
Office of Utilities Regulation

DECISION ON APPLICATION FOR RECONSIDERATION OF
"RECONSIDERATION OF THE OFFICE'S DECISION:
DETERMINATION NOTICE "ASSESSMENT OF RIO 6"
(2011/TEL/002/DET001/RCN.001)

BEFORE THE OFFICE OF UTILITIES REGULATION

3rd Floor, P.C.J. Resource Centre, 36 Trafalgar Road, Kingston 10, Jamaica

FINAL DECISION

Adoption Date: September 24, 2013



OFFICE OF UTILITIES REGULATION

September 24, 2013

DOCUMENT TITLE AND APPROVAL PAGE

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

2. DOCUMENT TITLE: DECISION ON APPLICATION FOR RECONSIDERATION OF "RECONSIDERATION OF THE OFFICE'S DECISION: DETERMINATION NOTICE "ASSESSMENT OF RIO 6"

3. PURPOSE OF DOCUMENT

This document contains the Office's decision on Digicel Jamaica Limited's application for reconsideration of the Office's Final Decision set out in the "Reconsideration of the Office's Decisions: Determination Notice "Assessment of RIO 6" Document No. 2011/TEL/002/DET001/RCN.001.

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 the Decision becomes effective **September 24, 2013**.

On behalf of the Office:



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Maurice Charvis
Director General

September 24, 2013

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STATEMENT BY THE OFFICE

This matter comes before the Office of Utilities Regulation ("Office") for its consideration on an application for reconsideration of the Final Decision contained in the "Reconsideration of the Office's Decision: "Assessment of RIO 6"", Document No: 2011/TEL/002/DET001/RCN.001 (the "Reconsideration"). The Office received an application from Digicel Jamaica Limited ("Digicel") dated May 30, 2013 requesting reconsideration of certain aspects of the Reconsideration.

Digicel purported that the Reconsideration contained decisions that were very different in nature and effect from those in "Determination Notice for Assessment of RIO 6" Document No. TEL2011002_DET001 (the "Determination Notice"). Digicel declared that it was aggrieved by certain decisions in the Reconsideration, to the extent that if they were contained in the original Determination Notice, Digicel would have applied for a reconsideration of that document.

In particular, Digicel requested that the Office reconsider the following:

- The effective date;
- Determination 2;
- Determination 15; and
- Determination 39.

The Office having considered the matter has concluded 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 Telecommunications Act (the "Act") for a reconsideration. Digicel has not raised any new facts or changed circumstances which would not, with ordinary diligence, have become 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. The Office's view is that a clarification of the issues raised in relation to Determinations 15 and 39 will suffice and has therefore issued the "*Clarification of Reconsideration of the Office's Decision: Determination Notice "Assessment of RIO 6"*" Document No 2011/TEL/002/DET001/RCN.001/CLA.001.

The specific issues raised by Digicel which are addressed in this document are therefore:

EFFECTIVE DATE

Digicel contended that the Office changed the effective date of the Determination Notice following a statement from Cable and Wireless Jamaica Limited ("LIME") that an immediate implementation of the decision was unreasonable and prejudicial to its operations and impossible to implement at

the time it was issued. Digicel concluded that LIME's concern was "only around the implementation of the new rates with what they perceived as retroactive effect". Digicel further stated that LIME suggested that the decision be implemented the first day of a billing cycle which is the first day of a calendar month. Digicel indicated that in response to the application for reconsideration both it and Columbus Communications Jamaica Limited ("Flow") responded to this request with respect to the implementation of the new rates. Digicel's position is that the first day of the next billing cycle would have sufficed as an appropriate implementation date and the Office in its Reconsideration went significantly above and beyond what was requested by LIME, which is to the detriment of other parties. Digicel also pointed out that LIME managed to implement the new rates by December 24, 2012 with payments and reconciliations based on the new rates as at that date. As a result, operators will be forced to repay LIME for amounts already settled. It is Digicel's position that the Reconsideration will be more onerous to implement than the original Determination Notice.

Digicel further contended that the Reconsideration contradicts Determination 38 of the Determination Notice, meaning that a stay was effectively imposed on the Determination Notice without being requested by LIME. Digicel stated that absent a stay, the correct process is that LIME should have submitted its RIO 6 on January 23, 2013 which would have given the Office ample time to review and approve the RIO 6. Digicel pointed out that as the Office is aware, Digicel already relied on the Determination Notice in an attempt to interconnect directly to LIME's mobile switch by way of a letter sent to LIME and copied to the Office dated May 7, 2013. This followed a letter from Digicel to the Office dated April 25, 2013 requesting that the Office confirm Digicel's interpretation of Determination 15 of the Determination Notice. Digicel therefore requested that the Office reconsider and amend Determination 2 to read:

"The non-tariff determinations in this document, shall be applicable as the default RIO terms to all carriers seeking to establish interconnection with LIME's fixed network at the effective date of this Determination Notice. The tariff determinations in this document, shall be applicable as the default RIO terms to all carriers seeking to establish interconnection with LIME's fixed network as of January 1, 2013."

RESPONSES TO APPLICATION FOR RECONSIDERATION:

The Office circulated the application for reconsideration to stakeholders on June 20, 2013 for response from interested parties by July 4, 2013. A response was received from LIME.

On June 21, 2013, the Office received a letter from LIME challenging the power of the Office to stay the Determination Notice and the Reconsideration. LIME also asserted that the Office had no jurisdiction to reconsider its Reconsideration. Further, LIME asserted that even if the Office had jurisdiction, the issues raised by Digicel in its application for reconsideration were adequately consulted on prior to the issue of the Reconsideration and raised no new facts or circumstances to qualify for further reconsideration. Finally, LIME argued that a reconsideration of a reconsideration was a breach of natural justice.

After due consideration, the Office by way of a letter dated July 18, 2013 responded to LIME indicating the following:

- The Office is of the opinion that it is vested with an implied power under the Act to order that its decision should not take effect pending a reconsideration of that decision;
- The right of a person to seek a reconsideration under Section 60(4) of the Act applies to any and all decisions of the Office without limitation. A determination on a reconsideration is a fresh decision of the Office, which may be the subject of a reconsideration request under the Act;
- Upon further review of Digicel's request, the Office has determined that the issues raised in connection with Determinations 15 and 39 do not conform to the requirements of the Act for a reconsideration, and will be formally withdrawn from the reconsideration process. Clarifications on these issues will instead be issued to Digicel and the wider industry;
- It is the Office's opinion that the issues raised by Digicel in relation to Determination 2 – the effectiveness of the determinations - raise and rely on new facts and/or changed circumstances that Digicel could not, with ordinary diligence, have known at the time when the Office was reconsidering its original decision on the effective date of the decisions in the Determination Notice. The Office will therefore continue the reconsideration process in relation to this single issue; and
- As mentioned earlier, there is nothing in the Act which excludes a decision of the Office which is issued as a result of a reconsideration of an earlier decision, from a further

reconsideration process, where the request for reconsideration complies with the requirements the Act. The Office has therefore not breached natural justice or a legitimate expectation of LIME simply because it has decided to reconsider a decision arising out of a previous reconsideration exercise.

The Office circulated a redacted version of LIME's response to the application for reconsideration to stakeholders on July 22, 2013 for comments from interested parties. No comments were received.

The responses to the application for reconsideration are as follows:

EFFECTIVE DATE

LIME maintained its objection to the consultation and indicated that its comments were submitted under protest. LIME submitted that "*the OUR is functus officio in this matter, having already exercised its powers under Section 60 (4) of the Telecommunications Act, as amended (the "Act")*". LIME indicated that in its application for reconsideration of the Determination Notice, it took issue with the immediate implementation of the Determination Notice. LIME also indicated that the Office in its Reconsideration, determined that the RIO 6 would become effective when it approved the updated RIO 6 documents. LIME pointed out that it requested clarification of the implementation date by way of a letter to the Office dated June 4, 2013. In response, the Office reiterated that the decisions which relate to the RIO would become effective on its approval of the updated RIO 6 documents. LIME contended that Digicel's application for reconsideration did not allege that the decision was based on material errors of fact or law nor did it rely on new facts or changed circumstances that could not, with ordinary diligence have become known to Digicel at the time the matter was being considered by the Office. It was therefore LIME's position that Digicel's request for an entirely new Determination 2 was inappropriate.

DECISIONS ON RECONSIDERATION REQUEST

In light of the request for reconsideration and comments received thereon, the Office has given further consideration to its Determination Notice for Assessment of RIO 6 and the subsequent Reconsideration of that Determination Notice and now issues the following response:

EFFECTIVE DATE

1. It is the position of the Office that the issues raised by Digicel in relation to the effective date of the Determination Notice and Determination 2 disclosed and relied on new facts and/or changed circumstances that Digicel could not, with ordinary diligence, have known at the time when the Office was reconsidering its original decision on the effective date of the Determination Notice. Specifically, the fact that the Office was not aware that the decisions in the Determination Notice had in fact been implemented with effect from December 24, 2012 and were being acted upon by all stakeholders in the industry. The Office's lack of knowledge was supported by the concerns raised by LIME in its request for reconsideration which was submitted in January 2013 where it stated that:

"the immediate implementation from 24 December 2012 of a Decision of this magnitude is unreasonable.

Given the complexity and the scope of the required changes, this is prejudicial to LIME's operations. The requirement is in effect retroactive, as it would have been impossible to implement at the time when it was issued on the afternoon of Christmas Eve.

LIME requests that the Office reconsider the imposition of a 24 December 2012 implementation date, and suggests instead that the Decision be implemented on the first day of a billing cycle, i.e. the first day of a calendar month."

LIME in response to its request for reconsideration submitted on February 19, 2013 further stated that:

"The implementation date of the Determination Notice for Assessment of RIO 6 is punitive in its effect and immediate compliance was impossible.

... A Determination Notice issued the afternoon of December 24, 2012 (Christmas Eve), when offices were closed (as is the custom) with an effective implementation of December 24, 2012

is in effect not a notice. By virtue of the time of service alone, the Determination Notice is retrospective in its effect. Further, even on effective receipt of "notice" on December 27, it could not be instantaneously implemented."

2. It was also not apparent from the response of the other operators to LIME's application for reconsideration that the Determination Notice had been implemented. Digicel agreed with LIME that immediate implementation was unreasonable and suggested that January 1, 2013 be used. Flow indicated its preference for the effective date stated in the Determination Notice but acknowledged the effect that implementing changes during the billing cycle can have on billing. Flow signalled that it was willing to work with LIME to resolve issues that may arise.
3. Stemming from LIME's application for reconsideration, the Office's interpretation of the situation regarding the matter of the effective date of the Determination Notice was that:
 - (i) It was not possible to immediately implement the decision on December 24, 2012;
 - (ii) As a direct consequence of Item (i) above, the decision was not implemented at the time when LIME submitted its application for reconsideration; and
 - (iii) LIME was asking the Office to indicate an appropriate implementation date which coincides with the first day of a billing cycle.
4. The Office only received LIME's confirmation that the Determination Notice was actually implemented by LIME effective December 24, 2012 on receipt of a letter from LIME dated June 4, 2013 indicating as much and requesting clarification on whether it was entitled to recover sums under-billed from the period December 24, 2012.
5. The Office in its Reconsideration had concurred with LIME that an immediate implementation of the decision was impractical. The Office then indicated its true intent with respect to the implementation date when it stated that it was not its plan for the determinations made in relation to the terms and conditions of the RIO to become immediately applicable on the stated effective date of the Determination Notice. The effective date of the Determination Notice was specifically in relation to Determination 38 which states:

"Determination 38

LIME shall provide the Office with a copy the finalised RIO 6 inclusive of all the determinations made in this document no later than 30 days after the effective date of this Determination Notice."

The Office further clarified in the Reconsideration that the determinations made in the Determination Notice which specifically relate to the terms and conditions in the RIO, will only become effective when the new RIO is approved by the Office and issued. This meant that Determination 2 had to be restated as follows:

"Determination 2

All determinations in this document, both tariff and non-tariff, shall be applicable as the default RIO terms to all carriers seeking to establish interconnection with LIME's fixed network when RIO 6 becomes effective."

In this regard, the intention of the Office was to comply with Section 32(4) of the Act which states that:

"(4) A reference interconnection offer or any part thereof shall take effect upon approval by the Office and all existing interconnection agreements executed by the filing carrier shall be amended in accordance with the approved reference interconnection offer and until actually amended are deemed to be so amended."

6. Further, LIME did not ask for the decision to be implemented on January 1, 2013. This was a recommendation made by Digicel in its response to the application for reconsideration. LIME merely requested that the decision become effective on the first day of a billing cycle.
7. The Office did not interpret LIME's request for reconsideration of the effective date to mean that it was only concerned with the implementation of the new rates. In the Office's opinion, LIME referenced the decision in general, with billing being a component of the overall decision. In this regard, LIME stated in its application that ***"the immediate implementation from 24 December 2012 of a **Decision (emphasis added)** of this magnitude is unreasonable"***. LIME further stated that it *"requests that the Office reconsider the imposition of a 24 December 2012 implementation date, and suggests instead that the **Decision (emphasis added)** be implemented on the first day of a billing cycle, i.e. the first day of a calendar month"*. LIME in its response to its application for reconsideration states that *"[t]he implementation date of the **Determination Notice (emphasis added)** for Assessment of RIO 6 is punitive in its effect and immediate compliance was impossible."* The Office's reasoning is that if LIME's

only concern was with respect to when the new rates became effective, it probably would have stated this directly by requesting in its application for reconsideration that the Office change the effective date of Determinations 39 – 43 which specifically relate to rates. Instead, LIME referenced the “Decision” throughout the applicable section of its application for reconsideration.

8. The Office agrees that both Digicel and Flow responded directly to the matter of the implementation of new rates with regard to LIME's request for a change in the effective date. However, Digicel did not indicate at any point in its response that it wanted the effective date for the rest of the Determination Notice to remain unchanged. Therefore, the Office was not aware that Digicel had taken a different interpretation of LIME's request compared to that of the Office. In any event, the Office maintains its interpretation that LIME's desire was for the effective date for the entire decision to be amended, with billing only highlighted as an example of the far reaching nature of the decision. As such, the Office does not agree with Digicel's interpretation of LIME's request and its use as a basis to conclude that the Office in its Reconsideration Decision 1 went significantly above and beyond what LIME had requested.
9. In the context where the Office was unaware that the Determination Notice had been implemented by LIME on December 24, 2012, the Office agrees with Digicel that by amending Determination 2 in the Reconsideration to state that the clauses which directly relate to the terms and conditions of the RIO only become effective after approval by the Office, the Office in essence, albeit unintended, retroactively and unknowingly imposed a stay of the decision.
10. The Office acknowledges that Digicel by way of a letter dated April 25, 2013 requested that it confirms Digicel's interpretation of Determination 15. In reply, the Office sent Digicel a letter dated May 6, 2013 indicating that the matter was the subject of a reconsideration and would be addressed by the Office in that process. To reiterate, this response was given in a context where the Office was unaware that the decisions of the Determination Notice had been implemented. Therefore, the Office did not see the need to urgently clarify the interpretation of Determination 15 for Digicel outside of the consultation process already underway in connection with LIME's reconsideration request since, from its knowledge at the time, the specific determination was not in force as the Determination Notice was not yet implemented.
11. The Office accepts now, as it similarly did in the Reconsideration, that its true intention regarding the effective date was not discernible from the wording of the Determination Notice. With the decision having been implemented by LIME on December 24, 2012, the Office accepts

that by modifying Determination 2 in the Reconsideration to reflect its actual intention, it may have unknowingly caused inconvenience and detriment to some operators. Were the Office advised that the decisions in the Determination Notice had already been implemented at the time when it received LIME's application for reconsideration on January 7, 2013, it would have taken into account other relevant factors and considerations with a view to mitigating the prejudicial effect of its decisions on all parties.

12. Given the passage of time, the Office accepts that there is no pareto optimal solution to this issue as, no operator's situation can be improved without making another operator's situation worse. Flow and Digicel indicated a preference for a December 24, 2012 and January 1, 2013 effective date, respectively. On the other hand, LIME was told by the Office not to implement the decision until the RIO 6 documents were approved by the Office. The Office also accepts that no operator was responsible for causing this situation.
13. The Office invited operators to a meeting on September 6, 2013 to discuss the matter of the effective date for RIO 6. The purpose of the meeting was to try to reach a mutually agreed and feasible effective date. Present at the meeting were representatives from:
 - 1 Force Communications LLC;
 - Digicel;
 - Flow; and
 - LIME.
14. At the meeting, there was unanimous agreement that the effective date for the RIO 6 should be October 1, 2013. Subsequent to this meeting, however, Flow in an e-mail to the Office dated September 13, 2013 withdrew its agreement to an October 1, 2013 effective date of RIO 6 citing that the change would have a significant financial impact on Flow.
15. As mentioned earlier, the Office acknowledges that its decisions with regard to the effective date of RIO 6 may result in inconvenience and detriment to some operators and that at this time, there is no pareto optimal solution to this situation. In light of the acceptance of the majority of operators present at the September 6, 2013 meeting of an October 1, 2013 effective date of RIO 6, and in keeping with Section 32 (4) of the Act, which indicates that a RIO is effective upon approval of by the Office, the Office will take the necessary steps to review and approve LIME's finalised submission of the RIO 6 so that it will take effect as at that date.

RECONSIDERATION DECISION 1

The effective date for RIO 6 shall be October 1, 2013. All tariff and non-tariff determinations in the Determination Notice dated December 24, 2012 (Document No. TEL2011002_DET001), as modified by the determinations in the Reconsideration dated May 16, 2013 (Document No. 2011/TEL/002/DET001/RCN.001) and this Reconsideration Decision, shall therefore be effective as at October 1, 2013.