

TELECOMMUNICATIONS REGULATORY COMMISSION
VIRGIN ISLANDS

REPORT ON THE DIRECTIVE ON CALL TERMINATION RATES IN THE
VIRGIN ISLANDS

1 August 2012

Reference Number: P/02/2012



1. Summary of the Consultation Process

On June 1, 2011, the Telecommunications Regulatory Commission (“the TRC”) launched a consultation on the **Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks (“the First Market Analysis”)**. The purpose of this consultation had been to review the market for call and SMS termination in the Virgin Islands and to assess if any operators were dominant in that market and, if appropriate, to apply regulation under Section 26 of the Telecommunications Act, 2006 (“the Act”). The TRC noted, however, that it did not propose to regulate wholesale rates for SMS termination at that time.

Upon the conclusion of the consultation on the First Market Analysis, the TRC received comments from operators, which were considered extensively and addressed by the TRC in its Short Report dated September 22, 2011. After consideration of all the comments submitted by the operators in response to the First Market Analysis, the TRC decided to declare all operators dominant in the termination of calls to their own networks.

On September 30, 2011, the TRC then began public consultation on the **Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks: Part 2: Assessment of Regulatory Remedies (“the Second Market Analysis”)**. The Second Market Analysis proposed to regulate termination rates on the basis of benchmarking and proposed specific termination rates as follows:

- Mobile termination rate: \$0.05 per minute
- Fixed termination rate: \$0.01 per minute

Upon having considered all the comments received by operators in response to this consultation, the TRC found that there was no evidence submitted by the operators strong enough so as to merit any change in the proposed regulation of termination rates. Therefore, the TRC embarked on the process of amendment of the respective Licences of the operators as required under Section 26(4) of the Act and as outlined in Part 2 below.

The documents which had been produced throughout the consultation process can be found on the TRC’s website and are identified as follows:

1. **Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks** published on June 1, 2011.
2. Responses to the consultation of the **Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks** submitted by CCT dated 16 June 2011, by LIME dated 1 July 2011 and by Digicel dated 19 August 2011.

3. **Short Report on the Consultation on the Market Analysis Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks** published on September 22, 2011.
4. **Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks: Part II Assessment of Regulatory Remedies** published on September 30, 2011.
5. Responses to the consultation of the **Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks: Part II Assessment of Regulatory Remedies** submitted by CCT dated 28 October 2011 and LIME dated 31 December 2011. No response was received from Digicel.
6. **Short Report on the Market Analysis of Wholesale Call and SMS Termination on Individual Fixed and Mobile Networks: Part II Assessment of Regulatory Remedies** published on February 10, 2012.

2. Licence Amendment

2.1 The Negotiation Period

Article 18.1 of the Licence granted to each operator provides that, before amending the Licence of a Licensee, the TRC is required to, for a period of not less than thirty (30) days in advance, negotiate in good faith with the Licensee with the goal of reaching an agreement with respect to such modification or amendment.

On February 10, 2012, the TRC wrote to CCT, Digicel and LIME proposing amendments to each of their respective Licences to give effect to the regulated termination rates set out in the Short Report on the Second Market Analysis. This marked the commencement of a thirty (30) day period of negotiation between the TRC and each Licensee in relation to the amendments. The Licence Amendment that was proposed by the TRC is set out below:

1. Article 8.1 shall be deleted and replaced by the following:

“ 8.1 Dominant Public Supplier

Prices for telecommunications services shall be determined by providers in accordance with the principles of supply and demand in the market. Should the Licensee be designated a Dominant Public Supplier in accordance with Section 26(4) of the Telecommunications Act, 2006:

- a. **The Commission may regulate the interconnection rates payable to the Licensee by any other licensee or operator of telecommunications services interconnected to the Licensee’s networks and may impose such rates as outlined in Annex 8.**

b. The provisions of Article 8, except 8.1(a) above, shall then apply to retail rates and prices chargeable by the Licensee.”

2. Article 9.4 shall be amended as follows:

i. Subparagraph (b) shall be numbered as subparagraph (c)

ii. The following shall be inserted as subparagraph (b):

Interconnection Default Rates shall not apply where the Commission has determined the Licensee to be a Dominant Public Supplier in accordance with Section 26(4) of the Telecommunications Act, 2006. Should the Commission determine that the Licensee is a Dominant Public Supplier, the provisions of Article 8.1(a) shall apply.

3. The following shall be inserted as Annex 8:

ANNEX 8

WHOLESALE CALL TERMINATION CHARGES

1. Effective from *[the date on which the process for amendment of the Licence is due to conclude i.e. ninety (90) days after conclusion of these negotiations]* (“the Effective Rate Revision Date”), the Licensee shall charge and shall be paid rates for the termination of all calls originated in the British Virgin Islands on each of its networks as follows:

Calls terminated on the fixed line network	US\$0.01 per minute
Calls terminated on mobile networks	US\$0.05 per minute

2. The Licensee shall execute revised Interconnection Agreements with each licensee or operator of telecommunications services interconnected to the Licensee’s networks to give effect to the rates prescribed in paragraph 1 above from the Effective Rate Revision Date and shall submit each such Agreement to the Commission no later than one week after the Effective Rate Revision Date.

During the negotiation period, responses were received from LIME and Digicel. By letter dated March 1, 2012, LIME requested that the TRC should replace the word “may” in Article 8.1 a) with “shall” to eliminate any regulatory uncertainty with respect to the regulation of call termination rates. LIME also requested clarification that the proposed regulation only applied to the wholesale call termination market and not to the related retail market.

LIME also proposed that fixed termination rates should also apply to calls terminating on networks which were marketed as fixed services regardless of the technology used to

terminate the call. LIME further argued that a fixed termination rate should apply to CCT's fixed wireless product "FiWi" because CCT marketed this product as a fixed service.

The TRC responded to LIME on 7 March 2012, indicating a willingness to change the wording from "may" to "shall" in order to establish regulatory certainty in the application of regulated termination rates to public suppliers declared dominant in the market for the call termination services. The TRC confirmed that the proposed regulation did not intend to apply to retail rates and proposed further redrafting to clarify the point. The TRC again confirmed its position on fixed and mobile termination rates, stating that termination on a WIMAX network would attract a wireless (mobile) termination rate unless operators were able to present cost information which demonstrated that the real cost of termination on such a network were significantly different.

By letter dated March 7, 2012, Digicel requested clarification that the proposed regulation was confined to voice call termination only and applied only to wholesale call termination rates and not to retail rates. As in the TRC's response to LIME, the TRC responded to Digicel on March 8, 2012, confirming that the proposed regulation did not intend to apply to retail rates and proposed further redrafting to clarify the point.

CCT did not submit a written response but responded by telephone stating that they had no objections to the proposed amendment but sought to confirm that the proposed regulation would not apply to retail rates. On March 8, 2012, the TRC wrote to CCT and also confirmed that the proposed regulation would not apply to retail rates.

2.2 The Post-Negotiation Consultation Period

Article 18.5 (b) of the Licence granted to each operator mandates the TRC to, before adopting a Directive to amend a Licence, publish a notice in the Gazette and at least one other newspaper of general circulation in the Virgin Islands and send a copy of the notice to the Licensee stating *inter alia* that it proposes to adopt a directive to amend the Licence and the reasons for same.

On April 19, 2012, the TRC published a revised proposed Licence Amendment in the Gazette and invited interested parties to submit comments on the proposed amendments by May 19, 2012. The revised proposed Licence Amendment was as follows:

1. Article 8.1 shall be deleted and replaced by the following:

"8.1 Dominant Public Supplier

- i. Prices for telecommunications services shall be determined by providers in accordance with the principles of supply and demand in the market.
- ii. Should the Licensee be designated a Dominant Public Supplier in accordance with Section 26(4) of the Telecommunications Act, 2006 the Commission shall regulate the wholesale call termination rates payable to the Licensee by any other licensee or operator of telecommunications services interconnected to the Licensee’s networks and shall impose such rates as outlined in Annex 8.
- iii. Annex 8 shall not apply to retail rates and prices chargeable by the Licensee.”

2. Article 9.4 shall be amended as follows:

- iii. Subparagraph (b) shall be numbered as subparagraph (c)
- iv. The following shall be inserted as subparagraph (b):
Interconnection Default Rates shall not apply where the Commission has determined the Licensee to be a Dominant Public Supplier in accordance with Section 26(4) of the Telecommunications Act, 2006. Should the Commission determine that the Licensee is a Dominant Public Supplier, the provisions of Article 8.1(ii) shall apply.

3. The following shall be inserted as Annex 8:

ANNEX 8

WHOLESALE CALL TERMINATION CHARGES

- 1. Effective from *[the date on which the process for amendment of the Licence is due to conclude i.e. ninety (90) days after the publication of this Notice]* (“the Effective Rate Revision Date”), the Licensee shall charge and shall be paid rates for the termination of all calls originated in the British Virgin Islands on each of its networks as follows:

Calls terminated on the fixed line network	US\$0.01 per minute
Calls terminated on mobile networks	US\$0.05 per minute

- 2. The Licensee shall execute revised Interconnection Agreements with each licensee or operator of telecommunications services interconnected to the Licensee’s networks to give effect to the rates prescribed in paragraph 1 above from the Effective Rate Revision Date and shall submit each such Agreement to the Commission no later than one week after the Effective Rate Revision Date.

By letter dated May 21, 2012 Digicel responded proposing that the TRC revert to the use of the word “may” over “shall” in order to grant the TRC some flexibility in imposing the regulation. Digicel argued that the TRC should have the flexibility to choose whether or not to regulate termination rates, even where dominance has been found.

Digicel also suggested in its letter that the TRC should clarify that the regulation applied only to domestic termination rates for calls originating in the Virgin Islands and requested some rephrasing to refer specifically to dominance in the call termination market. In addition, upon inquiry as to what were the TRC’s proposals for the payment of compensation, Digicel considered that it was likely to sustain damage by way of foregone revenue upon the future capping of mobile termination rates by the TRC. The TRC’s final response to Digicel’s points is detailed in section 3 below.

2.3 The Hearing

Article 18.5 (c) of the Licence requires the TRC to call a public hearing during which the Licensee and those third parties with a legitimate interest that have duly filed comments or objections which the TRC deems substantial and relevant, shall have a right to be heard.

The TRC held a Hearing on July 18, 2012 which was attended by CCT, Digicel and LIME as follows:

CCT

Jose Luis Fernandez, General Manager

Digicel

Andrew Gorton, Head of Regulatory Affairs

Declan Cassidy, Chief Executive Officer

Tom Reynolds, In-House Counsel

LIME

Sean Auguste, General Manager

Christine Morris-Gillespie, Legal and Regulatory Counsel (by video-conference)

Melesia Sutherland-Campbell, Regulatory Advisor (by video-conference)

The TRC summarized the comments that had been made by each operator both during the negotiation period and during the post-negotiation consultation period and the positions that had been issued by the TRC in response to each comment. In particular, the TRC clarified that:

- i. the proposed Licence Amendments applied solely to calls originating in the Virgin Islands and did not apply to international calls terminating on local networks; and
- ii. the regulated rates would not apply retroactively but would apply for a period of two years from the date that the Licence Amendments take effect.

Each operator present at the Hearing was then allowed an opportunity to make submissions on the proposed Licence Amendment. The positions of each operator, as represented at the Hearing, are summarized below.

i. CCT

CCT indicated that it was in full agreement with the proposed Licence Amendment and had no further comments to make or amendments to propose.

ii. Digicel

Digicel indicated that there was no reason why the proposed regulated rates could not take effect from August 1, 2012 since it was a simple matter for operators to make adjustments to their invoices to give effect to new interconnection rates. Upon inquiry by the TRC, Digicel indicated that it was possible for the proposed regulated rates to apply from any day of the month and not necessarily from the first of the month, although it might be more convenient for operators for the effective date to be from the first day of each month.

Digicel re-iterated its position that the word “may” ought to have been employed in Article 8.1(ii) as opposed to the word “shall”. Digicel pointed out that the Act afforded a discretion to the TRC and that such discretion should be preserved in the proposed Licence Amendment. In addition, Digicel cautioned that there is precedent in the region in which an operator had sought injunctive relief against a regulator based on the use of the word “shall” in relation to the exercise of that regulator’s powers and therefore, the TRC should seek to avoid this.

In relation to Article 8.1(ii), Digicel proposed the replacement of the phrase “be designated a dominant public supplier” with the phrase “be designated as dominant in the market for call termination services”. Digicel considered this modification necessary to ensure that there was no ambiguity that the market to be regulated by virtue of the Licence Amendments was that of call termination services and not retail services.

Digicel also confirmed that whilst it does not intend to make an application for damages at the Hearing, it reserved its position generally on the matter of compensation.

iii. LIME

LIME stated that it continued to have an issue with the application of a mobile termination rate to what it considers to be a service that is ostensibly a fixed service and offered as such albeit using a mobile technology. LIME noted that one reason for its objection was that the wording of the proposed amendment to Annex 8, in its opinion, was likely to create difficulties in the regulation of a mix of technologies i.e. the termination of calls using a mix of both fixed and mobile. LIME considered that the removal of the word “line” from the first line of the Table in Annex 8 would serve to apply the regulated rates to “fixed networks” and not necessarily to fixed line networks.

Taking the argument further, LIME expressed the opinion that although the proposed Licence Amendments applied only to the origination and termination of domestic calls on a wholesale basis, there were two disconnects which the TRC should seek to address. They related firstly to the presentation of fixed versus mobile in the retail and wholesale markets and secondly to the presentation of fixed versus mobile in the domestic versus the international markets. On the latter point LIME noted that there are number of call termination services that are on record internationally as being fixed that will now be regulated by the proposed Licence Amendments as mobile. However, LIME did not offer further detail as to what were the specific call termination services to which reference was being made in this case.

LIME further noted that the word “shall” was the preferred terminology as opposed to the word “may” not only because of the need for regulation but also to provide certainty that all parties designated as dominant in a particular market would be regulated equally.

LIME also registered its objection, which it had previously raised in the response to the second phase consultation dated 31 December 2011, in relation to the use of rates from metropolitan France and its overseas Territories in French Guiana, Guadeloupe and Martinique as viable benchmarks for call termination in the Virgin Islands. LIME had previously argued, in the response of 31 December 2011, that the inclusion of benchmarks from the French overseas territories of French Guiana, Guadeloupe and Martinique is inappropriate as the ARCEP calculations to arrive at these regulated rates are based on the costs of a fixed line operator in Metropolitan France but no further detail on this issue was offered by LIME at this stage.

After the parties had made their respective submissions, the TRC again raised the question as to what might be the most appropriate date of application of the proposed Licence Amendments. The TRC inquired from attendees whether either August 1, 2012 or September 1, 2012 should be the effective date of application of the proposed Licence Amendments, if made final.

CCT responded that it was comfortable with either date. Digicel responded that there was no reason why the new rates could not be implemented from August 1, 2012. Digicel further explained that it the proposed rates would be easy to implement as it only entailed changing one number on the relevant invoice for charges incurred during the month of August, which would not be issued until September. LIME requested that the regulated rates apply from September 1, 2012 but, upon inquiry by the TRC, added that it did not anticipate any specific problem to implement the rates from August 1, 2012.

3. TRC's Final Position on the Issues

Upon full consideration of the representations made by CCT, Digicel and LIME during the negotiation period, the post-negotiation consultation period and at the Hearing, the TRC's position in relation to each of the issues raised is as follows:

i. Article 8.1(ii) – “Shall” vs. “May”

Section 26(3) of the Act provides that the TRC may determine that a public supplier is dominant with respect to a telecommunications network or a telecommunications service. **Section 26(4)** requires that where the TRC determines that a public supplier is dominant in any market, the TRC shall include in the licence of the public supplier, upon issuing or by amending the licence, such terms and conditions to the licence for the purpose of regulating tariffs, protecting the interests of users and other licensees and of ensuring fair competition amongst licensees as it considers appropriate.

The TRC considers that whilst Section 26(3) of the Act affords it some discretion as to whether or not it may intervene in any particular market and declare a public supplier dominant, once it decides to so intervene, section 26(4) affords little discretion to the TRC as to whether or not regulatory measures may be applied. Although section 26(4) provides that the TRC may apply regulatory measures “as it considers appropriate”, the TRC believes that the Act did not intend that the TRC should opt to impose or not to impose regulated termination rates other than in accordance with the process contemplated in the Act and in the Licence of each operator. Should the TRC decide

that such regulation of the nature prescribed in the proposed Licence Amendment is no longer relevant, then the TRC may either act on the application of a public supplier who was determined dominant and considers that it has lost its dominance under **section 26(5)** of the Act or rely on the broad powers afforded under **section 6(d)** of the Act to ensure fair competition among licensees and other operators of telecommunications networks and providers of telecommunications services.

Therefore, the relevant part of Section 8.1(ii) shall read:

“..... the Commission shall regulate the wholesale call termination rates payable to the Licensee by any other licensee or operator of telecommunications services interconnected to the Licensee’s networks and shall impose such rates as outlined in Annex 8.”

ii. Scope of the Licence Amendments

The TRC confirms that the amendments apply only to domestic mobile termination rates. The TRC believes that the following wording set out in Annex 8 of the final Licence Amendment outlined in Part 4 below adequately and appropriately communicates this intention:

“the Licensee shall charge and shall be paid rates for the termination of all calls originated in the British Virgin Islands on each of its networks...”

The TRC also confirms that the regulated rates apply only to the relevant wholesale market and not to the related retail market. The TRC believes that this is adequately reflected in the following wording of Article 8.1 (iii) as outlined in Part 4 below:

“Annex 8 shall not apply to retail rates and prices chargeable by the Licensee.”

The TRC accepts Digicel’s position, as represented at the Hearing, that the wording of Article 8.1 (ii) should be changed from “Dominant Public Supplier” to “supplier dominant in the market for call termination services”. The TRC believes that this modification would further clarify that the scope of the Licence Amendment only applies to the market for call termination services.

Therefore, Article 8.1 (ii), as set out in full in Part 4 below, shall now read:

“Should the Licensee be designated as a supplier dominant in the market for call termination services in accordance with Section 26(4) of the Telecommunications Act, 2006...”

Similarly, the following shall be inserted as subparagraph (b) of Article 9.4:

“Interconnection Default Rates shall not apply where the Commission has determined the Licensee to be a supplier dominant in the market for call termination services in accordance with Section 26(4) of the Telecommunications Act, 2006. Should the Commission determine that the Licensee is a supplier dominant in the market for call termination services, the provisions of Article 8.1(ii) shall apply.”

iii. Compensation

Article 18.1 of each operator’s Licence provides that the TRC shall compensate the Licensee for any expense incurred or damage caused as a result of an amendment or modification made to the Licence.

The TRC considers that no operator is likely to incur expense or damage as a result of the proposed Licence Amendments such as to attract the award of compensation under the Licence. Indeed, no operator has made an application for compensation for consideration by the TRC as a result of the amendments proposed to its Licence. Therefore, the TRC does not propose to award compensation to operators upon the amendment of its Licence in accordance with the Directive.

iv. Application of Fixed Termination Rates to Fixed Networks and Mobile Termination Rates to Mobile Networks

It is the TRC’s position that the FiWi service offered by CCT uses CDMA technology, which is a wireless (mobile) technology and therefore, in the view of the TRC, it is appropriate to apply a mobile termination rate. The rationale behind the application of benchmarking, using countries in the region with regulated benchmarks and following a costing methodology, is to achieve termination rates in the Virgin Islands which are as close to cost as possible without going down the route of producing a long run incremental cost model (“LRIC”) for the Virgin Islands which, in the view of the TRC and as endorsed by the operators, would not be an efficient solution for the Virgin Islands. The termination rates applied should reflect the cost of providing the termination service.

Therefore, if a mobile technology is used to provide the service, then a mobile termination rate should apply to cover the cost of providing the wholesale termination

service, regardless how the retail service might be marketed. For this reason, the TRC does not agree that the word “line” should be removed from the Table included in Annex 8 of the proposed Licence Amendments.

Therefore, the regulated termination rates, as outlined in Annex 8 set out in Part 4 below shall be as follows:

Calls terminated on the fixed line network	US\$0.01 per minute
Calls terminated on mobile networks	US\$0.05 per minute

v. The Appropriate Use of Benchmarks

The TRC believes that the inclusion of benchmarks from the French overseas territories of French Guiana, Guadeloupe and Martinique did not materially alter the objective to set a fixed termination rate that would be in line with Caribbean benchmarks from 2012-2014. The TRC considers that the purpose of including benchmarks from the French overseas territories was to include regulated rates that had been calculated on the basis of a pure LRIC methodology which were applied in the Caribbean. The ECTEL benchmarks were calculated on the basis of a LRIC plus methodology and so using both ECTEL and ARCEP benchmarks enabled the TRC to set a regulated rate which reflected a combination of the costing methodologies that are currently at use throughout the regulated world. The European Commission’s Recommendation on Termination Rates of May 7, 2009 advocates the use of a pure LRIC methodology over a LRIC plus methodology and Europe is now moving towards the use of pure LRIC. Using the pure LRIC benchmarks from the French overseas territories and the LRIC plus benchmarks from ECTEL, the TRC arrived at a fixed termination rate of US\$0.01. If the ARCEP benchmarks are removed and only ECTEL benchmarks are used, then a simple average of \$0.0147 would result as the average termination rate for ECTEL countries for 2011. The TRC believes that termination rates are on a downward trend throughout the region and therefore the appropriate rate for 2012-2014 for the Virgin Islands would be below a rate set for 2011. Therefore, even without the use of ARCEP benchmarks, the appropriate rate to apply remains \$0.01 to ensure that the Virgin Islands fixed termination rate is in line with regional benchmarks from 2012 to 2014.

vi. Date of Application of the Licence Amendment

Based on the representations made by the operators at the Hearing, the TRC believes that there is no reason why the regulated rates should not take effect from August 1, 2012. Therefore, the TRC’s Directive which gives effect to the Licence Amendments shall state that the Licence Amendments shall apply from August 1, 2012.

4. Final Licence Amendment

Based on the above, the TRC shall, by issue of the appropriate Directive, amend the respective Licences of CCT, Digicel and LIME with effect from August 1, 2012 as follows:

1. Article 8.1 shall be deleted and replaced by the following:

“8.1 Dominant Public Supplier

- i. Prices for telecommunications services shall be determined by providers in accordance with the principles of supply and demand in the market.**
- ii. Should the Licensee be designated a supplier dominant in the market for call termination services in accordance with Section 26(4) of the Telecommunications Act, 2006 the Commission shall regulate the wholesale call termination rates payable to the Licensee by any other licensee or operator of telecommunications services interconnected to the Licensee’s networks and shall impose such rates as outlined in Annex 8.**
- iii. Annex 8 shall not apply to retail rates and prices chargeable by the Licensee.”**

2. Article 9.4 shall be amended as follows:

- i. Subparagraph (b) shall be numbered as subparagraph (c)**
- ii. The following shall be inserted as subparagraph (b):**
Interconnection Default Rates shall not apply where the Commission has determined the Licensee to be a supplier dominant in the market for call termination services in accordance with Section 26(4) of the Telecommunications Act, 2006. Should the Commission determine that the Licensee is a supplier dominant in the market for call termination services, the provisions of Article 8.1(ii) shall apply.

3. The following shall be inserted as Annex 8:

ANNEX 8

WHOLESALE CALL TERMINATION CHARGES

- 1. Effective from August 1, 2012 (“the Effective Rate Revision Date”), the Licensee shall charge and shall be paid rates for the termination of all calls originated in the British Virgin Islands on each of its networks as follows:**

Calls terminated on the fixed line network	US\$0.01 per minute
Calls terminated on mobile networks	US\$0.05 per minute

- 2. The Licensee shall execute revised Interconnection Agreements with each licensee or operator of telecommunications services interconnected to the Licensee's networks to give effect to the rates prescribed in paragraph 1 above from the Effective Rate Revision Date and shall submit each such Agreement to the Commission no later than one week after the Effective Rate Revision Date.**