

February 24, 2012

The General Counsel / Commission Secretary
The Fair Trading Commission
Good Hope
Green Hill
ST MICHAEL

Attention: **Mrs. Kim Griffith Tang-How**

Dear Mrs. Griffith Tang-How,

Re: **FTC-001/12 – DIGICEL – MR-LRIC GUIDELINES**

We refer to the Commission’s letter of 13 February 2012 and to the enclosed Procedural Directions as provided relating to the underlying Review process (“the Directions”).

Pursuant to the terms of the letter and the Directions, Digicel was invited to submit reasons in support of its application for the granting of a stay of the LRIC Guidelines and Decision and Order dated 12 December 2011 no later than today, 24 February 2012. We understand that the FTC is considering Digicel’s request for a stay as a preliminary matter in this review process. This letter is respectfully submitted in response to this invitation as extended by the FTC relating to this preliminary matter.

There are a number of factors that Digicel would submit strongly support the granting of a stay. All of these factors are respectfully grounded in basic principles of procedural fairness and natural justice. Digicel would also submit that the practicalities of the situation would inexorably demand that the FTC would grant the stay as sought and proceed to determine Digicel’s request for a review on its merits as distinct from proceeding with the substantive process and the review process in parallel; a route that would likely create considerable problems for all concerned. The submissions drawn from those factors are further elaborated on below.

Refusal of Stay amounting to effective summary rejection of Review Request / Pre-Determination of the Review process

Digicel would submit that if the FTC were to reject Digicel’s request for a stay of the substantive decision, then this would essentially amount to a complete pre-determination of all of the substantive matters at issue on the part of the FTC; essentially a summary dismissal of Digicel’s request for a review prior to the completion (or even substantial completion) of the review process itself. There would not be any other reasonable interpretation open to Digicel in all of the circumstances if the FTC were to

refuse to impose a stay, but would rather seek to “drive on” with the underlying process in the face the request for a Review.

It must of course be borne in mind that this Review process is not about a single issue; or even two or three discreet issues. As will be evident from Digicel’s Notice of Motion and Grounding Affidavit dated 13 January 2012, Digicel has raised in the order of a dozen discreet issues arising from the FTC’s Decision and Order. The Decision and Order was a complex one encompassing wide ranging matters of both substance and procedure. Digicel has sought to review quite a number of specific procedural and substantive elements of that Decision and Order. It may be that the FTC may find that that some of these issues have more force than others. However, to refuse to implement the stay and proceed with the substantive LRIC process before addressing *any* of those points raised for Review by Digicel would, essentially, amount to a summary rejection by the FTC of the entirety of Digicel’s Request for a Review. It would be tantamount to a blanket refusal before the review itself had even taken place. Such an approach would constitute an affront to basic principles of procedural fairness and regularity.

Given that the Review process involves the FTC adjudicating on a Decision / Order that it has itself reached, the potential for infringing on the basic principle of *nemo iudex in sua causa* looms unavoidably large. Digicel would respectfully submit that the only appropriate course of action in the circumstances would be for the FTC to properly consider the Request for a Review on its merits, fully and thoroughly. This can only be properly achieved if the FTC were to stay the substantive order so as to allow this review to happen in an unhindered and fair manner.

Digicel would respectfully submit that if the FTC were to refuse Digicel’s application for a stay of the substantive Decision / Order, then this would deprive the entire Review process of any semblance of fairness and procedural regularity. Refusing to implement the stay and to proceed with the substantive underlying LRIC process would, in all the circumstances, pre-judge the review process in a manner adverse to Digicel. The result of what is a preliminary matter would essentially determine the result of the entire review process. In insisting on proceeding absent the stay, the FTC would be clearly signaling that it has no intention of proceeding other than in absolute accordance with the original Decision and Order.

All sides must be heard

As an extension to the foregoing point regarding pre-determination, the FTC will of course accept (as is obvious from the Directions provided and the approach adopted by the FTC generally) that all Parties have a right to be heard before any Decision is made by the FTC. Digicel would submit that a refusal of the stay as requested by Digicel would infringe the basic principle of *audi alteram partem*. Again, such a refusal on the preliminary issue would determine the result of the entire review process.

The refusal of the stay as requested by the FTC would, in essence, amount to a confirmation by the FTC that it has pre-determined the outcome of the Review process and was essentially simply going through the motions in a form of box ticking exercise so as to comply with procedural formality. Digicel is not suggesting that the FTC would conduct its business in this manner (quite the contrary actually) and therefore expects that the FTC will implement the stay as requested and not proceed with the LRIC process in a substantive way whilst conducting a Review of the fundamental elements of that very process in parallel. Digicel (along with all interested Parties) has a right to be heard before any Decision

is taken. This is a basic principle which Digicel does not expect the FTC (or indeed any other party) to seek to gainsay.

No Prejudice in Implementing the Stay

Obviously a significant factor to be considered by the FTC is whether or not any relevant party would be unduly prejudiced by the implementation of the stay as sought by Digicel. Digicel does not believe (and can see no basis why it would be the case) that any party would be prejudiced in any way at all (let alone significantly) by a stay being implemented by the FTC at this juncture as sought. In simple parlance, what real harm would it do to stay the process temporarily at this juncture such that the matters raised can properly be considered with the benefit of submissions from all concerned?

This is not a situation whereby any significant commercial or property interest is at play as might be an issue in, for example, some form of injunction procedure. Indeed, Digicel is not aware that any party (or the industry generally) is applying pressure to the FTC to proceed rapidly (or at all) with the underlying LRIC process. The FTC will of course be aware of Digicel's fundamental position that the entire LRIC process is wholly unnecessary and inappropriate in a small island market such as Barbados. Digicel has previously submitted this to the FTC.

Digicel does not believe that a stay of the process followed by a proper consideration of the Review on its merits could possibly be said to prejudice any party. Digicel has not raised these matters as part of the Review process in any adversarial or acrimonious way. Digicel has a genuine concern and belief that elements of the Decision and Order contain serious flaws and shortcomings which ought to subject to a real in-depth scrutiny by the FTC with the benefit of the input of all interested Parties. This is the very essence of a proper consultative process. It is in the interests of all concerned (including the FTC), that these fundamental matters are addressed in the manner sought by Digicel before any further substantive steps are taken in the underlying process.

As a converse to this, Digicel believes that if the FTC were to refuse to implement the stay and decide to proceed with the substantive LRIC process on the basis of the Decision and Order, then this would undoubtedly prejudice Digicel and would place Digicel (and other Parties) in quite an invidious position. Refusing to impose the stay would likely involve the FTC engaging with Parties in relation to a process whereby many of the fundamental substantive and procedural elements of that self-same process are subject to a Review. The creation of such an unsatisfactory situation would be inappropriate and wholly avoidable. Put simply, the refusal to implement a stay simply cannot equate with a fair review process.

Digicel would therefore submit that this lack of prejudice in implementing the stay ought to weight very heavily in favour of the granting of the stay.

Delay to the substantive process

The implementation of the stay is most unlikely to have any real impact in terms of a substantive delay on the underlying process. The FTC has promptly responded to Digicel's Review request and has set out quite a tight procedural process with enthusiastic timelines to deal with that review process. As is clear from the FTC's Directions, it is envisaged that all submissions are to be with the FTC by 30 March 2012; just over a month away from where the Parties are today. Given the critical path of the underlying

process as it has proceeded to date, it could hardly be suggested that the Review sought by Digicel has seriously delayed or undermined the process or could do so.

In any event, it is (as we are sure the FTC would readily agree) far more important that the underlying process be done properly rather than quickly. Digicel would submit that delay is therefore not a significant issue that the FTC ought to consider in the exercising of its discretion, but, even if it was, it is clear that no real delay would be entailed by the imposition of the stay as requested. Therefore this absence of significant (or any) real delay is a factor that would support the imposition of the stay as requested by Digicel.

Practical Considerations

It is important not to look at this matter in the abstract, but rather to embrace the practical realities of the situation. The FTC is proceeding with what is a complex and lengthy process involving significant matters. Digicel has sought a Review and Reconsideration of fundamental elements of that underlying process. Digicel would submit that there is very little practical merit in adopting a twin track approach of, on the one hand, refusing the stay and proceeding substantively with a process based on those fundamental principles under review and, on the other hand, seeking to conduct a Review process of those principles applicable. This would be akin to proceeding to build a house whilst the planning consent for the said house is going through a review process with the appropriate authorities.

The FTC ought not put itself in a situation whereby it expends time and resources to pushing a complex process forward whilst running the risk that they may have to “reverse engines” at some point and attempt to cure certain defects in how that process was constructed and conducted. As the FTC will no doubt appreciate, this would be a recipe for a very serious headache. It simply seems wholly unfeasible and unrealistic for the FTC to proceed in a manner where such a real hostage to fortune would be created. These are fundamental and important issues which are subjected to this review; these are not frivolous or vexatious matters. They ought to be addressed properly and with appropriate deference.

Nature of Review Process

It is also relevant that many of the matters being reviewed at the behest of Digicel were not actually directly addressed during the course of the consultation process as conducted to date. Digicel has made this point in the Notice of Motion for Review dated 13 January 2012, but it must be appreciated that Digicel is addressing many of these issues for the first time. As such, it could be said that this is not (in its truest) sense a review process. The FTC ought also take this into consideration in terms of the exercise of its discretion in relation to the request for the application of a stay on the substantive process. This is not a situation whereby Digicel is essentially seeking a second bite at the cherry in relation to the matters raised. This also strongly militates in favour of the application of a stay of the substantive process whilst the review is being addressed.

Taking all of the above into account, Digicel would respectfully submit that the FTC ought to confirm that it will implement a stay of the Decision / Order under review until such time as the Review process initiated by Digicel is concluded definitively pursuant to the terms of the Directions published and procedures adopted by the FTC.

We should be very much obliged if the FTC would confirm its decision in relation to this preliminary matters as appropriate.

Yours faithfully,
DIGICEL (BARBADOS) LIMITED

HELGA MCINTYRE
Head of Legal & Regulatory, EC