

**RESPONSE TO C&W COMMENTS ON DIGICEL SUBMISSIONS**

IN THE MATTER OF SECTION 105 (4) OF THE  
TELECOMMUNICATIONS ACT 2002

IN THE MATTER OF THE SECTIONS 36 OF  
THE FAIR TRADING COMMISSION ACT 2002

IN THE MATTER OF SECTIONS 8, 53(2) & 54  
OF THE UTILITIES REGULATION  
(PROCEDURAL RULES) 2003

IN THE MATTER OF A DECISION AND/OR  
ORDER OF THE FAIR TRADING COMMISSION  
DATED THE 24<sup>TH</sup> DAY OF FEBRUARY 2010  
ON THE REFERENCE INTERCONNECT OFFER

AND IN THE MATTER OF A REQUEST FOR  
REVIEW AND VARIATION BROUGHT UNDER  
SECTION 36 OF THE FAIR COMPETITION ACT

**BETWEEN**

**DIGICEL (BARBADOS) LIMITED**

**APPLICANT**

**AND**

**FAIR TRADING COMMISSION**

**RESPONDENT**

1. Digicel takes no issue with paragraphs 1-6 of C&W's Response to Notice of Motion and Submissions ('C&W's Response').
2. As regards paragraph 7, Digicel states that the parties were given an opportunity to comments on some aspects of the draft but that when further changes were made by C&W, which were discussed with the Commission, Digicel was not consulted. Digicel is of the view that it should have been consulted on those changes. The FTC also believed

that Digicel should have been consulted, as in their decision, handed down on February 24, 2010 ('the Decision'), they suggested that Digicel had been consulted when in fact Digicel has no record of being consulted on these changes.

3. As regards paragraph 8, Digicel repeats its position outlined in paragraph 2 above and states further that once the Commission mandated to C&W that certain changes should have been made, Digicel should have been made aware that such a mandate had been given and should have been given the opportunity to comment, along with other stakeholders in the market, on those mandated changes. The Commission clearly is also of that view because the decision suggests that Digicel was consulted on all changes but Digicel, once again, has no record of being consulted on those changes.
4. As regards paragraph 10, Digicel does not agree that issues which arose, during the period between the closure of the consultation and the issuance of the decision, and which C&W and the Commission discussed during that period were fully vented with Digicel and the other stakeholders in the market.
5. As regards paragraph 11, Digicel states that whilst it agrees that the practice of regulators is governed by the legislation in its respective territory and that their practice could only be of persuasive relevance in Barbados, one practice remains constant throughout the other territories. Regulators go to great pains to ensure that no party is left out of discussions which are had between the Regulator and another party which would have an impact on their business, and specifically when it relates to rates which are one of the centre pieces in an interconnection agreement. Regulators ensure that parties are kept abreast of the discussions and outcomes so that they can constantly be seen as being unbiased and dealing with the situation with an 'even hand'. The requirements of regulators in the legislation are indeed the same throughout the Caribbean.
6. As regards paragraph 12, Digicel once again states that the Commission has failed in its obligation to comply with the principles of natural justice by not including Digicel and other stakeholders in its discussions with C&W during the period between the closure of the consultation and the issuance of the decision.
7. As regards paragraph 13, Digicel is not seeking to impose an obligation on the Commission beyond the bounds of the relevant statutes. In fact Digicel is merely reminding the Commission of its obligations under the relevant statutes. The Telecommunications Act very clearly states at clause 6 (c) that "shall be responsible for

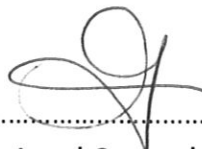
the regulation of competition between all carriers and service providers in accordance with this Act to ensure that the interest of consumers are protected.” By, ensuring that Digicel and all other stakeholders are a part of every stage of the discussions, the Commission is following the tenets established under the Telecommunications Act. As well section 4(4) the Fair Trading Commission Act states that “the Commission shall, in performing its functions under subsections 3(a) (b)(d) and (f), consult with the service providers, representatives of consumer interest groups and other parties that have an interest in the matter before it.” This clause is also further support that Digicel is not imposing any obligation on the Commission beyond the bounds of the relevant statutes but is merely reminding the Commission of its existing obligations, under the relevant statutes. And that the Commission, in not making Digicel a part of its discussion with C&W between the period the consultation closed and the issuance of the decision, was not acting in pursuance of its mandate under the relevant statutes.

8. As regards paragraph 14, Digicel refutes the suggestion that the Commission met the requirements of section 27(3) in its approval process of the RIO. Digicel’s reference to section 27(3) refers to the period between the end of the consultation and the issuance of the decision. During that period, Digicel understands that the Commission communicated with C&W inter alia in relation to the very central point of interconnection rates and which ultimately resulted in the decision to decrease them by 15%. Digicel and the other stakeholders in the market should have been part of these discussions. The Commission again, clearly agrees with this view as the Commission suggested in the decision that it had had such discussions with Digicel and the other stakeholders. By not having those discussions with Digicel and the other stakeholders, the Commission was not in compliance with the provisions of section 27(3).
9. As regards paragraph 15, Digicel disagrees with C&W’s interpretation of subsection (b) of section 27(3) and states that the wording of the section is very clear. Section 27(3) (b) (iii)(iv) and (v) states that “in deciding whether to approve or refuse an RIO, the Commission shall have regards to...(iii) need to promote competition, (iv) long term interest of the end users; and (v)submissions whether oral or written of carriers providing and seeking interconnection. Digicel is of the view that this supports its position that the Commission is obliged to ensure that a level playing field is present for all stakeholders in the market, at all times and that it would do so by ensuring that all decisions made, especially after the consultation period closed and the issuance of the decision, would be imparted to other stakeholders in the market and would allow for their input. Digicel’s representations had not been received in relation to the rates discussion or any other bilateral discussions going on between the Commission and

C&W, nor had that of the other stakeholders. In its duty as regulator, the Commission in promoting competition – by being fair and transparent to all stakeholders in the market, would be fulfilling its mandate to safeguard the long term interests of end users. The Commission would do so by ensuring that it receives the input of all parties on such an issue, particularly on that of rates and not just the input of one party.

10. As regards paragraph 16, Digicel states that all stakeholders in the market should have been advised of and been able to participate in any consultation which took place after the consultation period was over and between the issuance of its decision. The Commission apparently is also of this view, as the Commission thought it had involved all stakeholders in the market. Digicel's absence, along with that of other stakeholders in the market, from such consultations, means that all stakeholders in the market did not have ample opportunity to comment on the draft RIO and therefore this meant that the Commission was not able to consider those comments as required.
11. As regards paragraph 18, Digicel states that at no point did it suggest that the Commission would present its draft of the RIO to the industry. At all times, the Commission would be presenting C&W's initial draft, including as the consultation process continues, changes to C&W's initial draft. The Commission does in fact either have the option to approve or not approve the RIO, however the Commission's obligation is to ensure that it bases the decision it comes to ultimately on several factors, set out in the legislation – one of them being the submissions made by the "carriers providing or seeking interconnection". If the Commission does not have the submissions of carriers providing or seeking interconnection on all issue which arise until the day on which its decision is issued, then the Commission has not fulfilled its obligations under the relevant statutes.
12. As regards paragraph 19, Digicel, at no point in its submissions, was suggesting or has suggested that that the Commission would present its own draft of the RIO. The draft presented by the Commission would always be the draft given to it by the dominant provider, C&W, at the start of the consultation process. In Digicel's suggestion as to the process which should be followed, Digicel is merely suggesting that the Commission provide the industry and the dominant provider with its own comments on the draft provided by C&W.
13. In conclusion, Digicel repeats its request for the Commission to make the following orders: -

- a. THAT the decision of the Respondent be quashed and that the procedure outlined by the Applicant in paragraph 21 of its submissions be followed; OR in the alternative
  - i. THAT the Applicant must be a part of the process, at every step of the way, in order for the process to be transparent and for due process to take place; and
  - ii. THAT during such a process, leading to the approval of a Reference Interconnection Offer, the Respondent shall engage all parties, throughout the process and not one entity, to the exclusion of others.
- b. Staying the Decision and/or Order of the Respondent until final determination of this matter or further determination.
- c. Restraining the Respondent from taking any further action against the Applicant in relation to the Decision and/or Order whether such action is under the provisions of the Fair Competition Act 2002 or under the Fair Trading Commission Act 2000 or otherwise.

A handwritten signature in black ink, consisting of several loops and a vertical stroke, positioned above a horizontal dotted line.

**Legal Counsel for Digicel**