Submission

in response to

the review of C&W RIO 5

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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 5. Digicel has a number of fundamental concerns with a number of clauses contained within RIO 5 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.

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:

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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.

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. 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 appears to advocate.

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 set of rules 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 RIO5 following "approval" by the OUR. 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. 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) virtually impossible for us to argue a position which relies on the true "intention" of a clause that we did not agreed or negotiate. 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. 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[1]. 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.

[1] Please see the spreadsheet at Annex 1 – this indicates that (since launch) Digicel has paid (through the one off and recurring charges) an amount for an interconnection link which exceeds the total cost of building a new link. The first of the two worksheets assesses the actual payments made by Digicel since inception and compares these to the current cost of creating a similar link. The second work sheet accounts for the time value of money and assumed a depreciation period of 7 years.

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[2].

3. Overview of substantive comments on RIO 5

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 and the latest bilateral agreement between C&W and Digicel is based on RIO 3. The ability to add new services is explicitly contained within RIO 3[3] as well as RIO 5.

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 RIO 5, which was 'approved' by the OUR. This provision provides:

[2] Please see the spreadsheet at Annex 2 –The spreadsheet contains the fixed termination rate for Jamaica based on the approved RIO5A and the recently issued RIO5A1. The rates are broken down into three categories – i.e. local, regional and national. The rates are then further divided into fixed and variable rates. The spreadsheet also includes fixed termination rates for 5 European countries. A comparison of the fixed rates showed that based on RIO5A/RIO5A1 the difference between the local and the regional rates was approximately 250 per cent, while the average difference for the 5 European countries was below 30 per cent. The difference between the local and National rates was above 500 per cent for RIO5A/RIO5A1, compared with an average difference of below 80 per cent for the 5 countries.

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

"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.

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 Agreement between the parties (i.e. RIO 3) 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 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 [4]

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 [5]

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

[4] Legal Framework – clause 28

5 Joint Working Manual – Clause 2.4

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.

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 jointing 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.

3.5 Confidentiality

It is essential that the confidentiality requirement[6] 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.

[6] Legal Framework – Clause 19

3.6 Currency fluctuations [7]

Under the RIO, C&W has the unilateral right to vary its charges in the event that the Jamaican dollar devalues/revalues against the US dollar. Digicel questions the need for this clause at all. For example, why should the clause only refer to the US dollars – why not the Euro?

C&W has failed to provide any evidence to confirm that a devaluation of the Jamaican dollar results in a corresponding increase in its costs. In the absence of such evidence, the clause must be removed. If C&W is able to provide such evidence, the OUR must undertake regular reviews of these currency fluctuations and their affects, to ensure that the 'approved' rates remain strictly related to actual costs.

Notwithstanding Digicel's concerns about the validity of the clause, it is clearly unacceptable that C&W is able to increase its charges without the consent of the other party. We therefore request that (if it can be demonstrated that the clause should be retained) the text should be amended to make it clear that the consent of **both** parties is required before such a change may take affect.

3.7 Fixed to mobile retention

The current retention rate of 8% significantly overestimates the degree of risk to which C&W is exposed. We question the appropriateness of requiring the rest of the industry to pay for C&W's exposure to bad debt – an issue which one would reasonably expect a major player such as C&W to not only have the expertise, but also the resources to deal with this adequately itself in the six year period since Digicel's entry into the market.

7 Legal Framework – Clause 10.4

Digicel reduced the fixed to mobile retail rate in 2003. Further, while the rate of mobile take up has increased exponentially since Digicel entered the market, the number of fixed line subscribers has not significantly increased. C&W has also introduced a pre paid service for its fixed network, a service where (by definition) the risk is zero. These factors have had the effect of significantly reducing C&W's exposure to risk, however there has been no corresponding reduction in the retention rate.

In light of the above factors, Digicel would expect the OUR to require C&W to significantly reduce the rate to reflect the true scale of its current risk or alternatively to undertake a far more frequent (e.g. quarterly) review of the retention rate, to ensure that the rate only compensates C&W for the demonstrable level of bad debt it suffers (which to Digicel's understanding was the original purpose of the retention) and is not simply a unfair subsidy to C&W at the expense of other operators which is the de facto situation today.

3.8 CLI[8]

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

8 Legal Framework – Clause 13

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[9]

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. For example, if a company decides to cancel capacity before C&W has undertaken any infrastructure procurement, Digicel questions the appropriateness of any fee as it is not clear what charges C&W will have incurred.

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 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

9 Tariff Schedule – Part 1

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. It is not clear that this degree of analysis has been undertaken historically and as such, Digicel questions whether all of the relevant C&W rates are cost oriented.

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. C&W therefore is charging up to over one hundred percent 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 recent 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 5, 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. 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. 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. 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.