
Office of Utilities Regulation

**Clarification of Reconsideration of the
Office's Decision: Determination Notice
"Assessment of RIO 6"**



OFFICE OF UTILITIES REGULATION

September 12, 2013

DOCUMENT TITLE AND APPROVAL PAGE

1. DOCUMENT NUMBER: 2011/TEL/002/DET001/RCN.001/CLA.001

2. DOCUMENT TITLE:

Clarification of Reconsideration of the Office's Decision: Determination Notice "Assessment of RIO 6".

3. PURPOSE OF DOCUMENT

To provide clarification on the intended effects of the Office's decision regarding its reconsideration of certain aspects of the assessment of RIO 6 Determination Notice.

4. ANTECEDENT DOCUMENTS

Document Number	Description	Date
TEL 2009/03: Rep/01	Invitation for comments on Draft RIO 6	June 5, 2009
TEL2011002_CON001	Preliminary Determination for Assessment of RIO 6.	November 1, 2011
TEL2011002_CON002	Second Consultation Document for Assessment of RIO 6.	September 7, 2012
TEL2011002_DET001	Determination Notice for Assessment of RIO 6.	December 24, 2012
2011/TEL/002/DET001/RCN.001	Reconsideration of the Office's Decision: Determination Notice - "Assessment Of RIO 6"	May 16, 2013

5. APPROVAL

This Document is approved by the Office of Utilities Regulation and applies as of **September 12, 2013**.

On behalf of the Office:



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Maurice Charvis
Director-General

September 12, 2013

**CLARIFICATION OF RECONSIDERATION OF THE OFFICE'S
DECISION: DETERMINATION NOTICE
"ASSESSMENT OF RIO 6"**

TO: All Carriers

WHEREAS pursuant to section 60 of the Telecommunications Act (the "**Act**"), the Office of Utilities Regulation (the "**Office**" or "**OUR**") issued "Reconsideration of the Office's Decision: Determination Notice "Assessment of RIO 6" Document No: 2011/TEL/002/DET001/RCN.001 (the "**Reconsideration**") on May 16, 2013 which details the Office's decisions regarding the reconsideration of certain determinations set out in the "Determination Notice for Assessment of RIO 6" Document No: TEL2011002_DET001 (the "**Determination Notice**"). The Reconsideration addressed decisions that related to the effective date of the Determination Notice, the charging for transit of Cable & Wireless Jamaica Limited's ("**LIME**") fixed network to get to its mobile switch, and the applicable RIO 6 rates.

WHEREAS by way of a letter dated May 30, 2013 to the Office, Digicel Jamaica Limited ("**Digicel**") has sought possible reconsideration of the decisions contained in the Reconsideration. In this regard, Digicel stated that "*the Reconsideration contains decisions that are so different in nature and effect from the original Determination Notice that it may warrant a fresh reconsideration process and we will be guided by the Office in this regard.*" Digicel also indicated that given the difference between the decisions in the Reconsideration and the original decisions contained in the Determination Notice, it is aggrieved to the extent that had the new decisions been in the original Determination Notice, Digicel would have applied for a reconsideration of those decisions.

WHEREAS the Office has reviewed Digicel's request for reconsideration of Determinations 2, 15 and 39 as set out in the Reconsideration and has determined that the request in relation to Determination 2 should be dealt with by way of reconsideration. Therefore, the Office's response to this specific request will not be addressed in this Clarification document.

WHEREAS the specific issues outlined by Digicel which are addressed in this Clarification are as follows:

1. Digicel indicated that it is pleased with the Office's intention to uphold Determination 15. However, Digicel stated that to the best of its knowledge, commercial terms for interconnection are not addressed in the mobile Reference Interconnection Offer ("RIO") as the Joining

Service section of the mobile RIO is bespoke/to be agreed with the interconnection seeker. Digicel's position is that the reconsidered wording of Determination 15 makes it only applicable until the mobile RIO is approved. In Digicel's opinion means that:

1. *As of June 1 (or whenever the mobile RIO will be approved) Determination 15 will not be applicable.*
2. *According to Reconsideration Decision 1, determination 15 is not applicable until the RIO6 has been approved which is unlikely to happen within the next 6 months.*
3. *Only following 2 and as a consequence of 1, when the Mobile RIO is approved a Party seeking to interconnect with LIME's mobile network will either have to pay the commercial terms and conditions as offered by LIME which is to be provided bespoke (it took LIME almost 7 months to provide an offer to Digicel) and then to seek the OUR's dispute resolution (a process which has no stipulated timelines and in the past has been protracted at best).*

In other words, the longstanding issue with direct interconnect with LIME's mobile network will not progress in any respect with the amended wording of Reconsideration Decision 2."

In addition, Digicel indicated that the issue of LIME using a higher transit rate for transiting incoming international minutes to its mobile network as highlighted in Digicel's response to the Application for Reconsideration remains unaddressed and needs to be clarified by the Office. Digicel's position is that the Reconsideration seems to approve of these higher transit rates, which is contrary to the Office's statements that charges should be the same regardless of where the call originated. Digicel therefore requested that the Office amend Determination 15 to read:

"Unless there are technical reasons on the part of the interconnecting operator preventing it from obtaining direct interconnection with LIME's mobile switch, there shall be no transit or other costs of connection for the interconnecting operator other than the tariffs listed in the Tariff Schedule for mobile termination rates or as separately determined by the Office. If applicable, the transit charge for any call transiting LIME's fixed network should be the same independently where the call has originated. Where the interconnecting operator is not a licenced domestic carrier, LIME is not obligated to offer direct interconnection to its mobile switch pending the agreement of commercial terms with the interconnecting operator, regardless of whether or not there is agreement on technical terms. In any event, disputes regarding commercial issues relating to interconnection to LIME's mobile switch should be referred to the Office for resolution"

2. With regard to Determination 39, Digicel's position is that even if the chronology of events outlined by LIME and accepted by the Office is correct, it does not prevent the Office from establishing rates other than those set by LIME in RIO 5A1 as allowed under the legislation. Digicel indicated that while the rates in RIO 5A1 were not approved by the Office, *"the Determination Notice and the Reconsideration, at best, merely acknowledges that LIME had the right at certain times, in relation to certain carriers, to unilaterally change rates."* Digicel contended that the RIO 5A1 rates are not applicable to Digicel as LIME never complied with the revision provisions in the interconnection agreement between the parties. Digicel argued that the implementation of RIO 5A1 rates will increase costs for Digicel and revenue for LIME. Digicel stated that *"[t]o allow an increase in rates just before the Office is about to launch its cost model project for the fixed network to base the rates on Pure LRIC is not only inappropriate but arguably a breach of the Act"*. Digicel therefore requested that the Office amend Determination 39 to read:

"The tariffs for Termination, Special Access, and Transit Services contained in the draft RIO 6 are not approved. The approved RIO 6 tariff for PSTN Termination, Retention rate, Incoming International Call Termination, Transit, National Directory Enquiry, 119 and 110 Emergency Services are as indicated in Table 4 in "Assessment of RIO 6 Determination Notice". The tariff for Weather Warning, 1-888-Call CWJ Access, National Freephone, International Freephone, and Home Country Direct Collect Service shall remain as indicated in the RIO 5A Tariff Schedule"

WHEREAS the powers of the Office to reconsider its decisions are governed, *inter alia*, by the provisions set out in Section 60 of the Act, which states in part that:

"60 – (4) A person who is aggrieved by a decision of the Office or Authority, as the case may be, may, within fourteen days of receipt of that decision, apply to the Office or Authority, as the case may be, in the prescribed manner for a reconsideration of the matter.

(5) An application under subsection (4) shall be heard only if the applicant –

- (a) relies upon new facts or changed circumstances that could not, with ordinary diligence have become known to the applicant while the matter was being considered by the Office or Authority, as the case may be; or*
- (b) alleges that the decision was based upon material errors of fact or law.*

(6) *The Office or Authority, as the case may be, may, in relation to an application under subsection (4), confirm, modify or reverse the decision or any part thereof.*

(7) *Where a decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.*

(8) *Where an application is made under subsection (4)-*

(a) *the Office or Authority, as the case may be, may, on an application by the applicant, order that the decision shall not take effect until a determination is made under subsection (6); and*

(b) *the Appeal Tribunal shall not hear an appeal under section 62 in relation to that decision until such a determination is made by the Office or Authority, as the case may be.”*

AND

WHEREAS the Office is of the opinion that the issues raised by Digicel in relation to Determinations 15 and 39 do not meet the conditions specified under section 60 (5) of the Act for a reconsideration, in so far as Digicel has not raised any new facts or circumstances which would not have been known to Digicel at the time the matter was being considered by the Office. Further, Digicel has not alleged that any of the decisions made by the Office in the Reconsideration were based on material errors of law or fact. In fact, most of the issues raised by Digicel were duly consulted on and considered prior to the issue of the Reconsideration. The Office’s view is that a clarification of the issues raised by Digicel in relation to Determinations 15 and 39 would be the appropriate response in these circumstances.

The Office **HEREBY PROVIDES** the following explanations and **MAKES** the attendant clarifications as follows:

Determination 15

1. It is not the Office’s intention to repeal the effect of Determination 15 once the mobile RIO is issued. The intended effect of Determination 15 is to facilitate interconnection of licensed domestic carriers with LIME’s mobile network, and to mitigate the risk of those carriers being subjected to pay additional costs to use LIME’s fixed network, where there is no technical impediment to direct interconnection to LIME’s mobile network, on the part of the carrier seeking such interconnection. In other words, Unless there are technical constraints on the part of the interconnection seeker, once the mobile RIO is approved and in effect, it is expected that carriers will interconnect directly to LIME’s mobile

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network, utilising the framework established under the mobile RIO, without the need to transit LIME's fixed network, and as a result be subject to transit costs.

2. The inclusion of the words “[p]ending the approval and issuance of a mobile RIO” in Determination 15 was merely to give recognition to the fact that the conditions that will eventually govern direct interconnection to LIME's mobile network will be those set out in the approved mobile RIO and related determination issued by the Office in this regard. Therefore, it is expected that the intended effect of Determination 15 as described in paragraph 1 above, will continue to exist under the regime governing direct interconnection to LIME's mobile network arising out of the approved mobile RIO framework. So whether or not the mobile RIO is approved and in effect, local domestic carriers who wish to interconnect directly to LIME's mobile network should be allowed to do so where there is no technical reason on the part of the interconnecting carrier preventing direct interconnection with LIME's mobile switch. In such an instance, the interconnection seeker will not be required to pay transit fees in relation to LIME's fixed network. Therefore the addition of the words “[p]ending the approval and issuance of a mobile RIO” in Determination 15 neither add nor detract from the effect of the decision embodied therein.
3. In the Reconsideration, the Office acknowledged that there may be instances where there is merit to LIME's claim that Determination 15 could be prejudicial to LIME. This is in a context where the parties fail to reach agreement on commercial terms, interconnection takes place and on resolution of the dispute, a decision is made in favour of LIME's position on the commercial terms and it is also determined that LIME suffered a financial loss as a result. However, the Office also recognised that an interconnection seeker could also be prejudiced if it was forced to pay a transit charge where commercial terms for direct interconnection are not agreed. It was determined that there was less risk of financial loss associated with allowing direct interconnection to LIME's mobile switch in cases where the only impediment to such connection is failure to agree on commercial terms, as against sanctioning the payment of a transit charge in such instances. The Office however sought to balance the interest of both parties. In this regard, the Office decided to amend the original wording of Determination 15 to differentiate between interconnection seekers which are licenced domestic carriers with customers on their network and other interconnection seekers. This was the only intended change to Determination 15 which sought to prevent certain interconnection seekers from paying unwarranted transit charges, while offering LIME some protection from interconnected operators who could easily exit the market with sums owing where there is a dispute in relation to commercial terms.

4. Digicel is correct that Determination 15 is not applicable until the Office approves RIO 6. The Office disagrees however that this was unlikely to happen within the next six (6) months. The Office issued its Reconsideration on May 16, 2013 which instructed LIME to submit the finalised RIO 6 to the Office within thirty (30) days of the effective date of the Reconsideration. This means that LIME was to submit the finalised RIO by June 15, 2013 which it did. The Office could have approved same shortly thereafter.
5. The Office confirms that as determined in the Harmonisation of Mobile RIO Determination Notice Document No. 2013/TEL/003/DET.002, the joining services section of the mobile RIO is listed as bespoke and therefore is left to negotiation of the interconnecting parties. The mobile RIO contains many commercial terms, some of which are not directly related to tariffs. However, failure to agree on commercial issues does not necessitate transiting the fixed network.
6. Digicel made reference to an issue of multiple transit rates depending on call origin and contended that the Reconsideration seemed to approve this principle. The Office disagrees that its decision gave any such approval. In the Determination Notice, the Office determined a regional transit rate and a national transit rate using benchmark analysis. These rates are independent of whether the call originates in Jamaica or overseas. Therefore, there was no need to expressly state in the determination on the issue that the transit charge was independent of the origin of the call.

Determination 39

7. The Office agrees with Digicel that regardless of the accuracy of the chronology of events outlined by LIME with respect to Determination 39, the Office is empowered by the legislation to set different rates from those set by LIME in RIO 5A1. However, the Office is required to justify its decisions. As stated in the Determination Notice *“[u]nder Section 4 (3) of the Act, the Office in the exercise of its functions is entrusted with the responsibility to verify whether services are provided efficiently and in a manner designed to afford economical and reliable services to customers. The Office is not convinced that this is the case with regard to Special Access and Transit Services...”* It was further stated that *“Section 29 (5) and Section 33 (2) [of the Act] allows the Office to consider local and international benchmarks when determining interconnection charges particularly in instances where the Office is unable to obtain cost information that it is satisfied is relevant and reliable. Against this background, the Office has decided to use benchmark data to determine tariffs for RIO 6 where available.”* Where the Office was unable to find international benchmarks for particular services, it chose to leave the rate for those services unchanged as there would be no basis to justify different rates in the absence of a cost

study. At the time of writing the Determination Notice, the Office's position was that the applicable rates were those in the RIO 5A Tariff Schedule as it had not approved those in RIO 5A1 Tariff Schedule. It was pointed out by LIME in its application for reconsideration that at the time when the RIO 5A1 Tariff Schedule was issued, there was no requirement for approval from the Office to adjust tariffs for exchange rate variations, a point which the Office conceded. The Office therefore stands by Determination 39 as expressed in the Reconsideration. The determinations made by the Office in relation to RIO 6 are applicable to all carriers who interconnect with LIME's fixed network.

8. It is the Office's opinion that there is no basis for Digicel's assertion that allowing an increase in rates just before the Office is to develop a cost model for the fixed network to base rates on Pure LRIC is arguably a breach of the Act. Further, as explained in section 33 of the Act, the Pure LRIC (avoided cost) principle is only applicable when determining the interconnection charges for wholesale termination services. All other interconnection charges are to be established between total long run incremental cost and the stand alone cost of providing the service. The services for which the tariffs have been set equivalent to those in the RIO 5A1 Tariff Schedule are not termination services. These services fall in the category of other interconnection services and as such would not have their tariffs determined on the basis of the Pure LRIC approach.

In view of the above, **THE OFFICE HEREBY EXPLAINS AND CLARIFIES DETERMINATIONS 15 and 39** respectively as follows:

- (a) **Where there is failure to agree on commercial terms for direct interconnection to LIME's mobile network, unless there are technical issues on the part of the interconnection seeker which prevent it from interconnection directly with LIME's mobile switch, there should be no transit or other costs of interconnection other than those listed in the Tariff Schedule for licensed domestic carriers with customers on their network. As a result of the misunderstanding caused by the inclusion of the words "[p]ending the approval and issuance of a mobile RIO" in Determination 15, the Office hereby clarifies Determination 15 as follows:**

"In instances where the interconnecting operator is a licensed domestic carrier with customers on its network, once there are no technical reasons on the part of the interconnecting operator preventing it from obtaining direct interconnection with LIME's mobile switch, LIME is obligated to offer direct

interconnection to its mobile switch and there shall be no transit or other costs of connection for the interconnecting operator other than the tariffs listed in the Tariff Schedule. Where the interconnecting operator is not a licensed domestic carrier, LIME is not obligated to offer direct interconnection to its mobile switch pending the agreement of commercial terms with the interconnecting operator, regardless of whether or not there is agreement on technical terms. In any event, disputes regarding commercial issues relating to interconnection to LIME's mobile switch should be referred to the Office for resolution."

- (b) The tariff for Weather Warning, 1-888-Call CWJ Access, National Freephone, International Freephone, and Home Country Direct Collect Service shall remain as indicated in the RIO 5A1 Tariff Schedule.**

This Clarification is provided as of 12th September 2013.