

IN THE ICT APPEALS PANEL

Re: Application for Review:

Digicel (PNG) Limited Application for Review pursuant to Section 256 of the National Information and Communications Technology Act 2009 in respect of a Decision dated 27 October 2014 by the National Information and Communications Technology Authority (NICTA) to recommend that the Minister renew the declarations of the Domestic Mobile Terminating Access Service (DMTAS) and the Domestic Fixed Terminating Access Service (DFTAS).

Panel Members

Mr Mel Togolo and Mr Allan Asher

1. The Appeals Panel:

- i. Panel Finding In Relation to Standing:
 1. The Panel has conducted the Review in such a way that it meets the requirements of natural justice, fairness and expedition. The Panel is committed, in so far as it is within its jurisdiction properly to do so, to assist in achieving the Objective of the Act, observing and furthering the Regulatory Principles¹ and to following the procedural requirements of the Act².
 2. The Panel concludes that Digicel has the requisite standing to bring and maintain the application for Review.
 3. The Panel notes that in its Cross Submission submitted on May 1, 2015, NICTA has reversed its earlier submission that the applicant had no standing to pursue a Review before the Panel
 4. The Panel notes that jurisdictional challenges made by both Digicel and NICTA have added significantly to the complexity and timeframe of the Review.
- ii. The Panel concludes that in relation NICTA's compliance with the Declaration Criteria, taking into account the extensive material available to NICTA at the time of its Recommendation to the

¹ The Act, Section 2, Objective of Act and Section 3, Regulatory Principles. The Panel notes in particular the objective of the Act in ensuring that the ICT industry contributes to the greatest extent possible to the long-term economic and social development of Papua New Guinea. ICT services are to be supplied as efficiently and economically as practicable and supplied at performance standard that reasonably meet the social, industrial and commercial needs of Papua New Guinea and its people. The Panel in applying the regulatory principles of section 3 is mindful that to the extent that markets are not competitive, appropriate ex ante regulatory measures may be required to promote and maintain effective and sustainable competition and that regulatory measures should be proportionate and crafted to achieve results that are no more burdensome the necessary to achieve their stated regulatory objectives.

² The Act Section 259 Procedure

Minister, including The Discussion Paper and submissions as described in the Response to Comments Report, prior ICT Appeals Panel Determinations and regulatory Actions taken by ICCC, NICTA has met the requisite standard under the Act.

- iii. The Panel concludes that in relation to the inclusion in the proposed Service Description of the termination of calls originating outside Papua New Guinea:
 1. As a matter of law, NICTA, on satisfying itself that all of the declaration criteria would be met by the declaration of a wholesale service, can specify the particular terms of the declaration pursuant to section 129 of the Act.
 2. Complex legal and commercial arrangements are involved in incorporating in service definitions of calls originating outside Papua New Guinea.
 3. The question of whether or not the previous declaration included: *“the termination of calls and short messaging services on mobile networks situated in Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country”* as argued by NICTA and denied by Digicel is a matter for the Courts to decide.
 4. The Panel concludes that in the absence of a judicial determination to the contrary, NICTA is entitled under the Act to recommend to the Minister that DMTAS and DFTAS be declared with variations and appropriate terms pursuant to Section 127 (1) and (2).
 5. The Panel further concludes that rather than describing the terms of the new recommended Declaration as one which *“clarifies”* that communications originating outside Papua New Guinea were part of the prior Declaration, NICTA should have proposed a variation to the particular terms of the existing declaration and provided in its report reasons and conclusions as to why that variation was desirable. The Panel notes that section 129 (3) of the Act provides such a mechanism for variation.
- iv. The Panel concludes that in relation to the issue in paragraph 118(iii)4, NICTA is entitled to express views about policy and that it is entirely consistent with its role under the Act.

- v. The Panel concludes that in relation the issue in paragraph 118(iv)1, NICTA is entitled to make such recommendations as per paragraph 1(iii)1-5 above. However, the Applicant may challenge the legality of the clause in the Courts.
- vi. The Panel concludes that in relation to 118(v):
 - 1. following a careful Review of the content of the NICTA Discussion Paper, the Response to Comments Report, submissions made to NICTA and to the Panel, the Panel is satisfied that NICTA has met its obligations under section 129 of the Act
 - 2. certain processes of NICTA such as the treatment of the submission by ICCC and the challenge to the Standing of Digicel to make an Application for Review could have been improved, however neither of these shortcomings is sufficient to set aside the original decision and return the matter to NICTA

Other matters of concern to the Appeals Panel

2. Timeliness of NICTA public enquiry

- i. In its submission to the Panel, NICTA states that *"in anticipation of the expiry of the deemed declaration of DMTAS and DFTAS on 31 December 2014, NICTA conducted a public enquiry during 2014, as required by section 127 of the Act in sufficient time to enable a recommendation to be made to the Minister on whether to make a further declaration of DMTAS and/or DFTAS before the end of the year"*.³
- ii. **The Panel disagrees that sufficient time was allowed for the regulatory process to be effectively carried out.**
- iii. In commencing its enquiry in September with a recommendation at the end of October, NICTA provided an inadequate timeframe for all of the processes to be concluded by the end of December 2014. In the Panel's view NICTA should have been aware of the likely controversy which would arise concerning termination of calls originating outside Papua New Guinea and of the near certainty that at least one of the affected operators would raise

³ NICTA Submission dated April 7, 2015 at paragraph 33

objection in the form of a Review, or as has happened in the past, litigation.

- iv. NICTA is not alone in contributing to the present level of uncertainty in relation to these regulatory arrangements. Processes around the establishment of the ICT Appeals Panel and confusion about the status of the deemed declaration by the Minister have all placed an unnecessary burden on commercial operators and the regulator.
- v. **The Panel recommends that in future Reviews, considerably more time should be allowed for the process to be completed prior to the end date of declarations.**

3. Cartel allegation

- i. Among the many points on which NICTA and Digicel fundamentally disagree, is the assertion made by NICTA in relation to the Interconnection Agreements between Digicel and Bmobile and between Digicel and Telikom⁴.
- ii. NICTA states that it is aware that the interconnection agreements purport to exclude termination of calls that do not originate on either party's mobile network within Papua New Guinea. In both cases, according to NICTA, the arrangements are devised to suit the purposes of Digicel and its contracting parties, which are each monopoly providers of access to their networks for the purposes of termination.
- iii. NICTA argues that the restrictive terms of the interconnection agreements are *"simply a cartel agreement that prevents competition for the origination and termination of international calls, with the result that consumers are denied choice and must face increased prices. Retail charges for calls into and out of Papua New Guinea are very high by world standards and this is largely a function of lack of competition in domestic termination services for international calls"*.
- iv. Digicel vigorously objects to this characterisation by NICTA and

⁴ NICTA Submission dated April 7, 2015 at paragraph 66

describes it as a "*baseless allegation*".

- v. **The Panel is not in a position to express a view on the legality of the interconnection agreements, however, it recommends that details of the arrangements be forwarded to ICCC for review under Part VII of the Independent Consumer and Competition Commission Act 2002.**
- vi. **If the agreements are found to be in breach of competition law, then they can be voided and less anti-competitive arrangements may take their place. If, on the other hand they are found to be compliant, NICTA will need to rethink its administrative approach in this area.**

4. Costs of the ICT Appeals Panel

- i. The Act provides that the costs of the Panel in a Review of a decision of NICTA shall be borne by the parties to the Review as determined by the Panel.
- ii. Parties have the right to pursue their interests to the full extent that the law and their own resources allow. However, the more complex and prolific a party's submissions become and to the extent that they challenge submissions by other parties, the time and cost of the Review will be increased.
- iii. The Panel is of the view that the Applicant and NICTA have both contributed to the complexity and duration of this Review through extensive challenges to the submissions of the other party.
- iv. **The Panel has determined that the applicant should meet two thirds of the costs of the Review and that NICTA should meet one third of the cost of the Review.**
- v. **The Secretariat to the Panel will formally notify parties of the cost obligation.**

Abbreviation	Glossary of abbreviations and terms used in this Review
Application, Application for Review, Review	Digicel (PNG) Ltd Application for Review pursuant to Section 256 of the in respect of a declaration dated 27 October 2014 by the National Information and Communications technology Authority to recommend that the Minister renew the Declarations of the Domestic Mobile Terminating Access Service and the Domestic Fixed Terminating Access Service
bmobile	A telecommunications service provider
Court	National Court of Justice
Decision	Recommendation by National information and Communications Technology Authority to the Minister to renew Declarations of the Domestic Mobile Terminating Access Service and the Domestic Fixed Terminating Access Service
Declaration Criteria	Threshold criteria specified at Section 128 of the Act to engage regulatory action
Declaration, The Declaration	Declarations of the Domestic Mobile Terminating Access Service and the Domestic Fixed Terminating Access Service
Declared Services	A telecommunications service subject to regulatory non-discrimination conditions
Deemed Declaration	A service which is deemed to be declared by statute or in consequence of the inaction of the Minister
Determination of Standing, Standing	Standing means the right of a person whose interests are affected to Appeal. A threshold issue to the bringing of an Application for Review of a regulatory decision
DFTAS	Domestic Fixed Terminating Access Service
Digicel	Digicel (PNG) Limited, a major telecommunications service provider in Papua New Guinea
Direction	Regulatory orders made by the ICT Appeals Panel in respect of the conduct of this Review
Discussion Paper	NICTA Discussion Paper Public Inquiry into the potential renewal of the declarations of the domestic mobile/fixed terminating access services 1 September 2014
DMTAS	Domestic Mobile Terminating Access Service
Draft Declaration	Draft Terms of the Proposed Declaration at Annex B of the NICTA Discussion paper September 1 2014
Gazette	National Gazette of Papua New Guinea
NICTA	National information and Communications Technology Authority
Operator Licensee	Telecommunications service providers or access providers subject to the Act
Panel of Experts	Appointed Panel of persons who may Review certain regulatory decisions
Parties	Persons with a requisite interest participating in a regulatory process
Prior Declaration	Refers to a service which has, in the past, been subject to regulation
Public Inquiry	Mechanism provided in the Act for inquiry into declaration or renewal of the declaration of a service
Regulatory Principles	Principles set out in Section 3 of the National Information and Communications Technology Act 2009
Rehearing	The process of remaking a regulatory decision subject to Appeal
Secretariat, Panel Secretariat	For the purposes of this Review, the Secretariat is comprised of seconded Treasury Officials
Section X	Section of the National Information and Communications Technology Act 2009
Telikom	A telecommunications service provider
The Act	National Information and Communications Technology Act 2009
The Minister	Minister for Communications and Information Technology
The Panel, Appeals Panel, ICT Appeal Panel	Information and Communications Technology Appeals Panel

Background to the Panel Review

5. The Act provides for NICTA to conduct public enquiries into whether or not particular wholesale services should be made “declared services” by the Minister.
6. An operator licensee that supplies the declared service must comply with particular non-discrimination obligations.
7. The terms and conditions of supply of the declared service must be consistent with the general pricing principals specified in the Act and the service specific principles that must be specified by NICTA for each declared service.
8. NICTA may also be called upon to arbitrate a dispute between two operator licensees regarding the terms and conditions of supply of a declared service.
9. According to Schedule 1 of the Act, the DMTAS and the DFTAS were deemed to be declared services in accordance with Section 131 of the Act.
10. These deemed declarations expired on 31 December 2014.
11. On 1 September 2014, NICTA gave notice of its intention to undertake a public enquiry into and “*report on whether the domestic mobile terminating access services and/or the domestic fixed terminating access services should continue to be declared service under section 130 of the Act following the expiry of the existing declaration of those services on 31 December 2014*”.
12. On the same day, NICTA issued a discussion paper entitled public enquiry into the potential renewal of the declarations of the domestic mobile/fixed terminating access services.
13. On 28 October 2014, NICTA released its decision in a report titled “*The renewal of the declaration of the domestic mobile terminating access service (DMTAS) and the domestic fixed terminating access service (DFTAS)*”.
14. Key elements of the decision made were that:
 - i. “*NICTA has held a public enquiry into whether or not the existing declaration of the DMTAS and/or DFTAS should be renewed following their expiry by 31 December 2014.*”
 - ii. “*NICTA is satisfied that all of the declaration criteria specified in section 128 of the Act would be met by the continued declaration of the DMTAS and the DFTAS. Accordingly NICTA hereby recommends that the Minister declare those services for a period of five years.*”
 - iii. “*A draft declaration that reflects this recommendation (and which NICTA has considered against, and is satisfied meets all of, the declaration criteria) was provided at Annex C of the report.*”

- iv. *NICTA considers that regulatory intervention is necessary in addressing the potential market failures and anti-competitive consequences of each network operator's monopoly control over the termination of calls (and SMS in the case of mobile) on its network. NICTA is satisfied that all of the declaration criteria would be met by the Minister's renewal of the declaration of the DMTS and the DFTS. In accordance with Section 129 of the Act, NICTA recommends that the Minister declare those wholesale services on the terms set out in Annex C. Following that, NICTA recommends that the Minister arranges for the Head of State to amend the regulations along the lines of the draft amendment at Annex D to make both the DMTAS and the DFTAS designated interconnection services for the purposes of section 137 of the Act."*
- v. Digicel by Application to the Panel seeks a Review of the Decision of NICTA to recommend Declaration of the DMTAS and the DFTAS.

Legislative scheme for Appeals

15. The Act, at Part XIII provides for the Review of certain decisions of NICTA.⁵
- i. Certain decisions of NICTA may be reviewed by the ICT Appeals Panel. The ICT Appeals Panel is constituted from members of the Panel of Experts established under the ICCC Act.
 - ii. The ICT Appeals Panel shall be comprised of single member who will be an International Arbitrator or a resident member, depending on the matter the subject of the application for Review. The International Arbitrator must be a person with international experience in the operation and administration of an economic regulatory regime and a non-resident of Papua New Guinea.
 - iii. The International Arbitrator may determine that certain applications warrant that the ICT Appeals Panel should be constituted by two members, the International Arbitrator and a resident member.
 - iv. No Actions may be taken in Court from a decision of NICTA until the ICT Appeals Panel process is first exhausted. Judicial Review is only available after a person has first exhausted all other remedies provided under this Act.
 - v. Determination of Standing to bring an application for Review, formal contents for an application, procedures to be followed by the Panel and the specification that a Review shall be by way of rehearing are all provided for in Part XIII.

⁵ Section 254 of the Act provides a Simplified Outline of the appeals provisions

Application for Review

16. On November 17, 2014, Digicel, a member of the Digicel Group, a global communications provider with operations in 32 markets in the Caribbean, Central America and Asia Pacific including Papua New Guinea, filed an Application for Review.
17. The application for Review was made pursuant to section 256 of the Act to the Panel in respect of the decision by NICTA to recommend that the Minister renew the declaration of the DMTAS and DFTAS.

Scope of Review

18. The scope of the Review applied for by Digicel relates to the following matters:
 - i. Whether NICTA's analysis and conclusions in relation to the recommendation of the renewal of the Prior Declaration are consistent with the requirements of the declaration criteria set out in Section 128 of the Act;
 - ii. Whether, taking into account the wording and scheme of the Act, the recommended amendments of the service definitions contained within the Prior Declaration to now provide: *"For the avoidance of doubt, the domestic mobile terminating access service applies to the termination of calls and short messaging services on mobile networks situated in Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country"* and *"For the avoidance of doubt, the domestic fixed terminating access service applies to the termination of calls on fixed networks situated in Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country"* are lawful.
 - iii. Whether NICTA has acted in excess or want of jurisdiction by seeking to make "policy" decisions rather than applying the terms of the Act in accordance with Government policy;
 - iv. Whether the Decision is consistent with the objectives contained in Section 2 of the Act;
 - v. Whether the decision is consistent with the Regulatory Principles contained in Section 3 of the Act.

Formal Matters

19. Pursuant to Part V of The Independent Consumer and Competition Commission Act 2002 and Part XIII of the National Information and Communications Technology Authority Act 2009, Mr Mel Togolo, Chairman of the Panel of Experts appointed an ICT Appeals Panel.
20. The appointment, dated February 3 2015 constitutes the Panel with himself as Resident Arbitrator and Mr Allan Asher, International Consultant to the Panel of Experts.

21. The appointments were made in pursuance of Part XIII Division 2 of the Act.
22. On March 16 and 31, 2015 and on other occasions the Panel issued certain directions in relation to the Review:
- i. *Parties directly affected by the application were invited to join the Review and make written submissions on the matter the subject of the Review.*
 - ii. *The same confidentiality provisions will apply to the appeal process as applied to an arbitration process conducted by the NICTA.*
 - iii. *Pursuant to Section 259(2) of the National Information and Communications Technology Act 2009, the ICT Appeals Panel stays the recommendation of NICTA the subject of this Review.*
 - iv. *The Secretariat served copies of the application for Review and supporting documents as lodged by Digicel and Bmobile on all parties associated with this matter (that is, Telikom (PNG) Limited, Bmobile Limited, Independent Consumer and Competition Commission (ICCC) and the NICTA).*
 - v. *Submissions that the NICTA or any other parties wish to make in respect of the Review were to be made by close of business on the Friday 03rd April 2015. Following the institution of legal proceedings by Digicel in which challenges to the NICTA Recommendation and an alleged Deemed Ministerial Determination were made, the Panel extended the time in which submissions would be received.*
 - vi. *Following receipt of additional submissions from the applicant, NICTA and Telikom, the Panel extended the submissions timetable and also extended its planned determination date to Wednesday, May 13 2015.*

Standing

23. The Act provides at Section 257, that:
“A person whose interests are affected by a decision of NICTA of a kind specified in section 256, may bring an application for review of the decision to the ICT Appeals Panel”
24. In its submission to the Panel, NICTA raises *“important threshold issues relating to whether the ICT appeals Panel can or should proceed to consider Digicel’s application and request for relief, and if so, as to the required procedure for any such consideration”*⁶

⁶ NICTA submission to the ICT Appeals Panel in respect of the application by Digicel for a Review of the decision of NICTA to recommend declaration of DMTAS and DFTAS dated April 7, 2015 at paragraph 1

25. As this is a foundational jurisdictional issue, the Panel will deal with it prior to considering other aspects of the application for Review and responses.

26. NICTA in an initial submission, questioned the appropriateness of the ICT Appeal Panel Review:

- i. The essence of NICTA's submission is that Digicel has no standing under the Act to seek a Review.
- ii. This proposition was said to flow from the failure of the Minister to respond to the NICTA Recommendation within the statutory timeframe and the operation of Section 130(5) of the Act which deems the decision to have been made by the Minister.
- iii. NICTA contended that in consequence the Recommendation has no further force or effect.⁷
- iv. At paragraph 11(v) of its submission, NICTA refers to correspondence addressed to the Panel by Digicel to support the contention that the deemed declaration is operative.
- v. The conclusion drawn by NICTA is that because there is no "relief" available to Digicel, they consequently have no interest and thus no standing under the Act to seek a Review.
- vi. NICTA supports its contention with references to court authorities relating to hypothetical decisions and circumstances in which no rights are affected.
- vii. In a subsequent submission, lodged with the Panel on May 1, 2015 NICTA has reversed its position and "*NICTA no longer opposes the Appeals Panel proceeding to make a decision on Digicel's application*".⁸

27. Panel analysis and conclusion of issues of standing raised by NICTA

- i. Firstly, in respect to the issue of the standing of Digicel to make an application for Review:
 1. Section 257 of the Act makes provision for standing in an application for Review.
 2. This section provides that "*a person whose interests are affected by a decision of NICTA of a kind specified in section 256, may bring an application for Review of the decision to the ICT Appeals Panel*".
 3. Digicel, a major telecommunications service provide in Papua New Guinea and having fulfilled the threshold requirements of the Act is *clearly* "*a person whose interests are affected by a decision of NICTA*".⁹
- ii. Secondly, in relation to the issue of deemed acceptance of the recommendation, it is clear that the recommendation of NICTA was

⁷ NICTA Submission Op. Cit. at Paragraph 11(vi)

⁸ NICTA Cross Submission to the Appeals Panel May 1 2015 at paragraph 9

⁹ The Act Section 257 (1)

made on October 28, 2014 and that up until December 27, 2014, the Minister had neither accepted or rejected the recommendation.

- iii. The legislative scheme
 1. Section 129 of the Act sets out the Recommendation process and seems to have been complied with.
 2. Section 130 of the Act deals with Declaration by Minister.
 3. Subsection (4) of Section 130 provides that where the Minister has not made a decision within 30 days of receiving the recommendation, "*NICTA shall confirm with the Minister the timing of the decision*".
 4. The Panel has no information on whether or not this provision which appears to have the effect of putting the Minister on notice of the imminent expiry of the time period has been complied with.
 5. Subsection (5) provides that where the Minister has not made a decision after 60 days, then he is deemed to have accepted the recommendation and it is treated as having been made for the purposes of subsection (3).
 6. Subsection (3) provides that if the Minister accepts the declaration recommendation to declare a wholesale service or renew existing declaration, the declaration must be published in the National Gazette on the particular terms set out in NICTA's report (paragraph (a)) and the Minister shall notify NICTA of his decision(paragraph (d)).
 7. Subsection (6) provides that a decision by the Minister to accept a declaration (deemed or otherwise) has effect from the date of its publication in the National Gazette or such later date as is specified in the terms of the declaration.
 8. The Panel takes the view that as at the date of its Direction staying the Recommendation of NICTA there was in force no deemed declaration by the Minister and that the convening of the ICT Appeals Panel was a lawful measure and that the constitution and operation of the Appeals Panel should continue.
 9. The Panel Secretariat have been advised previously that the Minister had no intention to take any further Action on this matter until the completion of the process of the ICT Appeals Panel.

28. Digicel Action in the National Court of Justice

- i. On March 31, 2015, Digicel commenced proceedings before the National Court of Justice.
- ii. In correspondence with the Panel, Digicel stated: "*We confirm that Digicel has filed such proceedings against the Minister's deemed decision (OS (JR) No 141 of 2015) and, as a matter of courtesy, attach to this letter copies of the Originating Summons, Order 16 Statement, Notice of Motion, Affidavit of Kidu Andrew Kidu and Undertaking as to Damages.*
- iii. *As stated to the ICT Appeals Panel by Digicel in its letters of 19 March 2015 and 24 February 2015, the lodgement of the*

application for judicial Review is relevant to the Review and in particular whether it is appropriate for the ICT Appeals Panel to continue its current process.

- iv. Digicel set out the statutory provisions in relation to timeframes within which a Review by the Panel should be concluded and expressed the view that: *"As the ICT Appeals Panel will be aware from Digicel's prior correspondence on this matter, Digicel does not consider that the ICT Appeals Panel should continue the Review process while the judicial Review of the Minister's decision is also on foot. The ICT Appeals Panel, of course, has no jurisdiction to deal with any Review of the decision of the Minister. That jurisdiction is invested in the National Court. Consequently, and given that the matter is now before the National Court, Digicel submits that it would be appropriate and consistent with the scheme of the Act for the ICT Appeals Panel to adjourn the current Review proceeding until after the hearing and determination of OS (JR) No 141 of 2015 and for the ICT Appeals Panel to issue directions to that effect to the parties to the Review."*
- v. Notwithstanding the view expressed by Digicel that the Panel should not continue with its Review of the NICTA Recommendation until the conclusion of the litigation described above, Digicel did not purport to withdraw the Review and emphasized: *"For the avoidance of doubt, Digicel has not sought and does not wish to withdraw the Review but considers that it must be conducted in a way that has due regard to National Court Proceedings OS (JR) No. 141 of 2015, as would be the case in the event that the ICT Appeals Panel Review was adjourned."*
- vi. On March 31, 2015, the Panel issued a further Notice and Direction:
Notice is given that:
 - 1. Pursuant to the court Action undertaken by Digicel PNG Limited (the applicant) to the ICT appeals Panel on the same, the ICT Appeals Panel hereby makes a decision as follows
The ICT Appeals Panel directs that:
 - 2. The ICT appeals Panel is continuing its Review of the application described in this notice in accordance with its obligations under the National information and

- vii. The Panel has been advised by the Office of the Solicitor General that the litigation brought by Digicel is now at an end. We have been informed that:
- “The decision dismisses Digicel’s case and so the matter is closed. Digicel may appeal the decision to the Supreme Court. The judge said that Digicel should have waited for the ICT appeals Panel to complete its Review before it commenced Action in the National Court. The ICT appeals Panel can continue to do its work unfettered by the court Action. And I note from our discussion that it’s time for making a decision is almost up.”*

Digicel Application – issues for determination

29. Appearing at paragraphs 18 of this Determination is an outline of the Digicel application for Review and a statement of the scope of the Review from the application.
30. This section of the determination sets out issues raised by Digicel which require analysis and determination. Issues will be extracted in summary form from “**Grounds for Review**”¹¹ and tested against the submission made by NICTA as well as submissions made by other interested parties.

31. Alleged Procedural Flaws

- i. NICTA failed to take into account relevant matters. These include:
1. Actual circumstances, including the state of development of the telecommunications industry in PNG, Government Policy and the objectives of the Act. NICTA relied entirely on international precedent as the basis for recommending the renewal of the DMTAS and DFTAS declarations;
 2. A failure to undertake any empirical analysis based on actual evidence from PNG to support its hypothesis that a renewal of the declarations is justified;
 3. Improperly using a declaration *renewal* process to declare a service not previously subject to a declaration. NICTA has done this by purporting to “clarify” that the DMTAS and DFTAS as they were previously declared included *“the termination of calls and short messaging services on mobile networks situated Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country”*. This

¹⁰ The ICT Appeals Panel, Mr Mel Togolo March 31 2015

¹¹ Digicel Application for Review 17 November 2014 at page 5

terminology was not used in the Prior Declarations and is inconsistent with the scheme and wording of the Act. The effect of this purported clarification is to unlawfully extend the scope of the prior declarations. This would cause significant financial harm to the telecommunications industry in PNG, with those adverse effects resulting in higher retail prices and lower levels of private investment.

4. Failure to undertake any detailed analysis of the financial and investment impacts of extending the scope of the DMTAS and DFTAS declarations to include calls that have originated outside of PNG.
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- ii. NICTA has acted in excess or want of jurisdiction by seeking to make "policy" decisions rather than applying the terms of the Act in accordance with Government policy. At page 12 of the Decision NICTA states that *"[as] a matter of policy it is important that end-users and customers in PNG should receive calls that are addressed to them, even if those calls enter PNG via an international gateway that is operated by another network operator than the service provider to which the customer's service is directly connected"*. However, NICTA is not a policy maker and should not be making decisions on the basis of a policy that it has itself made up.

32. Interpretation Errors

- i. NICTA relied upon an erroneous and unlawful interpretation of key provisions of the Act to support its Decision, including that it has interpreted the Act in such a way as to permit it to recommend declaration of a service that includes the termination of calls and short messaging services that have originated outside of PNG.
- ii. NICTA's proposed amendment to the Prior Declarations would have the effect that calls and short messaging services that have originated outside of PNG may be "landed" in PNG by a transit (international gateway) operator and then passed to another network on the same commercial terms as a call that has originated within PNG.
- iii. Incoming international calls cannot properly be included within the ambit of the DMTAS or DFTAS. Digicel's view is strongly supported by the way the Act defines the terms "access" and "access seeker". Importantly, only access seekers are entitled to the regulatory privileges and protections that arise as a result of a service being declared. There follows the recitation of access and access seeker provisions from the Act¹² together with obligations of access providers.
- iv. Consequently, NICTA has exceeded its jurisdiction by attempting to recommend the declaration of a service that is not contemplated by the Act. Even if the DMTAS and DFTAS were to be declared in accordance

¹² Section 125(1) of the Act defines the terms access and access seeker. Specific obligations of access providers can be found at Section 136 of the Act.

with NICTA's recommendation, an access provider would not have any legal obligation to provide the services other than in the context of an access seeker providing retail services to its customers within PNG.

33. Application Errors

- i. NICTA has also failed to apply the requirements of the Act correctly and has not discharged its obligations under section 129 of the Act to satisfy itself that all of the declaration criteria that are set out in section 128 of the Act would be met by the continued declaration of the DMTAS and DFTAS.
- ii. A proper inquiry by NICTA would require evidence and analysis that demonstrated, with a high degree of certainty, that all of the declaration criteria would be met: In particular, NICTA did not provide any evidence or analysis to support its view that an extension of the scope of the declaration to include calls that originate outside of PNG was warranted or what the actual impact of such an extension of scope might be.
- iii. No such evidence or analysis was undertaken or exists and NICTA has instead erroneously relied on international precedent as the basis for its decision.

34. Consequently, Digicel argues that NICTA's conclusion that the declaration criteria would be met by the proposed declaration is incorrect. Specifically, the declaration criteria contained in sections 128(a), 128(b) and 128(c) (i) would not be met by the proposed declaration.

NICTA Preliminary Submission

35. In an extensive submission, which when exhibits are added, totals 56 pages NICTA has responded to the Digicel application. As was the case with the Digicel application, the Panel here presents a summary of relevant elements of the NICTA response.

36. The approach taken by NICTA was to provide an introduction to the declaration criteria consisting of an outline of the specific legislative provisions, a historical description of the origin of the deemed declarations of DMTAS and DFTAS, and a survey of the process leading to the declaration recommendation. Of particular note is the process undertaken by NICTA pursuant to Section 127 of the Act, which requires the conducting of a public enquiry. NICTA issued A Discussion Paper on September 1, 2014¹³ and invited public comment. The deadline for submissions and comments was initially set at 26 September 2014 (later extended to 3 October 2014.)

37. Submissions were received from the following four organisations:

- Digicel
- Bmobile

¹³ NICTA DISCUSSION PAPER Public enquiry into the potential renewal of the declarations of the domestic mobile/fixed terminating access services. 1st September 2014

- Telikom¹⁴
- ICCC

38. The submissions, according to NICTA, covered a wide-ranging spread of issues and matters associated with the renewed declarations of the DMTAS and DFTAS. NICTA claims to have given serious consideration to all of the issues and matters raised in the submissions other than the submission from the ICCC, including the comprehensive submission received from Digicel. The submission from the ICCC was received after the deadline and according to NICTA was set aside without further formal consideration, although it was “informally considered”. The ICCC submission, (which as noted in the Digicel Application was not available has now been published on NICTA's website)
39. The Panel is puzzled at the statement made by NICTA that it “set aside without further formal consideration” the important submission from ICCC. The statement is puzzling on a number of grounds; first the NICTA Response to Comments Report which Reviews submissions received and provides a summary and NICTA staff response incorporates at pages 12 and 13 a summary and endorsement of the ICCC submission. Moreover there is no qualification in the Response to Comments Report to the effect that the submission would be set aside. Finally, in saying that the submission was “informally considered” the Panel is quite unclear on the actual status of the submission. While it is true that the submission was received after the extended closing date, it is also true that the Act specifically empowers NICTA to consult with “*The ICCC and other government agencies in preparing its report*”.¹⁵
40. NICTA asserts in its submission that it followed its normal practice of preparing and subsequently publishing on its website a report in which key issues raised in submissions are set out together with NICTA's response. In the present case the report was entitled “*NICTA Response Report to Comments on Declaration of Domestic Fixed and Mobile Terminating Access Services.*”
41. According to NICTA, Digicel and other network operators have a dominant position, actually a monopoly position, in relation to access to their subscribers via interconnection. That is so according to NICTA “because, absent regulatory power to intervene or Act in relation to interconnection charges and terms, each operator controls whether, or on what terms, a wholesale call termination services is provided to its customers using its network. In addition, Digicel has over 85% by volume and value of the retail mobile market in PNG and, because of the high penetration of retail mobile services compared to retail fixed services, a high share of the total call market in PNG”. NICTA

¹⁴ NICTA Submission to the ICT Appeals Panel dated April 7 2015 at paragraph 35

¹⁵ Section 129(2) of the Act

concludes from this that *"If DMTAS is not offered on Digicel's network, then customers of other operators are unable to make calls to the vast majority of all mobile subscribers in PNG"*.

42. NICTA concludes from this state of affairs that *"If DMTAS were not declared, the future of the interconnection arrangements that are now in place would rely entirely on the willingness of Digicel to agree to provide the DMTAS on reasonable terms (including cost-based pricing) and for Telikom to provide such reasonable terms for DFTAS. If this willingness does not exist or is not maintained, then effective competition in the retail mobile and fixed markets, respectively, would be seriously compromised."*
43. In summary it is the submission of NICTA *"that the requirement set out in s.128 (b) (i) of the Act is met in the case of these wholesale services. Declarations of DMTAS and DFTAS are necessary to promote effective competition in the respective retail markets. The recent history of interconnection in PNG reinforces this point. In the period from 2008 through 2012, as referred to in Part I above, there was continuing and frequent dispute between Digicel, Bmobile and Telikom over DMTAS and DFTAS interconnection terms. The dispute continued for some time and was finally resolved with the intervention of the ICCC, and the Appeals Panel, applying the "Charging Principles" under the Telecommunications Act, 1996 to seek to ensure cost-based pricing of these monopoly services. This authority is similar in nature to what would arise from these services continuing to be Declared Services, and that would not exist if they are no longer declared services."*
44. NICTA claims therefore to *"have satisfied itself that the criteria for declaration associated with the competition objective have been met."*

NICTA's consideration of declaration criteria – efficiency objective

45. As previously discussed, the statutory declaration criteria also includes an efficiency objective. In relation to this, NICTA is required to show that under s.128 (b) (ii) *the wholesale service is supplied in whole or in part by a facility that cannot feasibly be substituted, as a matter of commercial reality, or by another facility in order to supply that wholesale service*. This requirement is clearly met in the case of terminating access services because, as a matter of logic as well as of commercial reality, the network platform of the access provider is the facility that sustains the service of the subscriber to whom the call is made and it cannot be replicated by the access seeker. Put another way, the facilities which sustain the wholesale terminating access services are the entire mobile and fixed network platform, respectively. There is no other facility that can be substituted for these platforms both "as a matter of commercial reality" (as described in the Act), or as a matter of logic, because alternative facilities would not have the relevant subscriber services connected to them.

46. There are three specific criteria that must be met for the efficiency objective to be met. The first criterion, under s.128(c) (i), is that "the declaration would not materially compromise the incentives for efficient investment in any facility over which the wholesale service may be supplied". The Act recognises that there are balances to be struck and inadvertent consequences to be avoided. The key balance is to ensure that the access regime does not operate in such a manner as to compromise the incentives for new investment in network coverage, network capacity and network capabilities in any material way.
47. The legislation provides and the Panel notes that the status of the DMTAS and DFTAS as Declared Services only means that NICTA may take actions to promote cost-based interconnection charges and resolve disputes, if circumstances warrant (and subject to judicial Review). NICTA argues that the presence of such powers in no way harms or compromises incentives for efficient investment in DMTAS or DFTA network facilities. On the contrary, according to NICTA, the potential for significant dispute between operators over such charges and the availability of steps by NICTA to resolve such disputes and promote cost-based interconnection charges (which are to include a reasonable return), enhances incentives for efficient investment. Above cost interconnection charges, in contrast, distort competition and undermine efficient industry investment. Efficient investment also is undermined where there is no prospect of regulatory intervention by NICTA to resolve disputes over such charges, which substantially increases investment uncertainty and the likelihood of protracted disputes.
48. An important element in the NICTA submission is the contention that *"There is nothing to suggest that the status of DMTAS and DFTAS would itself undermine incentives for efficient investment. In some countries, based on prior regulatory experience or prior pronouncements made by Regulators as to cost levels, operators have complained that incorrect decision on access pricing (i.e. decisions that did not allow recovery of cost plus a reasonable return), would undermine investment. Two well-known examples are the refusal of Telstra to invest in a national broad band fibre network in 2007-8, and the refusal of KPN in the Netherlands to invest in fibre in its access network unless certain conditions were met. In both cases the concern was that competitors would reap an unjustified advantage through mandated access to the facilities and services flowing from the investment at unduly low, mandated rates. However, in both of those cases it was not the idea of mandatory access alone that caused the problem"*. This is of importance as it goes to the statutory declaration criteria.
49. The Panel has been mindful of the Objectives of the Act in relation to *"concerns of the incumbent operators involved that the respective regulators would intervene to set a below-cost charge for access. That concern does not arise in PNG for a declaration of interconnection per se. Under the regime in Part VI of the Act, there are substantial procedural protections and strict criteria that apply to any intervention by NICTA to seek to set access prices, and there is no basis for an assumption that NICTA will do so improperly or in a way to undermine efficient investment."*

50. To support its contention that declaration would not undermine investment incentives, NICTA cites a submission made by Digicel in an earlier regulatory matter. Digicel noted, at paragraph 6 of its submission, that:
- i. *"Digicel is one of the largest foreign investors in Papua New Guinea, having invested in excess of PGK 1Billion since it launched its telecommunications services in July 2007."*
 - ii. *"Since then, Digicel has rolled out its voice and data network to all provinces in Papua New Guinea and now covers in excess of 4 million (72%) of the population of Papua New Guinea. Several of these areas had no telecommunications networks or services at all before the arrival of Digicel, including most parts of the Western Province and Bougainville."*
 - iii. *"To ensure its consumers are provided with the best quality of service, Digicel also established a world class backhaul transmission network across Papua New Guinea, has invested in the launch of a new 3G network, and is now investing in a 4G network."*
51. The conclusion drawn by NICTA is that *"This level of investment occurred, for the most part at the same time as the DFTAS and DMTAS were declared wholesale services. There is no reason to assume that the renewal of the declaration will materially compromise the incentives for efficient investment, when this has clearly not occurred in the past."*
52. The second requirement in s.128(c) (ii) related to the efficiency objective is that access to the wholesale service as a consequence of declaration should be technically feasible having regard to the specific factors identified in s.124(2) (a), namely :*"whether it is technically feasible for the relevant ICT services to be supplied, having regard to :*
- i. *the technology available or likely to become available; and*
 - ii. *the reasonableness of the costs involved; and the effect of supplying the ICT services on the integrity, operation or performance of other ICT services or facilities; ..."*
53. In relation to the third requirement of the efficiency objective, in s.128(c) (iii), concerning facilities access services. It is NICTA's contention that: *"the terminating access services is access to subscriber services not access to facilities. Therefore it is not necessary to show that the access involved would avoid inefficient replication of underlying facilities"*.
54. In addition to the criteria in s.128(2) (c), when considering the efficiency objective N ICTA is required to have regard to the factors listed in s.124(2) (b) and (c).
55. Section 124 (2) (b) refers to "the legitimate commercial interests of the access provider in supplying the ICT services, including the ability of the access provider to exploit economies of scale and scope. Digicel's continued investment in the sector in PNG is cited by NICTA as evidence that Digicel also did not regard the declaration as adversely affecting its

legitimate commercial interests, or prevents scope and scale economies from being realised. According to NICTA *"Such investment has occurred during the prior period in which the ICCC had power to regulate these charges, and the more recent period in which NICTA also has such powers. There is no reason to think that this might change in future. Certainly Digicel has not provided any such reason."*

56. The final element of NICTA's initial submission relates to Section 124(2) which requires NICTA to have regard to "(c) the incentives for investment in the facilities by which the ICT services may be supplied, including the risks involved in making the investment". NICTA relies on earlier elements of its submission to deal with this criterion.

Submission from ICCC

57. On October 9, 2014 the ICCC lodged a submission with NICTA in relation to the Notice of Enquiry for the Purposes of Section 231 of the Act.
58. The submission was lodged after the stated closing date set by NICTA and according to the NICTA submission to the Panel, *"it was given no more than informal consideration and set aside"*.
59. The Panel however believes the submission to contain highly relevant information and has taken it into account in the process of this Review. A summary of the submission follows:
60. Competition In the Markets for Termination Services:
- i. The extent of competition In the Markets for Termination Services is non-existent according to the ICCC submission. *"Each network operator is a monopoly in its own fixed/mobile network and there is no competition existing and is likely to exist in the relevant markets identified. Given the current structure of the market where one player is dominant and has stronger presence than other players, the commission is of the view that if declaration is not renewed, both the wholesale and retail segments of the market would suffer in terms of high termination rates at the wholesale level and high calls/SMS/MMS rates for subscribers at the retail level."*
 - ii. *"Due to the calling party pays arrangement, determination service of each individual network operator are not substitutable for each other in that a subscriber chooses the network while the calling party pays for its call originating at its network and terminating on the call parties network. Hence the called party does not have the incentive to choose a substitute network operator. The commission believes this is likely to give the ability to the individual network operators to raise the prices of their termination services above cost. The commission is of the view that the network operators should not be allowed to have mark-ups for*

termination services. In other words, NICTA determines the termination rates for the duration of the declaration.”

- iii. ICCC argues in its submission that there is no competition in the termination service market and that having the declaration continued would also set a benchmark for the network operators to offer cost-based wholesale termination charges to third-party operators who terminate calls in the network.
- iv. ICCC argues further that with declaration, *“there will be limited scope of vertically integrated firms who operate both at wholesale and retail markets (which all network operators do) to engage in anti-competitive practices such as margin squeeze and/or predatory pricing”*.
- v. In a concluding remark on competition issues, the commission puts forward the view that: *“declaration would promote competition in the retail markets where each network operator would aggressively competing in the marketplace in terms of rates and service quality as they are currently doing.”*
- vi. Elsewhere in this determination, there is a discussion of the wisdom or otherwise in NICTA's apparent treatment of the ICCC submission.
- vii. The Panel is of the view that ICCC is in a unique position to contribute to the assessment of the completion dimension of NICTA's Recommendation and cannot see any compelling reason for its exclusion.
- viii. Undoubtedly, the submission should have been circulated and posted earlier on the NICTA web site. However, the Panel is of the view that parties have had a sufficient opportunity to comment on matters raised in the submission in their submissions to this Review.

61. Efficiency in investment

- i. ICCC considers that while there may not be any direct efficiency gain in the termination services market, *“it is likely that some efficiency could be achieved at the retail level through subsidised retail services from profits obtained in the wholesale market.”*

62. Promotion of any to any connectivity

- i. ICCC, noting that respective network operators are monopolies over their own networks, believes declaration of the services *“will provide any to any connectivity by subscribers of respective networks.”*
- ii. According to ICCC even with new potential network operators, *“without the declaration there may be incentives were established operators to prevent new entrants from interconnecting with their networks. Hence with the continuation of declaration the competitive threats to the new entrants are eliminated. Declaration gives a new entrant the right of access to mobile*

- termination on an existing carrier's network."*
- iii. Importantly, ICCC argues that reductions in termination rates may result in a reduction in the price of the unit cost of providing the service bus uses at the retail level will enjoy the benefits such as lower rates.

Cross submission from Digicel

63. In a very strongly worded and wide ranging cross submission Digicel responds to the submissions from Bmobile and NICTA. Although Digicel (the Applicant) initiated the Review and made an initial submission with its application, it is dissatisfied with the process and in fact instituted legal proceedings in relation to the subject Recommendation. Digicel has argued that: *"Consistent with Digicel's earlier correspondence with respect to this proceeding, this submission is made under protest and without prejudice to OS (JR) No 141 of 2015, including any appeal of the decision made by Nablu AJ in respect of that proceeding."*
64. According to the cross submission: *"The process that has been adopted in this Review Proceeding is deeply flawed in that it does not accord with the requirements of section 259 of the National Information and Communication Technology Act ("Act"), the effect of which has been that Digicel has not been afforded the fundamental rights of natural justice and procedural fairness. It is also apparent that the ICT Appeals Panel's failure to establish a proper and timely process for this Review has resulted in a situation where the ICT Appeals Panel cannot possibly give proper and fair consideration to relevant matters prior to it making its decision on 5 May 2015, the date advised by Mr David Kui in an email to Mr Kila Gulo Vui on 23 April 2015. Digicel also reserves its rights in this regard."*
65. As noted earlier in this Determination, the Panel extended the date for the release of this decision until May 13, so that proper regard could be had for all submissions.
66. The Panel wishes to record its concern that both NICTA and Digicel have adopted particularly adversarial positions to one another such that the Panel has been required to regard every submission as contested. In order to conclude this Review in a reasonable time, though acknowledging that it now exceeds the Statutory 90 days by a week, the Panel has determined not to make findings on a paragraph by paragraph basis as urged by submitters. Instead the Panel have chosen to deal with issues at a higher level: that of the Declaration Criteria in the Act and the key grounds of review in the Digicel Application.
67. In its cross submission, Digicel asserts that NICTA has abused the Review process.
68. The main contention put forward by Digicel to support its proposition *"that it*

contains substantial amounts of material that were not referred to or apparently relied upon by NICTA at any point in its decision to recommend that the Minister renew the declarations of the Domestic Mobile Terminating Access Service ("DMTAS") and the Domestic Fixed Terminating Access Service ("DFTAS") on the terms that were proposed by NICTA."

69. To support its argument, Digicel cites Section 260 of the Act which sets out the basis for a Review by the ICT Appeals Panel. *"Digicel submits that the material and evidence referred to by NICTA in paragraphs 5, 7 – 8, 40, 42, 43, 49 and 50 of its submission is "new evidence" which did not comprise part of the documentary information and views that were before NICTA at the time it made its determination. Had it been NICTA would have had a duty to disclose that information to Digicel and other interested parties pursuant to the principles of natural justice and procedural fairness. Digicel notes in this regard that NICTA did not provide any indication that it had relied upon any material other than that which was disclosed during the Public Inquiry process."*
70. As evidence of its contention Digicel quotes the NICTA submission at paragraph 35: *"The submission from the ICCC was received after the deadline and was set aside without further formal consideration, although it was informally considered by NICTA. The ICCC submission, (which has been published on N ICTA 's website and is attached hereto as Exhibit 2 supported the DMAS and DFTAS being declared services after 31 December 2014"*.
71. Digicel contends that: "This statement appears, at best, to be misleading for the following reasons:
- i.* Firstly, NICTA referred to the ICCC submission extensively in its *Response to Comments Report* dated 27 October 2014. This does not seem to be consistent with NICTA's position that it was *"set aside without formal consideration"*;
 - ii.* Secondly, NICTA's apparent reason for setting aside the submission was that it was received "after the deadline" which had been set by NICTA as being 3 October 2014. However, the *Response to Comments Report* sets out the dates on which submissions were received with only Digicel and Bmobile having lodged their submissions "on time". In such circumstances, it is not clear why NICTA would have given "formal consideration" to Telikom's late submission while not giving "formal consideration" to the ICCC submission which was lodged a few days later;
 - iii.* Despite NICTA asserting that it had not given the ICCC submission *formal consideration"*, it nevertheless then states that the submission was *informally considered by NICTA"*. While it is not clear what the distinction between these terms is

intended to mean, it is nevertheless clear that NICTA placed at least *some* reliance on the ICCC submission. This is not surprising since under NICTA's Terms of Reference for the Public inquiry it undertook to: *"consult with the Independent Consumer and Competition Commission, operator licensees, and any other relevant parties or government agencies"*

72. Concluding its analysis of the status of the ICCC submission Digicel: *"Suggests that NICTA's obfuscation in relation to the ICCC submission has arisen as a result of NICTA having failed to provide Digicel or any other interested party an opportunity to Review and correct, comment on or contradict the views contained in the ICCC submission. In any case it is entirely inappropriate for NICTA to have sought to introduce the ICCC submission as evidence in this proceeding when the document was not provided to all interested parties, including Digicel, and NICTA has advised that the ICCC submission was "set aside without formal consideration."*
73. Responding to a view expressed by NICTA in relation to its bilateral interconnection agreements with other carriers which purport to prohibit delivery of calls originating outside PNG, Digicel states: *"Digicel objects strongly to the prejudicial and unsubstantiated allegations that have been made by NICTA against Digicel, including at paragraphs 41 and 66. In particular, Digicel denies that it engages (or has engaged) in any anticompetitive behaviour or arrangements and that NICTA's allegation that "the above arrangements are a cartel agreement that prevents competition for the origination and termination of international calls, with the result that consumers are denied choice and must bear increased prices" is unsubstantiated and false."*
74. The Digicel cross submission includes a seven page tabular response to each paragraph in the NICTA submission. Apart from one or two areas of agreement, the submission contradicts or deniers virtually every proposition put forward by NICTA and repeats much of earlier submissions.
75. As noted in Paragraph 66 above, the Panel has declined the implicit invitation from Digicel to respond paragraph by paragraph to its critique of the NICTA process and submissions. Similarly, the Panel has not so responded to the extensive a detailed comments submitted by NICTA against Digicel
76. Instead, the Panel has focussed its findings on certain key areas prescribed by the Act and on a number of subsidiary issues.

Bmobile Submission and Cross Submission

77. In its initial submission to the Panel, Bmobile annexed its submission to NICTA in response to the Discussion Paper on MTAS.
78. Bmobile supports the preliminary Submission to the Panel made by NICTA and hence is supportive of the continued declaration of MTAS and DFTAS.

79. In a brief observation, Bmobile notes that *"it is necessary to the declaration of the services continue to allow for a reasonable control of the significant market power that the applicant has"*.¹⁶
80. In its submission to NICTA on the discussion paper, Bmobile asserts that *"the relevant markets are the wholesale markets for voice call termination on individual fixed and mobile networks in PNG, and these markets are susceptible to ex- ante regulation of significant market power"*. In addition, Bmobile agreed with NICTA that *"each network operator has substantial market power in the market for voice call termination on its own network and that position is potentially harmful to the development of effective competition in the downstream retail mobile services market and to the long-term interests of consumers"*. In almost all respects Bmobile endorses the NICTA discussion paper and with the exception of a suggestion that the service description be extended to include mobile data, there are no issues raised against the discussion paper and subsequently the NICTA decision the subject of this Review.
81. Subsection (2) of the Act allows for the ICT Panel to introduce additional evidence that was not available to NICTA, in this case Digicel argues that ICC's submission was deemed late by NICTA and should not have been considered when making its recommendations to the Minister. However, ICC's submission can be introduced for purposes of subsection (2) as it is to ensure fairness of justice and all fundamental rights are considered.
82. In its cross submission submitted by Bmobile ¹⁷ the argument is advanced that it was appropriate for NICTA to take into account in its Recommendation the views expressed by ICC in its submission notwithstanding that it was received after the extended cut-off date.
83. Bmobile contends that: *"Paragraph 5 of the NICTA submission states facts which obviously the Minister or the ICT Panel will have the prerogative to reflect on when determining the issues brought about by Digicel, the fact stated is the law. With regard to the real examples of facts stated, and it is up to the ICT Panel to decide whether what NICTA has mentioned is deemed "introduced or new facts" and the decision to accept what is deemed "introduced or new facts" lies with the ICT Panel."*
84. And further that: *"With regards to paragraphs 7-8 of the NICTA's submission NICTA as the regulator has the right to raise the points stated in their submission, surely all other affected parties would have sought for these to be included through the ICT Appeals Panel applying section 260 of the NICTA Act. The facts raised by NICTA are facts that all parties are*

¹⁶ Bmobile submission Response to Digicel's Application For Review April 21 2015 at page 1

¹⁷ Bmobile op cit

aware of and it would still be considered by the relevant decision makers, such as the Minister, ICT Panel or the Courts.”

85. In response to strongly expressed views by Digicel to the effect that it has been denied natural justice and fairness in the Review, Bmobile states that: *With regards to paragraph 2.6 of Digicel's cross-submission Bmobile states that NICTA did provide the opportunity to all interested parties copies of the ICCC submission when it was up- loaded to the website and the discretion lies with all affected parties whether to reply or comment on the submission by ICCC or not, it was a matter of asking or submitting the responses and comments.”* And *“In relation to paragraph 2.7 of Digicel's cross-submission note that Digicel currently dominates the market for which it has leverage over. In our opinion, Digicel has significant market power in the mobile market in PNG.”*
86. In the opinion of Bmobile *“All of the declaration criteria would appear to be met by the renewal of the declaration of the DMTAS and DFTAS on terms consistent with those of the existing declaration (set out in Schedule 1 to the Act)”*
87. From the position of an active participant (though with a relatively small market share) Bmobile provides an insight into the effect of the bilateral commercial arrangement between itself and Digicel on interconnection of calls originating outside PNG.
88. Digicel states: *In relation paragraph 66 of NICTA's submission, the present interconnect agreement does not allow third party terminating calls to transit from international carriers across the local interconnect. It is expressly denied in the existing interconnect agreement, which we feel is anticompetitive. A ruling should be made allowing for third party calls from international providers to terminate through any network as true market competition and serving the interest of the end users with option of choices which will effectively bring about reasonable charges to the consumers. This cannot occur unless NICTA is allowed to exercise its regulatory power to insist on this as the mobile SMP party (Digicel) will be naturally reluctant to reduce its dominant position in the market.”*
89. The issue of potential regulation of calls arising from outside PNG is clearly one of the central areas of dispute in the Review. NICTA asserts that it is implicit in the previous Determination while Digicel strenuously denies that. In any event, the bilateral commercial relationships entered into by all carriers appears to foreclose the possibility of competition between carriers for terminating inbound calls. In a helpful submission Bmobile points out that: *“The terms and conditions on which an access provider fulfils its non-discrimination obligations are to be commercially agreed between the access provider and the access seeker. In this industry, Digicel has significant market power. Our ability to negotiate without NICTA's right to*

intervene and create fairness in the market can be significantly affected.”

90. Bmobile concludes its cross submission by *“Maintaining and reaffirming its position and agrees to the submission by NICTA. NICTA's submission is what is required of a regulator and its submission is fair and is not an abuse of the provisions of the NICTA Act. If Digicel are disputing the necessary and fundamental statements NICTA has stated in its submission it is in essence removing the role of NICTA. Without NICTA's involvement, parties affected do not have the leverage in the market. NICTA should have the power to intervene where the dispute between the players in the market are not resolved to create a fair and equitable market structure that results in effective competition and economic efficiency in the telecommunications sector within PNG.”*

NICTA Cross Submission

91. On May 1, NICTA filed an additional submission in response to the Cross Submissions made by Digicel and Bmobile. NICTA addresses many of the issues raised by Digicel including (in summary form) the following:
92. NICTA asserts that extensive work undertaken in relation to a 2012 Determination relating to DMTAS prices set by the 10-year interconnection agreement between Digicel and Bmobile resulted in lower charges. Regardless of the subsequent judicial Review challenge to the Determination, NICTA contends that the regulatory process undertaken necessarily involved it closely in market analysis which informed the process leading to the current Recommendation. NICTA therefore rejects the submission made by Digicel alleging that NICTA did not consider these circumstances during the process leading to its Recommendation (the subject of this Review), and that accordingly the Appeals Panel cannot consider them.
93. NICTA challenges this contention on four grounds. Although at some length, it is important to the Review process to set out NICTA's rebuttal of the challenge by Digicel:
- i. *“First, Digicel's allegation that these circumstances were not “before” NICTA, or “considered” by it, as part of the process leading to the Recommendation, (and thus cannot be considered by the Appeals Panel) is incorrect. These circumstances related to how the current DMTAS charges were set, to NICTA's most recent exercise of the “Declared Services” powers that are the subject of the Recommendation, and thus also to the most recent and relevant practical experience of the Actual or potential impact of NICTA having (or not) a “Declared Services”*

- power so as to be able unilaterally (i.e. without the consent of regulated parties) to regulate DMTAS such charges. NICTA expressly confirms that these circumstances were most definitely part of the factual background before it", and considered by it, in making the Recommendation. In particular, these circumstances, in NICTA's view at the time and now, strongly support the Recommendation, and in particular that if NICTA does not have a "Declared Services" power to regulate such charges, and they are instead set by operators, who may or may not request or agree to N ICTA having involvement, then there is a risk of anti-competitive conduct, including DMTAS prices being at substantially above cost levels (as occurred in the above situation leading to the current DMTAS agreements).
- ii. Second, Digicel already has effectively admitted in its Application to the Appeals Panel that these circumstances **were** before NICTA at the time of the Recommendation, and were considered by Digicel and NICTA at the time to be relevant to the making of the Recommendation. In particular, in its Application for Review to the Appeals Panel of 17 November 2014, Digicel itself raised these circumstances, in particular by contending that the current DMTAS charges were set between operators "[n]otwithstanding . . ." (emphasis added) regulatory intervention by of NICTA. From this alone, it is obvious that all parties considered today, and previously considered, the circumstances of the current DMTAS charges, and how they came to exist, including the exercise of "Declared Services" regulatory power by NICTA, to be highly relevant to the making of the Recommendation. To suggest otherwise, is simply untenable.
- iii. Third, by basing its Application in part on a claim that the current DMTAS charges were set "notwithstanding" NICTA intervention, (when, as shown in NICTA's prior submissions, those charges were in fact set, at a substantially lower level and for a much shorter term due solely to N ICTA's exercise of its Declared Services powers), Digicel has waived any claim that these matters cannot be considered by the Appeal Panel. Certainly Digicel cannot make an assertion about these matters, and then insist that NICTA cannot provide the correct facts to the Appeals Panel, by reference to the prior Affidavit of Charles Punaha of NICTA, filed in 2012 in the National Court litigation initiated by Digicel (and that Digicel has had in its possession since well before the Report and Recommendation).
- iv. Fourth, Section 260 of the Act, relied on by Digicel, has no application to such matters of public record and that were well-known to Digicel prior to and at the time of the Report and consultation process leading to the Recommendation, unquestionably are relevant to the Recommendation, and that Digicel had a full opportunity to comment on as part of that process. It only applies to matters not known to the parties at

the time of the Recommendation and as to which no opportunity to comment was then available. Digicel also can hardly claim a denial of procedural fairness or natural justice in this situation.

94. NICTA reasonably confirms that in the process of making the Recommendation, (including preparing the Report and responding to comments on it), NICTA also considered the prior history of regulation of the DMTAS and DFTAS.
95. The Panel is particularly pleased to note that NICTA has now reversed its position on the standing of Digicel to pursue this Review. *“Although in its initial submission at paragraphs 21 and 22, NICTA questioned whether Digicel had standing to pursue this application, NICTA no longer opposes the Appeals Panel proceeding to make a decision on Digicel's application.*
96. *Having considered this issue further, NICTA notes that Digicel's judicial Review Action has been dismissed, and NICTA considers that it cannot be said with certainty that a decision by the Appeals Panel will not have some practical consequences simply because of the Minister's deemed declaration.”*
97. In addition to its comments on the Digicel Cross Submission, NICTA observes that Bemobile makes the point that it was afforded every opportunity to comment on the issues in the course of the public consultation that led to the Recommendation to which Digicel's application relates.
98. NICTA notes that both Digicel and Bemobile were afforded exactly the same opportunities and had before them exactly the same papers and documentation from NICTA. Importantly they both were involved in and had prior knowledge of the disputes that are part of the historical context of the Recommendations and Determination.
99. NICTA notes that Bemobile's has a materially smaller business in terms of revenue and subscribers than has Digicel. Notwithstanding its current interconnection agreement with Digicel, it is important to note that Bemobile, in its submission, is concerned to ensure that NICTA's important powers in these matters are preserved through the declaration.
100. For the reasons mentioned earlier in this Determination, the Panel has not sought to deal with each of the points made by NICTA in relation to the submission from Digicel. It is neither necessary as a matter of law nor practical

in the timely completion of this review.

101. The Panel has expressed conclusions on the key issues in contention in the Application for Review and this by way of rehearing the matter with the evidentiary data base available to NICTA at the date of its decision.

Data Base for Panel Review

102. Section 260 of the Act sets out the "Nature of the Review" to be undertaken by the Panel.
103. The Act provides that the Review is to be by way of rehearing and, subject to the Act, must be conducted solely on the basis of the documentary information and views that were before NICTA when it made its determination.
104. Provision is made in the legislation for the Panel to grant leave to a party to introduce additional material or evidence that was not available to NICTA with new facts up until the date of the Panel hearing.
105. It is important to note that the Panel is not bound by the rules of evidence and may adopt such procedures as it sees fit. This does not absolve the Panel from the scrupulous application of fairness and due process. It does, however, allow the Panel to consider surrounding information and circumstances which informed the NICTA Decision with a view to best achieving the objectives of the Act.
106. Submissions to the Panel have argued that material be excluded from the Panel consideration while other material should be included.
107. The position taken by the Panel is to make its determinations on the basis of the documentary information and views that were before NICTA when it made its determination.
108. In its Response to Comments Report, NICTA lists 4 submissions it received. In addition however, the Panel is cognisant of previous Panel, ICCG, and judicial determinations which bear on the issues which are the subject of this Review. These have informed the Panel in its Review.
109. Natural Justice requires that affected parties to the deliberations of the Panel have an opportunity to Review, contradict or comment on the material before NICTA up until the date of the Panel hearing.
110. The Panel has therefore, been open to submissions and representations and has taken into account in its Review a wide database comprising of all those

matters listed above and submissions made to it.

Statutory provisions for Panel Determination

111. Pursuant to section 260 of the Act, the Panel Review shall be by way of rehearing.
112. The Act provides in Division 3 - Declared Services, of Part VI- Interconnection and Wholesale Access, the requirements for a NICTA Declaration Recommendation.
113. The Act seeks to promote the “competition objective” and the “efficiency objective”¹⁸ and sets out other Objectives to be achieved.
114. Division 3 sets out the requirements for a Public Enquiry by NICTA, Declaration Criteria, and the requirements for a Declaration Recommendation by NICTA.
115. Part XIII of the Act spells out the provisions for the ICT Appeals Panel, jurisdiction for Review, standing of an applicant for Review, formal requirements in an application for Review, procedure for the Panel to follow, description of the nature of the Review and provisions relating to the decision of the Panel.

Issues for Panel Decision

116. What documentary information and views were before NICTA when it made its determination?
 - i. As noted earlier in this Determination Digicel (the Applicant) and submitters to this Review have argued for the exclusion of certain documents and submissions from the Review.
 - ii. At Paragraph 2 of the Digicel Cross Submission it is argued that *“material and evidence referred to by NICTA in paragraphs 5, 7-8 ,40, 42, 43, 49 and 50 of its submission is “new evidence” which did not comprise part of the documentary information and views that were before NICTA at the time it made its determination”*
 - iii. **The Panel disagrees with the Applicant in this matter and regards the material provided by NICTA to be compliant with the Act and relevant to the Review. It is the view of the Panel that there is no obligation on NICTA to list all source documents for its deliberative process where these are well-known and have been the subject of considerable argument in previous regulatory decisions together with not infrequent appearances in the courts. To require an exhaustive list of all matters upon which NICTA**

¹⁸ The Act Section 124 Objective of This Part

draws its opinion is would be unnecessarily burdensome both for the regulator and for parties wishing to participate in the regulatory process.

- iv. NICTA at paragraph 35 of its Submission stated that: *The submission from the ICCC was received after the deadline and was set aside without further formal consideration, although it was informally considered by NICTA. The ICCC submission, (which has been published on NICTA's website and is attached hereto as Exhibit 2) supported the DMTAS and DFTAS being declared services after 31 December 2014"*
- v. The Act provides no grounds upon which NICTA should disregard the submission from ICCC. *Instead, it expressly empowers NICTA to "consult with the ICCC and other government agencies in preparing its report, including where desirable to promote a consistent approach to economic regulation within Papua New Guinea"*¹⁹
- vi. **The Panel disagrees with NICTA in this matter and regards the Submission made by the ICCC to be compliant with the Act and relevant to the Review. Although received after the deadline for submission of comments on the Discussion Paper, the ICCC submission was properly before NICTA at the time it made its determination.**
- vii. **NICTA erred in not circulating the ICCC submission to other interested parties at an earlier time, however all parties have had ample time to Review, contradict or comment on the material in their submissions to the Panel.**

117. Has the Panel followed the Procedure prescribed in the Act?²⁰

- i. In Part B of its submission²¹, NICTA asserts that the Panel has not provided suitable directions to ensure that each party has an opportunity to Review and respond to any initial submissions made by any other party. NICTA further contends that the Panel process may be invalid due to a lack of specific directions on submissions.
- ii. In its Cross Submission, Digicel, argued that the "Review Proceeding is deeply flawed in that it does not accord with the requirements of Section 259 of the Act"²²
- iii. **The Panel disagrees with NICTA and Digicel. All parties have had an opportunity to Review and respond to initial submissions made by other parties in accordance with the Act. The Panel, mindful of the Objectives of the Act as provided every opportunity for parties to put forward views and respond to others.**

¹⁹ The Act at Section 129 (4)

²⁰ See Section 259 of the Act

²¹ NICTA Submission at Paragraphs 21-22

²² Digicel Cross Submission at Paragraph 1.3

118. Has NICTA adequately addressed the Declaration Criteria of the Act?

- i. Throughout its application and cross submission, Digicel asserts that NICTA has failed, abused the processes of this Review, acted outside its jurisdiction in certain matters, misapplied the law and failed to address the statutory criteria for Declaration of a wholesale service
- ii. A summary of the areas of objection by Digicel appear earlier in this determination they relate to: Procedural Flaws, Interpretation Errors and Application Errors
- iii. Procedural Flaws
 1. Digicel asserts that NICTA failed to take into account the Actual circumstances of the telecommunications industry in Papua New Guinea and instead relied entirely on international precedent.
 2. Digicel argued further that no empirical analysis was undertaken,
 3. That in including in its recommendation " determination of calls and short messaging services on mobile networks situated in Papua New Guinea regardless of whether those communications were originated in Papua New Guinea or in another country" NICTA Acted contrary to the Act
 4. In expressing a view on matters of policy, NICTA is according to Digicel acting in excess or want of jurisdiction
- iv. Interpretation Errors
 1. NICTA in extending a declaration to include termination of calls that originated outside Papua New Guinea is erroneous and unlawful
 2. definitions in the Act of access and access seeker support this construction according to Digicel
- v. Application Errors
 1. NICTA has not properly discharged its obligation under section 129 In Relation to Declaration Criteria



Mr. Mel Togolo

Appeals Panel

.....¹⁵ May 2015