragraph 53 of Annex 5 of C&W's Licence are incorporated into the Interconnection Regulations by express reference by regulation 10(2); the terms of paragraph 54 of Annex 5 of C&W's Licence are incorporated into the Interconnection Regulations by express reference by regulation by regulation 10(3).
- 5.3.10 The application of C&W's adjusted FAC model for the determination of the MTR pending the development and approval of the FLLRIC model is a mandatory requirement of C&W's Licence, the ICTA Law and the Interconnection Regulations as part of a regulatory framework which was intended to create certainty in the manner in which interconnection charges are determined until the FLLRIC model is developed and approved.
- 5.4 *Upon proper construction of the ICTA Law, the Interconnection Regulations and the terms of C&W's 2003 Licence, the MTR determined by the Authority pending the development and approval of the FLLRIC model shall be no more than 25% higher, nor less than 25% lower than the MTR as determined by application of C&W's adjusted FAC model.*

- 5.4.1 Pursuant to section 68(3) of the ICTA Law and regulation 6(h) of the Interconnection Regulations interconnection costs, including the MTR, are required to be cost oriented.
- 5.4.2 Pursuant to paragraphs 53 and 54 of Annex 5 to C&W's 2003 Licence as incorporated into the Interconnection Regulations by regulations 10(2) and 10(3), the Authority is obliged to apply C&W's adjusted FAC model for the determination of the MTR pending the development and approval of the FLLRIC model.
- 5.4.3 Paragraph 59 of Annex 5 to C&W's Licence provides:
"Prior to April 1, 2004, the Authority shall conduct a proceeding to establish whether and the extent to which the mobile termination rate should be amended until a FLLRIC model is created. Any such determination can only result in no greater than a 25% increase or decrease to the mobile termination rate charged by mobile Licensees at that time. Any change shall take effect on or after April 1, 2004 as specified by the Authority and shall be superseded by FLLRIC rates when available."
- 5.4.4 Paragraph 59 of Annex 5 to C&W's Licence requires that the MTR, as determined by application of C&W's adjusted FAC model may only be amended by an increase or decrease no greater than 25% in a proceeding which the Authority should have conducted by 1 April 2004 and subject to such amendment, if any, the MTR as determined by the application of C&W's adjusted FAC model shall be the applicable MTR and shall remain in place only to be superseded by the rates as determined by the FLLRIC model.
- 5.4.5 Paragraph 59 of Annex 5 to C&W's Licence is binding on the Authority since C&W's Licence forms a part of the Agreement dated 10 July 2003 to which the Authority is a party and which has statutory force by virtue of the Ministerial Directive.
- 5.5 *Upon proper construction of the ICTA Law, the Interconnection Regulations and the terms of C&W's Licence dated 10 July 2003, until the FLLRIC model is developed and approved by the Authority, where, especially, no single MTR has been agreed among*

all the telecommunications licensees, the Authority is not entitled to refuse to determine the MTR applicable to all telecommunications licensees, or to defer such determination to the completion of the development of the FLLRIC model, and any such refusal or deferment by the Authority is unlawful.

- 5.5.1 Paragraphs 49, 50, 53, 54 and 59 of Annex 5 to C&W's Licence, and regulations 6(h), 10(1), 10(2) and 10(3) of the Interconnection Regulations create a regulatory regime of certainty regarding interconnection charges, including the MTR, whereby even though the preferred model for the determination of costs for the purpose of establishing the MTR is the FLLRIC model, express provision is made for the application of C&W's adjusted FAC model for the determination of the MTR for the period pending the development and approval of the FLLRIC model.
- 5.5.2 By paragraph 54 of Annex 5 to C&W's Licence and regulation 10(3) of the Interconnection Regulations, C&W's adjusted FAC model is fixed until the completion of the development of the FLLRIC model, and by paragraph 59 of Annex 5 to C&W's Licence, the level of adjustment to the MTR was restricted pending the introduction of rates as determined by the FLLRIC model.
- 5.5.3 It was the clear intention of the parties to the Agreement dated 10 July 2003, and of the Governor in Cabinet, when it made the Interconnection Regulations, that there be no period of uncertainty as to how the MTR should be determined.
- 5.5.4 Especially in light of regulation 10(1)(b) that interconnection rates shall be non-discriminatory, where there exist two MTRs in the market, especially where one Licensee is the responder with respect to both such MTRs, the Authority has an obligation under the ICTA Law to determine a single cost-oriented MTR forthwith, and, upon application by a Licensee for such a determination, may not defer such determination pending the completion of the development and approval of the FLLRIC model.

5.6 *The question whether an MTR agreed in an Interconnection Agreement between telecommunications licensees is cost-oriented, or otherwise in compliance with the ICTA Law and the Interconnection Regulations, is a question within the sole jurisdiction of the Authority, and it is a requirement of the ICTA Law and the Interconnection Regulations that an MTR agreed among telecommunications licensees shall comply with the Law and the Regulations.*

5.6.1 Regulation 25 of the Interconnection Regulations provides:

“Interconnection and infrastructure sharing agreements and the procedures for arriving at such agreements shall be based upon the terms of the Law, conditions of the licence, relevant regulations, regulations, (*sic*), decisions, directives or standards and other guidelines that the Authority may prescribe.”

5.6.2 Regulation 22(2) of the Interconnection Regulations provides:

“The Authority may reject any interconnection or infrastructure sharing agreement, or any portion thereof, if it determines that the agreement does not comply with the Law, conditions of the licence, relevant regulations, regulations, (*sic*), decisions, directives or standards and other guidelines that the Authority may prescribe.”

5.6.3 Regulation 7(2) provides:

“The Authority may, in its discretion, direct a licensee to amend the legal framework document to reflect the terms of its licence, relevant rules, regulations, decisions, directives or standards and other guidelines that the Authority may prescribe...”

5.6.4 Consequently, where the question as to whether the mobile termination rate agreed between telecommunications licensees is cost-oriented or is otherwise in compliance with the ICTA Law is brought to the Authority for determination, it is an improper exercise of the power or discretion of the Authority under regulation 10(i) of the ICTA Dispute Resolution Regulations to decline to consider or determine the dispute on the ground that the subject matter of the dispute should be governed by the terms and conditions of an existing contract between the party referring the dispute and the respondent.

5.7 *The Authority's refusal to determine a cost-oriented MTR rate, based on its conclusion, at paragraph 10 of ICT Decision 2006-6, that no meaningful evidence can*

be adduced to support a change in the MTR pending the conclusion of the public process for developing the preferred cost methodology, is contrary to the ICTA Law and the Interconnection Regulations, and is unreasonable, irrational, and inconsistent with the Authority's own continuous practice and the Authority's own previous decisions.

- 5.7.1 Under the terms of C&W's Licence and the Interconnection Regulations, until the FLLRIC model is built, costs calculated for interconnection rates shall be determined by applying C&W's adjusted FAC model.
- 5.7.2 The FLLRIC process is still incomplete. The Authority in ICT Decision 2006-6 has given no indication as to when it is expected that the FLLRIC model shall be developed and approved. On 26 January 2006 the Authority issued additional interrogatories to C&W thereby reopening the process and extending the date by which it can reasonably be expected to be completed.
- 5.7.3 The Authority has repeatedly applied C&W's FAC model since 2004 for the purpose of determining whether C&W's retail prices satisfy the applicable imputation tests (one of the purposes for which the adjusted FAC model may be applied pursuant to paragraph 49 of Annex 5 to C&W's 2003 Licence).
- 5.7.4 In particular, in ICT Decision 2004-1 and ICT Decision 2004-2 the Authority used C&W's adjusted FAC model as the basis for making extremely damaging determinations that C&W had priced its mobile services below cost and was guilty of anti-competitive conduct in breach of the terms of C&W's Licence.
- 5.7.5 The application of C&W's adjusted FAC model, in addition to evidence thus far available to the Authority from the FLLRIC process, would clearly show that the MTR of CI\$0.1845 per minute is significantly above cost, and therefore not in compliance with the ICTA Law and the Interconnection Regulations.

5.7.6 In the circumstances, the Authority is mandated by law to apply C&W's adjusted FAC model to determine the MTR pending the completion of the FLLRIC process. The fact that the Authority has previously applied and continues to apply C&W's adjusted FAC model as the basis for the imputation tests, including the imputation tests carried out in ICT Decision 2004-1 and ICT Decision 2004-2, but now refuses to apply C&W's adjusted FAC model as the basis for determining a cost-oriented MTR, constitutes an inexplicable inconsistency in the exercise by the Authority of its regulatory functions.

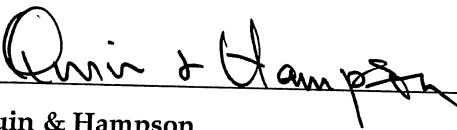
5.8 *The decision of the Authority to decline to consider C&W's application for a determination of a cost-oriented MTR is irrational and unreasonable on the ground that the Authority failed to consider or to give sufficient weight to a number of considerations brought to the attention of the Authority by C&W, namely:*

5.8.1 the undue delay in the completion of the FLLRIC process which constitutes a fundamental change in circumstances not anticipated by the Authority nor C&W at the time of the issue of C&W's Licence on 10 July 2003 nor by the parties to the Interconnection Agreement the subject of which the Determination Request was made;

5.8.2 the fact that C&W, as a responder to requests for interconnection is party to an Interconnection Agreement with TeleCayman which provides for an MTR which is different from the MTR agreed as part of the Settlement Agreement with Digicel and Wireless Ventures has created a situation whereby there exist more than one MTR, which therefore renders it impossible for C&W to offer interconnection services on terms which are non-discriminatory, as required by the ICTA Law and the Interconnection Regulations;

5.8.3 the fact of the existence of an artificially high MTR and the opportunities for acts of arbitrage, damaging to C&W and inconducive to the development of a fair and competitive telecommunications, market which the Authority, by its statutory duty to promote competition in the provision of telecommunications services, is obliged to prevent and to guard against.

Dated this 9th day of February 2007



Quin & Hampson

Attorneys-at-Law for the Applicant

NOTE: Pursuant to Order 53 rule 3(3) unless the Judge is of the opinion that leave may be granted without the need to hear from Counsel on behalf of the Applicant, an oral hearing is requested before this application for leave to apply for Judicial Review is considered and determined by this Honourable Court.

This EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW was issued by Quin & Hampson, Attorneys-at-Law for the Plaintiff whose address for service is 3rd Floor, Harbour Centre, P.O. Box 1348, George Town, Grand Cayman.