Submission
in response to
the review of C&W RIO 6
[non- confidential]

Index

INDEX....2

1. INTRODUCTION.... 3

2. GENERAL COMMENTS.... 4

2.1 NATURE OF THE OUR'S REVIEW PROCESS....4

2.2 DISCRIMINATION....4

2.3. DETRIMENTAL EFFECTS OF THE CURRENT APPROACH....5

2.4 INFRASTRUCTURE/CAPACITY COSTS 7

2.5 USAGE CHARGES 7

3. OVERVIEW OF SUBSTANTIVE COMMENTS ON RIO 5....8

3.1 NEW SERVICES/REQUIREMENT TO SIGN A NEW RIO....8

3.2 BANK GUARANTEE 10

3.3 FORECASTING REQUIREMENTS 10

3.4 FOOTWAY JOINTING BOX....11

3.5 CONFIDENTIALITY....11

3.6 CURRENCY FLUCTUATIONS 12

3.7 FIXED TO MOBILE RETENTION 12

3.8 CLI 13

3.9 EARLY TERMINATION FEE....14

3.10 TARIFFS....15

4. CONCLUSION....16

1. Introduction

Digicel welcomes the opportunity to provide the OUR with detailed comment on the current version of Cable and Wireless Jamaica ("C&W") RIO 6. Digicel has a number of fundamental concerns with a number of clauses contained within RIO 6, and notes with particular exception that its comments to RIO 5 made in January 2008 do not appear to have been considered in the current irritation of RIO 6. Digicel remains particularly concerned with a number of proposed clauses in RIO 6 as they create a significant imbalance between the commercial position of C&W and the other contracting party. An overview of Digicel's concerns with the content of the RIO are summarised below and are also highlighted more particularly in individual comments on each of the attached suite of documents. Where information is commercially sensitive it has been redacted and is marked with the following […] and can only be disclosed by the OUR with Digicel's express prior written permission.

The succeeding comments are not exhaustive and Digicel's decision not to respond to any particular issue raised by the OUR or any party does not necessarily represent agreement, in whole or in part with the OUR's or that party's position on these issues; nor does any position taken by Digicel in this document mean a waiver of any sort of Digicel's rights in any way. Digicel expressly reserves all its rights. Any questions or remarks that may arise as a result of these comments by Digicel may be addressed to:

Richard Fraser
Head of Legal and Regulatory
Digicel (Jamaica) Limited
Fax: +1 867 920 4626
Tel: +1 876 878 0409
Email: richard.fraser@digicelgroup.com

2. General comments

2.1 Nature of the OUR's review process

Digicel notes the OUR's position that it has a responsibility to protect new entrants who may not have the bargaining power to secure an agreement with C&W. The OUR must also recognise that the Jamaican market comprises operators at different stages and business models. Digicel is firmly of the view that it is not appropriate for there to be a process which effectively overrides terms which were commercially agreed between the parties concerned.

An interconnect agreement is first and foremost a commercial agreement between two parties. The protection that the OUR seeks for "weaker" operators could and should be achieved by other means. According to the Telecommunications Act, the OUR has also the ability to impose certain additional obligations on "dominant" operators, such as the obligation to apply any conditions agreed on a non-discriminatory basis. Therefore, any material changes to the reference offer, have to be offered to all other operators in the market (so as to comply with the non-discrimination obligation). The key word is "offered", i.e. it should be optional for an operator to chose whether or not to include any modifications done to a RIO subsequent to that operator's execution of its specific interconnect agreement with the dominant operator. Moreover, the RIO is akin to an a la carte menu offered by the dominant operator, from which an operator may choose the elements of the offer which are applicable to it and that it may wish to have incorporated into any pre-existing interconnect agreement which it may have entered into with the dominant operator.

2.2 Discrimination

Digicel appreciates the OUR's fundamental concern that there should be no discrimination. However, the OUR should accept that the Jamaican market comprises a number of different types of operators, with differing needs and requirements.

Digicel – all rights reserved

Discrimination only occurs where (in identical circumstances) operators are treated differently – where conditions are not the same, it is not anti-competitive for differences in contractual terms to exist. The OUR's position on "unifying" the RIO does not have the flexibility which is essential to reflect these differences. For instance, a fixed operator has to some extent different needs and priorities to that of a mobile operator. It is for this reason that Digicel has significant concerns with the "one size fits all" approach that the OUR at least previously appeared to advocate.

The OUR is not and could never be in the position to determine what is in the best commercial interest of all operators in the Jamaican telecommunications market. It is only through negotiation of an interconnect agreement, based on the foundation of a RIO as a minimum offering from dominant operators, that companies can pursue that objective for themselves. It is no doubt against this backdrop that the Act envisages negotiations (as per international best practice) as an important prerequisite to agreeing an interconnect agreement. The requirement to negotiate considered in the context of the Objects of the Act will no doubt also lead to what parliament envisaged as a socially optimal outcome.

2.3. Detrimental effects of the current approach

At present, C&W takes the position that once the RIO has been assessed by the OUR, "no" amendment can take place. This position is incorrect as the OUR merely reviews parts of the agreement and not the entire document. Further, if the parties agree a variation, it should not pose an issue as long as C&W "offers" it to others (who would then have the opportunity to amend their own agreements accordingly if they wished to do so).

We strongly recommend that the OUR clearly states that the RIO is merely a minimum **offer** and that everything is open for negotiation or at the very least to provide written confirmation (in the form of an Annex) of the precise clause number and document name which have been 'approved' or acknowledged by the OUR.

Digicel is currently engaged in several legal disputes with C&W as a direct result of a clause which was “inserted” in RIO 5, an offer that Digicel has not availed itself of incidentally, following “approval” by the OUR. This said clause remains in the current version of RIO 6. In particular, C&W has inserted clause 10.4, which is now used by C&W (in conjunction with clause 23.1) to increase the interconnect rates in a way which we now understand was never the intention of the OUR when it “approved” that clause. Based on its interpretation of how a RIO operates C&W have sought to unilaterally impose such terms on Digicel by reference to it being a part of an ‘approved’ RIO despite the fact that Digicel has neither accepted same nor agreed to any variation in its pre-existing interconnection agreement to incorporate such provision as set out in the RIO. It is not for the OUR, nor do we believe was the intention of the OUR, to enter into agreements on behalf of Digicel or any other operator but nevertheless C&WJ has attempted to avail itself, where commercially advantageous to itself, of a purported ambiguity surrounding OUR “approvals” while otherwise relying on actual agreements if the impact of the same “approvals” runs counter to its commercial interests.

This illustrates the need for the OUR to clearly state that a RIO is a minimum **offer** of the terms on which interconnection may be effected between operators and that such terms are only incorporated by agreement between the Parties. This is a vital distinction which needs to be made particularly in the context where Digicel and C&W have a pre-existing interconnect agreement. As such it is more a matter that the proposed terms in subsequent RIO’s (such as in RIO 5 or RIO 6) may be incorporated by amendment or variation to the terms of pre-existing interconnect agreements which the parties may have signed and that it is not an absolute requirement that interconnected parties must sign new interconnect agreements which are based on subsequent RIO’s published by the dominant operator.

Essentially the problem that we face is that the disputes are civil matters and the OUR is not a party. Therefore, the court will merely examine the text of the agreement and it is (for obvious reasons) difficult for the court to ascertain a position

Digicel – all rights reserved

which relies on the true "intention" of a clause that Digicel had not, proposed, agreed to or negotiated itself. In short, it is not appropriate for a party (in this case the OUR) to take on the responsibility of negotiating for all alternative operators; especially when it has not taken all of the alternative operators considerations on board (which it would be virtually impossible to do) and it does not have to live with the often unfortunate, burdensome and costly implications.

2.4 Infrastructure/capacity costs

Prior to approving any C&W tariff, the OUR must undertake a thorough and detailed assessment of the one off and recurring costs to ensure that they accurately reflect the actual cost of provision. This is essential to ensure C&W's compliance with the principle of cost-orientation. In general, there is significant focus on the termination fees (which admittedly are very important), however there are several other fees in an interconnect agreement that also need to be scrutinized, e.g. the costs of physical interconnect.

The apportionment of costs for infrastructure must ensure that there is no over-recovery of C&W's costs. RIO5 currently allows C&W to recover its entire interconnect infrastructure costs from each party (RIO 6 has no tariffs relating to any of the Joining services). Where an incumbent can simply pass its costs on to another party there is no incentive for the operator to be efficient or to price its services on the basis of their true cost. The most efficient and equitable arrangement is for each operator to carry its own cost and that only the cost of the physical connection between the two parties should be split 50/50. An alternative way to apportion costs could be based on the in/out ratio of traffic exchanged between the networks.

2.5 Usage charges

Digicel also questions the validity of the usage charges contained in the Tariff Schedule. The current charges include a significant differential between the rates applied to local, regional and national traffic which is not replicated in other jurisdictions with similar network topologies. See comments in the tariff schedule. It is

noticeable that in essence all rates have increased in the tariff schedule – many by several 100%. This cannot be justified especially since many of them are already high by international comparison.

3. Overview of substantive comments on RIO 6

3.1 New services/requirement to sign a new RIO

At present, for a number of reasons (not least due fundamental concerns with certain provisions contained); Digicel has not signed an agreement based on RIO 5 or the proposed RIO 6 and the latest bilateral interconnection agreement between C&W and Digicel (the "ICA") is based on RIO 3. The ability to add new services is explicitly contained within RIO 3[1] and the ICA as well as RIO 5 and proposed RIO 6.

Notwithstanding this express provision, as well as the obligation (in section 30 of the Telecoms Act) which obliges C&W to interconnect with other operators in accordance with the principle of cost orientation (i.e. C&W should not discriminate between operators in terms of the interconnect services provided), C&W has refused to provide the incoming international service to Digicel on the basis of clause 18 of the Legal Framework document in the ICA which is the same in RIO 5, which was 'approved' by the OUR and is also in the draft RIO 6. This provision provides:

> *"18.1 Either Party may, at any time, request from the other Party an agreement to interconnect their respective Systems for the provision of any service or facility which (a) in the case of C&WJ it offers to provide under its current published RIO and (b) in the case of Telco it offers to provide or provides under an interconnection agreement with another public voice carrier in accordance with the Act.*

[1] Interconnection Agreement – clause 18 (RIO 3)

18.2 Following a request by the Telco pursuant to Clause 18.1, the parties shall meet to discuss inter alia service forecasts, technical requirements and operational issues. When the parties are reasonably satisfied that the Telco's System meets the technical requirements of C&WJ's then current published RIO in relation to the service or facility which Telco has requested, C&WJ shall offer to enter into an agreement to interconnect the Parties' respective Systems for the provision of the service or facility to the Telco on the terms set out in C&WJ's then current RIO. Upon acceptance of this offer by Telco, ***this Agreement shall be amended*** *by the addition of a relevant Service Description, together with a revised Service Schedule and Tariffs Schedule and, if applicable, a revised Parameter Schedule and Joint Working Manual to give effect to the new terms* ***or, if appropriate, the Parties shall agree*** *and enter into a new interconnection agreement." [our emphasis]*

On the basis of the wording of the text, it is clear that there is provision for new services to be added to the existing ICA between the parties or alternatively, the parties may agree to enter into a new contract. C&W has taken the unilateral position that it requires Digicel to enter into a new contract based on the opportunistic and flimsy reliance on the words "*if appropriate*" which it unilaterally deemed it to be and is refusing to provide Digicel with a requested new service until then. This was clearly not the OUR's intention when it reviewed the Agreement. However as a result of a blanket 'approval' of the RIO, C&W has taken an unduly restrictive interpretation of the clause and is essentially discriminating against Digicel (as the incoming international service is available to any other operator in the market, but not Digicel). Also it is always open for parties to agree to sign a new version of any agreement t if they are in agreement that it is the most appropriate way of doing the amendment(s). Hence it is no need to have such wording in the Agreement as it could - and evidently is – being abused.

The OUR must refrain from 'approving' any terms (such as clause 18) which will

have the effect of permitting C&W to unilaterally oblige the other party to sign a new RIO (notwithstanding the other party's valid commercial reasons for refraining to do so) and which enable C&W to refuse to provide new services, even though these services are available to others in the market.

3.2 Bank guarantee[2]

While this requirement may be necessary for a new entrant, it is not appropriate for all operators who wish to contract with C&W, therefore the text should be amended to reflect this. For example, where a guarantee is required on objective grounds, it may be possible to obtain a guarantee by a sufficiently solvent parent company.

3.3 Forecasting requirements[3]

Operators are required to forecast demand for C&W's services. While this may sometimes be possible, it is not always the case (e.g. predicting the number of calls to C&W's fault reporting service). As such, it is inequitable for C&W to require such forecasts to be provided prior to providing service and further to penalise operators for any inability to accurately estimate the level of demand. The demand for many of these services is beyond the operator's control. Therefore, all forecasting requirement should be carefully examined by the OUR and where it is concluded that it would be unreasonable or impossible for the operator to accurately estimate demand, the forecast requirement should be removed. In addition it would be easier to have just two categories of trunks – national and international trunks, hence it would not be necessary to undertake any more granular forecasting than a simple estimate of the relevant traffic volumes on these respective trunks.

---

[2] Legal Framework – clause 28

[3] Joint Working Manual – Clause 2.4

3.4 Footway jointing box

As drafted, it is not clear that either party may provide the footway jointing box – in fact, C&W asserts that it must provide the service (all of the service definitions are drafted on the basis of this assumption). While the contracting party may require C&W to provide the footway joining box, it must be possible to have this facility provided by an alternative party (e.g. as the result of a tender process), especially where the alternative party can do so at a more cost efficient price than C&W. C&W has now also taken the position that it is the other party that should carry all costs which is a major step back in the liberalisation, contrary to best practise and as such shouldn't be allowed.

3.5 Confidentiality It is essential that the confidentiality requirement[4] is strengthened. Operators are required to disclose substantial information to C&W on its proposed services (e.g. as a result of the forecasting requirements and when providing data to the directory enquiry services). As a vertically integrated company there is always the concern that such data could be disclosed by C&W so as to secure a commercial advantage to its downstream business. Therefore, we request that the text of the provision be revised to make it clear that a breach of the confidentiality requirements is material and therefore would give rise to the right to terminate the agreement. There should be explicit wording prohibiting a party in any way to use or take advantage of information in respect of a Party's Subscribers which is passed to the other Party for any purpose and specifically not by its Customer Facing Divisions. Due to the nature of interconnect the parties hand over information that never would be shared with any competitor in any other business as such it is absolutely vital that no commercial advantage is taken from any such information – this is e.g. a legal requirement in the EU.

[4] Legal Framework – Clause 19

3.6 Currency fluctuations[5]

Under the RIO, C&W has sought the unilateral right to vary its charges in the event that the Jamaican dollar devalues/revalues against the US dollar.

It is clearly unacceptable that C&W is able to increase its charges but that no such increase would be available to Telco. We therefore request that the text should be amended to make it clear that the ability to effect such increases be reciprocal. It should also be clear that if allowed only changes to a party's own charges should be allowed.

3.7 Fixed to mobile retention/bad debt

After more than 8 years of liberalisation, the bad debt retention allowance on fixed to mobile calls needs to be removed altogether. Common sense will tell you that if you permit an operator to charge up to an 8% surcharge on a particular service providing it can show that it is incurring such levels of bad debt, then that operator is not only discouraged from removing non-paying customers from its subscriber base but will in fact be **encouraged** to maintain at least an equivalent level of non-paying customers for which it can effectively receive subsidy for from paying customers. It flies in the face of all regulatory economic convention to allow for such a high and perpetual charge for bad debt. Indeed C&WJ in its statutory accounts show that bad debt is written off against corporate tax so there is in effect a 'double count' on bad debt that means C&WJ are not only allowed to recover such defaults but also enjoy the benefits of writing the same off at the taxpayers' expense.

Furthermore, when the bad debt retention charge was applied to fixed to mobile calls, it was generally envisaged that such calls were responsible for high landline phone bills. However, that fact, which was disputable in any event, is certainly no longer true where new services including broadband services is considerably changing the makeup of the average landline phone bill. Why should callers of fixed to mobile

[5] Legal Framework – Clause 10.4

networks be forced to subsidise unpaid bills by customers availing themselves of these other services. In the event a bad debt retention will be maintained, which Digicel rejects, it should reflect the actual bad debt and in no event exceed 2% which still would be well above the level a prudent telecommunications company would have its bad debt. This line item is today in fact a profit line for C&W which never was or could be the intention.

Further, in RIO 6 C&W now propose to effect a fundamental change to the manner in which the fixed to mobile origination service is charged. C&W have sought to introduce the ability to calculate payments by reference to mobile termination rates as opposed to the established fixed origination retention regime. Digicel does not accept that such a change can be considered through the consultation on a RIO and that instead a separate industry consultation must be undertaken by the OUR if this indeed is a matter which is to be seriously considered. The implications for such a seismic shift in the way the market has operated since liberalisation through a backdoor amendment to a RIO (in itself contrary to natural justice requirements) would have a profound effect on operator's profitability (entirely aimed at a positive outcome for C&WJ in this regard) and prices of other services. This in turn would have implications in terms of requiring an entire review of regulated (such C&W's price cap) and unregulated pricing (such as MTM interconnect rates) by the OUR and industry, respectively. By analogy, the magnitude of the issue we are dealing with, would be no different if C&WJ attempted to introduce a Receiving Party Pays (RPP) regime to Jamaica and eliminating the prevailing Calling Party Pays system by simply making various amendments to its RIO. The C&WJ RIO cannot be used as a vehicle for implementing changes to the fundamentals of the market as though the RIO in and of itself was some form of primary or secondary legislative tool.

3.8 CLI[6]

Bypass is an issue which affects all licensed operators in Jamaica. It is also a

---

[6] Legal Framework – Clause 13

problem that is increasing in Jamaica on an almost exponential scale. It is essential that operators have the necessary tools to detect bypass and (where it occurs) ensure that the appropriate international termination rate and Universal Service Levy are paid. In the absence of a contractual requirement for such CLI to be passed on all national calls, certain operators have an incentive to pass international calls without CLI in order to take advantage of the lower (national) termination rate and avoid paying the USO levy, thereby depriving Jamaica of revenues which would improve the educational sector.

Therefore, we strongly suggest that the text of the RIO be amended to include an express requirement that all national calls must be presented with CLI. In the event that the caller has decided to block their number, the CLI will be suppressed by the terminating operator (CLIR). Therefore, wherever bypassers chose to simply 'remove' or fail to present the CLI (for whatever reason), operators could still ensure that the appropriate international termination rate was levied and the USO levy paid.

3.9 Early termination fee[7]

Although not in the RIO 6 Tariff Schedule, Digicel assumes C&W still want to maintain its charges for the joining services. As drafted, C&W retains the ability to charge an early termination fee in the event that the other party decides to cancel capacity which has been ordered. The OUR must ensure that these early termination charges represent a true and accurate reflection of the actual costs which have been incurred by C&W at the time of cancellation and to the extent the investment been recovered via already paid charges. The latter is also a parameter that has to be factored onto the tariffs properly which is not the case today.

.

As the OUR is aware, for a number of years Digicel has unsuccessfully attempted to secure direct interconnection with C&W mobile. As a result of a constructive refusal of

[7] Tariff Schedule – Part 1

this request at present, calls to and from C&W mobile are transited via C&W's fixed network at an additional cost to Digicel (albeit disputed by Digicel) . It is essential that if direct interconnection becomes a reality, C&W must not be permitted to charge an early termination fee to Digicel. The current transit arrangement is not of Digicel's making or request and as such, it must not be penalised if the current inefficient routing of calls between itself and C&W comes to an end.

3.10 Tariffs

Digicel questions the OUR's ability to undertake a comprehensive analysis of each and every relevant tariff contained within the RIO. In light of the regulatory requirement for C&W's rates to be cost-oriented for certain services, it is exactly this degree of analysis which is essential to ensure compliance. The subjective nature of C&W's Activity Based Accounting approach allows scope for significant misallocation of costs (as discussed further in our attached comments on the 'Assumptions and Methodology' and with largely non-prescript and relatively non-intrusive regulatory accounting separation requirements imposed on C&WJ by international standards it raises the question as to whether reliance on C&WJ costs, or more accurately purported costs, alone is sufficient e.g. rates should be sanity-checked against appropriate international benchmarks. It is noticeable that C&W is suggesting increases of virtually all services and in many cases with several 100%. This cannot be accepted.

C&W is currently charging its retail customers 25 Jamaican Dollars per call for national directory enquiry services, while it charges other operators between 51.966 Jamaican dollars and 32.278 Jamaican Dollars per minute for the equivalent wholesale service (RIO 6 suggests a major increase to 104.416 – 113.702J$/cal)l. C&W therefore is charging up to over one hundred percent more (RIO 6 suggests up to 400% more) for the services to other operators than it charges its own retail customers. Digicel contends that that C&W is abusing its dominant position on the provision of wholesale directory enquiry service by either charging a wholesale rate which is too high and/or operating a margin squeeze. In a letter to Digicel Turks and

Caicos, C&W has explained the normal 'margin' that C&W would expect to exist between wholesale and retail rates:

> *"…C&W submits that the appropriate, and proportionate measure…for Digicel to provide services…on a wholesale basis, [is] at a retail rate it offers to its own retail customers, less a 20% discount…"*

While Digicel makes no comments on the appropriateness of the above 'margin', it clearly indicates that it is imperative for the OUR not only to examine whether individual rates are cost oriented, but also whether the margin between wholesale and retail rates are sufficient to allow other operators to compete. This is no easy task, but it is clear that before 'approving' any rate, this degree of OUR analysis is essential to prevent/avoid the crystallisation of anti-competitive behaviour. In addition, this ought not to be controversial as C&W seems to have a view on what margins operators should have on various services.

4. Conclusion

In view of the comments made above (and more particularly in the marked up versions of the suite of RIO documents) it is clear that Digicel has a number of fundamental concerns with the content of the current interconnect agreement. Not least, C&W's compliance with section 30(1)(a)(iii) of the Act which contains the obligation on a dominant carrier such as C&WJ to adhere to the principle of cost-orientation. In a number of key areas in RIO 6, C&W appears to have complete discretion in assessing its charges – this surely cannot be the OUR's intention and as such, any 'approval' of the RIO simply permits C&W to crystallise the commercial imbalance caused by the agreement and to maintain its dominant position in the fixed line market which, after 8 years of liberalisation has still not enjoyed effective competition. As currently drafted, the RIO does not represent a fair and equitable balance between C&W and its other contracting parties.

As a result of the significant information asymmetry that exists, it is virtually impossible for any regulator to comprehensively assess the validity of the RIO, accuracy of all charges and impact of the agreement on different players in the market. A one size fits all approach is simply not achievable. It is for this reason that Digicel questions the appropriateness of the OUR's current review process, whereby C&W uses the "approval" process as a justification for refusing to amend provisions within the agreement.

Digicel understands that the OUR seeks to ensure that all operators are able to secure a minimum level of services from the dominant operator and this is a valid objective and indeed the purpose of a RIO. However, Digicel questions whether this objective is being met under the current process. If the RIO properly represents a minimum standard, then it must be clarified that (1) all terms of the RIO can be negotiated and (2) it is optional for an operator to "upgrade" to a later version of the agreement or have certain sections from a later RIO incorporated in its existing interconnection agreement. This would address the concern with compliance with the non-discrimination obligation that the OUR appears to have. Also if an operator is able to secure a beneficial rate (e.g. as a result of high volumes of traffic) it should not be forced to pay the "standard" rate which is offered to others in the market which may not achieve the same traffic volumes.

If (notwithstanding the comments made above) the OUR seeks to continue its present "approval" of the whole agreement, it must undertake a far more detailed assessment of every single aspect of the whole suite of documents – not only the individual clauses, but also the inter-relationship between them. If the OUR is unable to do so, it must only "approve" individual clauses where this comprehensive assessment has been done (indicating the exact clauses in question – perhaps in a separate annex), leaving it to the other contracting party to negotiate the rest of the contract so as to achieve the best commercial outcome for the company concerned.

Digicel anticipates that there will be a further round of consultation on a final draft of

the RIO 6 as significant amendments by the OUR to the current draft, inevitably could have implications whereby new issues will have to be addressed through a combination of new, amended or deletion of current comments as a consequence of significantly altered foundation on which previous comments were or were not submitted.