

In the matter of an application by U-MOBILE (CELLULAR) Inc-  
(Digicel) for rates to be charged by Digicel for the provision of various  
interconnection services that shall be applicable to any operator  
interconnected to Digicel.

BEFORE THE COMMISSION.

Mr. Prem Persaud .....Chairman.  
Mr. Badrie Persaud.....Member.  
Mr. John C. Caesar.....Member.  
M. Maurice Solomon..... Member.

DIGICEL

Mr. Edward Luckhoo, S.C..... Attorney -at-Law.  
Mr. Stephen Fraser -..... Attorney-at-Law.  
Mr. Marcel Bobb -..... Attorney-at-law.  
Mr. Roger Yearwood- ..... Attorney-at-law.  
Mr. Gregory Dean - .....Chief Executive  
Officer.

GT&T

Mr. Miles Fitzpatrick, SC .....Attorney-at-law.  
Mr. Mark Waldron .....Attorney-at-law.  
Mr. Ronald Burch-Smith .....Attorney-at-law.  
Mr. Gene Evelyn - .....Director, Rate making.  
Mr. Yoganand Mahadeo-.....Chief Financial Officer.  
Mr. Delreo Newman .....Consultant.

## **CONSUMER REPRESENTATIVES**

**Ms Eileen Cox, A..... Consumers Advisory Bureau.**

**Mr. Patrick Dyal, AA-.....Guyana Consumers  
Association.**

**Mr. George Seales.....Consumers Movement of  
Guyana.**

### **RULING OF THE COMMISSION.**

U-MOBILE (CELLULAR) Inc (DIGICEL)'s application under Section 41 of the Public Utilities Commission Act No 10 of 1999 (the ACT) is for rates to

be charged by it for the provision of various interconnection services that shall be applicable to any operator interconnected to it. This application is under Section 41(2) of the Act, and the section deals with the setting of “rates” for a public utility which is desirous of changing any rate or rates being charged by it for any service provided by it, or where the utility initiates a new service for which rates will be charged.

The application was filed with the Commission on the 14<sup>th</sup> January, 2010 and we fixed a hearing for February 3, 2010. At that session we issued an order suspending the operation of the rates applied for, for a period of six months with effect from February 13, 2010, on ground that the hearing of the application is likely to be protracted as a result of the issues to be determined and the likelihood of much evidence to be submitted for the consideration of the Commission.

One of the issues to be determined, as canvassed by counsel for GT&T is whether the application is properly brought under Section 41 of the Act. Counsel for GT&T subsequently filed a brief and therein submitted that the best course of action is for the PUC to seek to use the “power of initiative” granted by Sections 36 and 21(5) to continue the interconnection under the expired interconnection agreement until the resolution of the current dispute by agreement or by order.

**What is this all about?** GT&T and Digicel had been operating under an Interconnection Agreement for a number of years and for which the Commission had given its sanction. To be precise that Interconnection Agreement was between GT&T and Cel\*Star later renamed U-MOBILE (CELLULAR) Inc – (DIGICEL). Digicel eventually took over from Cel\*Star and that agreement continued. In July 2009 Digicel served a six month notice on GT&T indicating its intention to terminate the agreement. Within the 6-month period, however, the parties met with the expectation of entering into another agreement. The discussions were not fruitful and at midnight of the 13<sup>th</sup> January, 2010, that agreement came to an end.

There appears to have been an arrangement that despite the termination of the interconnection agreement, GT&T will still maintain the interconnection links, and that is still in force and effect. As a consequence there is no disruption to the service of either utility and their respective customers suffer no inconvenience or embarrassment and they all enjoy a seamless service.

The agreement that has been terminated had provided for each utility company to pay to the other a fixed sum of money as compensation for the

interconnection which facilitated the making of calls by consumers. Digicel contends that since the agreement has come to an end the rates theretofore have come to an end also and the rates are now zero dollars. We understand this to mean that there is now no agreement as to what the rates are between the two companies for the interconnection. But consumers must still pay their respective providers for the service they are receiving, and the rates they pay are in terms of the rates fixed by this Commission. When we had fixed the floor and ceiling rates by Order No 1/2007 we took into consideration the interconnection rates of \$7.00 (seven dollars) between the utilities. The tariffs which Digicel has applied for all relate to interconnection charges to be paid by a utility service which is connected to it. They are not rates which a consumer is called upon to pay.

We have been advised, and out of interest we note, that while on the one hand Digicel has paid interconnection rates which it owed to GT&T up to and including 13th January, 2010, on the other GT&T has filed an invoice on Digicel for service up to and including January 31, 2010. Justice and fair play demand that at the end of the day whatever is due by either party to the other would be payable as from January 14, 2010. But let us get back on course.

In their application Digicel has spelt out what they are seeking, as follows:-

- (a) Digicel domestic mobile terminating access for calls originating on other Domestic Mobile Networks:
- (b) Digicel domestic mobile Terminating Access for calls originating on other Domestic Fixed (PSTN) networks.
- (c) Digicel domestic mobile terminating access for calls originating outside Guyana.
- (d) The introduction of a new call origination service for calls originating on Digicel's network and destined for termination outside Guyana.

GT&T's legal representative contends that Digicel cannot unilaterally seek to have rates fixed for interconnection charges since by its very nature interconnection involved a two-way traffic of telecoms services.

In response to GT&T's legal brief, Digicel on February 22, 2010, filed an application for the Commission to state a case in writing for the opinion of the Court of Appeal on some questions of law, in terms of Section 81 of the Act. In essence what the Court of Appeal was asked for was an opinion whether the Commission has jurisdiction to hear, entertain and determine the purported application by GT&T for an order that we and the Director of Telecoms ensure that an appropriate administrative order is issued which directs both

GT&T and Digicel to continue interconnecting on an interim basis under the now expired interconnection agreement on a retroactive basis to January 1, 2010, until such time as the interconnection matters are resolved either through the negotiation of a new interconnection agreement between the parties or through arbitration proceedings.

Subsequent pleadings by counsel for Digicel, however, have led the Commission to believe that they may not pursue that Section 81 application, and there seems to be a concession by them that the Commission can assume a jurisdiction under Section 36 of the Act. The Court of Appeal opinion in a reference by this Commission in a matter involving GT&T and Cel\*Star (**Civil Appeal No. 30 of 2004**) has ruled that the Commission “cannot abdicate its responsibility and statutory obligations under Section 36(2) once it has been approached by a public utility to be interconnected. It must hold an investigation and hearing as to whether the interconnection is in furtherance of convenience to the public, and may grant the interconnection on any terms and conditions it deems fit”.

So what we have in effect is, consequent upon the application by Digicel for rates under the provisions of Section 41, two issues have arisen, viz **(a)** is section 41 the proper section under which Digicel can file an application for interconnection rates: **(b)** can Digicel make such an application unilaterally for rates to be charged by it alone.

The Commission is of the view that it is of paramount importance and has decided to deal with the issue whether the application has been initiated under the proper section of the Act.

As we understand it, counsel for Digicel contends that the Commission having set out to hear the application filed under section 41 cannot now abort the process, but must continue to deal with it, and not be influenced by the “red herring” that it is brought under an incorrect section.

The fact that the Commission has set a date for hearing and suspended the operation of the rates applied for does not, in our judgment, inhibit us from considering, at any stage of the proceedings, the question of appropriateness of the section under which the application was filed. Indeed the question of the jurisdiction of the Commission to hear the matter as filed was raised at the first opportunity by the other side. This excited the attention of the Commission which then invited discussion on this issue.



Any application that comes before the Commission is presumed to be within its jurisdiction to deal with it, and that question is paramount - sine qua non – for the Commission to consider it.

We will first have to determine whether we can hear the application before we go on to consider whether the rates applied for are reasonable and just. Section 41 provides that if the Commission does not enter upon a hearing within a certain time the rates applied for shall be deemed to be the authorized rates for the service. The fact that a hearing has been fixed does not preclude the Commission from considering the bona fides of the application. When the Commission suspended the rates applied for it was giving itself and both parties the opportunity to examine and consider whether the application was properly brought before it.

In his submission counsel for Digicel claims that Digicel's application is made in the context of an existing **physical interconnection arrangement** between the parties – that both parties are committed to continuing the physical interconnection pending rate determination, and that GT&T may be bound to interconnect with Digicel under Section 36(1). In response to Digicel's application, GT&T in a response dated January 20, 2010, expressed its willingness to continue interconnection with Digicel provided that Digicel equally reciprocates, pursuant to the pre-existing methodology and arrangements which have been in place for over six years now, and served the industry well. And he goes on to say that GT&T may be bound to interconnect with Digicel under section 36(1).

It may be that the parties have at the moment agreed to continue actual interconnection in the public interest but there is no legal, binding interconnection agreement between them as to the terms and conditions (for a reasonable compensation) as are envisaged by section 36. The agreement they had between them for several years has been terminated by Digicel, having served a six month notice which expired on January 13, 2010. It goes without saying that it is in the interest of all parties – the utilities and the consumers – that there be a binding interconnection agreement between the parties.

Section 36 of the Act deals with interconnection. The Act provides for **“reasonable compensation”** for joint use of facilities where a public utility permits the use of its equipment by any other public utility. The question of compensation suggests a consensual arrangement, and the spirit and intendment of Section 36 suggest that interconnection is not a unilateral arrangement. When the section provides for any public utility having tracks, etc shall permit , for a reasonable compensation, the use of the same by any

other public utility, that suggest a consensual arrangement, and not a unilateral application for tariff for the service of interconnection. As we understand it interconnection agreements and rates are agreed upon in commercial negotiations between the parties and if they fail to come to agreement the regulator must determine the agreement and rate between them. It should not be that both parties must each apply for rates. This will be a tedious and costly exercise and will not be in the interests of either the consumers or the utilities.

Section 41 on the other hand provides for rates for a new service, or where the utility service desires to change rates being charged for any service provided by it. The legislature, in their collective experience and wisdom, would not have made provision for interconnection rates to be catered for under two separate and distinct sections of the Act. It is beyond doubt that Section 36 caters for compensation for interconnection between utilities, and it must accordingly follow that section 41 refers to and caters for rates to be charged consumers for the use of the various services. Such consumers do not include an interconnected utility service.

If one reflects for a moment, objectively, he will realize that the rate Digicel is seeking is for service which, of necessity, facilitates the sending/receiving calls by interconnecting facilities with another utility company for and on behalf of their respective customers. In other words interconnection offers a two-way traffic between two utility service providers: and as night follows the day it ought to be a mutual agreement between them. An interconnection agreement must, of course, contain all the terms and conditions, including technical specifications as well as co-ordination procedures and arrangements that are necessary for both utilities to provide interconnection services to each other.

The Commission accepts that it ought not to make a unilateral order in respect of interconnection charges by one party alone, and is of opinion that the provisions of Section 36 apply to interconnection and not those of Section 41. We accordingly dismiss the application by Digicel.

The Commission will hold public hearings in respect of the matters for which it is given responsibility by the provisions of Section 36 of the Act, and we accordingly invite the parties to suggest dates for an early hearing and determination of very important issues touching the interests and concerns of the utilities, the Commission and the interests and service to which the public is entitled.

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Prem Persaud - Chairman.

**PUC Order 2/2010.**

  
Badrie Persaud - Member.

  
John C. Caesar - Member.

  
Maurice Solomon - Member.

Dated this 11<sup>th</sup> day of March, 2010.