1. bemobile appreciates this opportunity to make comments on submissions made to NICTA's inquiry into the need for a Retail Service Determination regarding certain mobile telephony services.

2. We focus our attentions on the submission made by Digicel and comment below on the information provided by Digicel in their submission of 16 December 2011.

3. We are disappointed that Digicel failed to address the major issue at hand. That being how it employs excessive off-net retail prices combined with low on-net prices to anti-competitive effect, creating an artificial tariff mediated network effect to the detriment of consumers and competition. We had expected a defense of the strategy but instead saw little of substance in its submission.

4. Furthermore bemobile now finds itself at a significant disadvantage as we addressed the issue in great detail and provided an overwhelming weight of economic theory, practical implications and regulatory precedent for addressing what is a critical issue to the long term health of a competitive telecommunications industry and thereby provided Digicel with the full opportunity to address our arguments in favour of regulatory intervention.

5. By contrast, Digicel provided no information of any substance as to why it is employing such tactics and why it would be inappropriate for NICTA to intervene as it has both the power and duty to do if it is found that consumers will suffer as a result of the current situation.

6. Digicel has relied instead on making unsubstantiated threats and alleging inappropriate process flaws at a time when this inquiry is merely at the consultation phase. The whole purpose of a consultation is to enable stakeholders to comment on the process *and substance* of the issue to ensure a robust determination can be enacted. Digicel's demands to halt the process are not only premature but on inspection are also completely without foundation.

7. Digicel is clearly trying to prevent this important inquiry from taking shape and the absence of any material arguments in Digicel's submission in favour of its retail price discrimination policies perhaps shows the limitations of any arguments that may favour consumers and competition for such a policy by Digicel.

8. bemobile would have been more than happy to respond to any economic arguments put forward by Digicel that may have supported a pro-competitive rationale for the discrimination between on-net and off-net services. Perhaps it is because there are no good pro-competitive reasons for the employment of such tactics that none were produced in its initial submission,

however, if any do come to light in the course of a cross-submission by Digicel, it may be appropriate to then allow a comprehensive cross-submission of its arguments.

9. We are also surprised and disappointed not to see any submission from the ICCC given that we understood from NICTA that the ICCC requested and was granted an extension of more than a month from the original deadline for submission in order to do so. Clearly time is of the utmost importance in a situation such as this as Digicel's dominance is increasing daily. This should be well recognized by all stakeholders so the request for an extension from ICCC without any submission forthcoming is not only odd, it is also deeply damaging to competition and the process undertaken by NICTA.

10. This cross-submission will address new information that has come to light since our previous submission and the specific points raised by Digicel. What is clear is that NICTA have rightly identified a fundamental issue that goes to the heart of the long term viability of this critical industry of Papua New Guinea and NICTA must persevere with its inquiry to determine a robust and appropriate determination.

New Information has come to light that is relevant to the case:

11. bemobile has already provided strong arguments as to why a Retail Service Determination is not only appropriate but also essential for the long term health of competition in this sector and bemobile remain unconvinced that any compelling arguments have been put forward to change its view.

12. In addition, since our original submission was made in December 2011 there have been a number of substantial decisions and recommendations made from key international bodies that support our position.

13. On 28th February The Organisation for Economic Co-Operation and Development (OECD) released a paper entitled Developments in Mobile Termination[1]. In it it recommends cutting mobile termination rates to zero as that would help drive competition and increase overall consumer welfare:

    "Wholesale interconnection rates for mobile telephony service in the OECD area have decreased by 53% from 2006 to 2011. The charges, or mobile termination rates (MTRs), represent the fees that telecommunication network operators (fixed, mobile and VoIP) pay for delivering telephone calls to mobile wireless providers. Lower rates enable competition in the telecommunications market, encourage greater usage of mobile services through flexible unlimited call plans, and increase overall consumer welfare. Furthermore, it is only in countries where rates are lowest or

---

[1] http://www.oecd-ilibrary.org/science-and-technology/developments-in-mobile-termination_5k9f97dxnd9r-en

even at zero that new innovative VoIP services like Google Voice are able to flourish. This report is timely because many regulatory bodies, including in the United States and the European Commission, are debating whether to phase out MTRs altogether".[2]

14. Although the investigation by NICTA is about a Retail Service Determination, Mobile Termination Rates are relevant to the debate as they represent one side of the two sided market, with the retail service representing the other side. One cannot discuss the retail prices of off-network calls without understanding the cost of interconnection between operators.

15. The fact that PNG suffers some of the highest Mobile Termination Rates in the world is relevant to this debate. Digicel argued for high MTRs when interconnection was being resolved by the ICCC. The ICCC determined high termination rates in PNG although this was counter to the trend in the rest of the world for cost based MTRs.

16. High MTRs exacerbate the competition problem identified by NICTA. The fact that MTRs have been regulated by the ICCC at a rate that most nations believe distorts competition in favour of large mobile networks is surprising. One of the reasons why this NICTA inquiry is so critical to the health of competition in PNG is because of the excessive wholesale charges in the form of MTRs that have to be paid to Digicel for anyone who wants to call into its network.

17. These excessive MTRs represent a price floor for retail prices and results in crippling out-payments from smaller operators to Digicel.

18. The OECD report describes the reasons why MTRs have been capped by regulators across the world

    "The main reason why regulators have set MTRs is that they see the market for terminating wholesale voice services [...] as a market with a monopoly. Every market party has monopoly power for terminating traffic to its own customers. This is because according to regulators:

    - *"Voice termination is a separate market...there is no possibility to call the number via another method.*
    - *"In the absence of competition mobile networks have an incentive to set the termination rate on their network above cost. It can extract monopoly rents from those that need to call its network. It can use these rates to compete in other markets.*
    - *"Consumers may not change their mobile operator if other users calling them pay high termination rates....In addition, some consumers may attempt to maximize on-*

[2] OECD: Developments in Mobile Termination. Abstract.

net calls, for business or personal use, leading to loss of welfare given that not all potential calls will be on-net. "[3]

19. Clearly, the OECD recognizes the issue being investigated by NICTA and shows that regulators are concerned about the anti-competitive effects of the toxic combination of excessive and above cost MTRS together with on-net / off-net retail price differentials. The OECD report goes on to say:

    "Other effects of high termination rates are in conjunction with high on-net / off-net price differentials, which help larger operators to potentially leverage external network effects to the detriment of smaller operators"[4]

The OECD recommendations are in line with the European Commission's recommendations.

20. The recommendations from the OECD are consistent with the recommendations from the European Commission which were discussed in our original submission. In particular however we draw NICTA's attention the explanation of the competition problem described by the representative body of all European Telecommunications Regulators – the Body of European Regulators for Electronic Communications (BEREC) in its explanatory note of the European Commission's recommendations[5] where it said:

    "Above-cost termination rates can give rise to competitive distortions between operators with asymmetric market shares and traffic flows. Termination rates that are set above an efficient level of cost result in higher off-net wholesale and retail prices. As smaller networks typically have a large proportion of off-net calls, this leads to significant payments to their larger competitors and hampers their ability to compete with on-net/off-net retail offers of larger incumbents. This can reinforce the network effects of larger networks and increase barriers to smaller operators entering and expanding within markets.

    "The further termination rates move away from incremental cost, the greater the competitive distortions become in each of the above cases."[6]

21. Furthermore, in its recommendation to reduce MTRs to the level of incremental cost, the European Commission also recognized the strategic incentives of large operators to use on-net / off-net retail price differentials to anti-competitive effect:

[3] OECD: Developments in Mobile Termination. P.11
[4] OECD: Page 13. The Impact of MTRs.
[5] BEREC. SEC (2009) 600. Commission staff working document accompanying the Commiccion Recommendation on the regulatory treatment of fixed and mobile termination rates in the EU. Explanatory Document.
[6] BEREC. Page 16

"It has been further indicated in recent economic literature that in the presence of call externalities mobile networks have strong incentives to implement on-net/off-net price differentials due to: (i) high mobile-to-mobile termination charges which exceed marginal costs; and (ii) their strategic incentives to reduce the number of calls that subscribers on rival networks receive, reducing the attractiveness of rival networks and hence their ability to compete. This theory suggests that mobile call termination charges above marginal costs can lead to permanent net payments by smaller networks and, since off-net prices are set above costs, also implies that smaller networks receive relatively fewer calls. According to some of this literature, termination charges which are above the marginal costs of termination result in strategically-induced network effects which may be detrimental to smaller networks".[7]

22. Importantly, the European Commission recognized that interconnection was an essential part of the telecommunications landscape – if networks could not communicate with each other the whole system would fail. But, although a physical interconnect may be in place between operators, the strategic interests of each player would play a part in the amount and direction of traffic with implications for competition among those players.

    "It is also important to note that termination markets are a situation of two-way access where both interconnecting operators are presumed to benefit from the arrangement but, as these operators are also in competition with each other for subscribers, termination rates can have important strategic and competitive implications"[8].

Brokers' and analysts' views

23. Bemobile's view of MTRs and on-net / off-net retail price discrimination has been supported not only by the 27 nations in the EU and the 34 nations in the OECD, and numerous other countries around the world as described in our initial submission, but our competition claims have also been supported by the best of the world's financial analysts. Below, we reproduce some quotes taken from OFCOM's (the UK telecommunications regulator) 2011 Wholesale Mobile Voice Call Termination determination[9] where it recommended sharp reductions to termination rates of 80% (down to £0.0069 per minute [Papua New Guinea Kina equivalent as 9/3/2012: 0.0215]).

---

[7] BEREC: Page 18.
[8] BEREC. Page 15.
[9] OFCOM 15 March 2011

"We also note that a number of third parties (mainly brokers) have commented on the potential effects of lower MTRs across the EU in the context of the 2009 EC Recommendation (or have previously discussed the effect of lower MTRs). In general, the views expressed by brokers tend to support the view that high symmetric MTRs make it difficult for MCPs with fewer subscribers to compete effectively and reach a minimum viable scale. Brokers appear to agree that once this barrier is removed (or at least reduced), price competition would become more intense."[10]

Morgan Stanley for example highlights that[11]:

"High mobile termination rates are in our view probably the single most anti-competitive element of the European mobile landscape. They prevent deep price cutting by challenger or new entrant operators, as this leads to negative gross margins on outgoing calls (and indeed 3 in the UK has become a net payer of interconnection despite a very generous asymmetry in its favour)."

Société Générale made a similar point though with a retail emphasis[12]:

"A fall in MTRs towards zero could destabilize voice pricing as it would: a) remove the regulatory rents enjoyed by Vodafone thanks to its high market share (which helps create a significant "club effect" due to heavily discounted on-net traffic), b) aggravate the pricing environment (as small operators are no longer restrained by the presence of high MTR levels)."

Nomura Research also considered the implications of lower MTRs[13]:

"We remain nervous of four-player markets which typically have at least one sub-scale operator. Subscale operators will jostle for market share and can potentially be disruptive, especially as the termination rate floor disappears over the medium-term. [...] The regulatory pressure on termination rates in Europe is unrelenting, lowering the floor for off-net pricing."

24. Ofcom go on to note that the brokers' and analysts' views on the competition effects of MTRs are consistent with its position of maximising competition by adopting pure LRIC.

In February 2012, the UK Competition Commission found that Ofcom's determination to reduce MTRs to £0.0069 over a 4 year glide path did not go fast enough.

25. A final point to make on Ofcom's 2011 determination and again new evidence relevant to this investigation is that there was an appeal by the large incumbent mobile operators in the UK against Ofcom's 2011 determination and this went to the UK's highest Competition Court – the Competition Appeals Tribunal for a full hearing.

---

[10] OFCOM: Para 8.78
[11] OFCOM Para 8.79
[12] OFCOM: Para 8.80
[13] OFCOM: Para 8.82

26. On 14 February 2012 the UK Competition Appeals Tribunal published the Competition Commission's findings on the matter. It found that Ofcom was right to impose pure LRIC cost pricing on the mobile networks, however, the Competition Commission called for a faster reduction in MTRs to the pure LRIC level, using a three-year glide path as opposed to the four-year glide path proposed by Ofcom[14].

27. It is worth noting that the competition concerns around both high MTRs and on-net / off-net retail price differentials were highlighted throughout the 555 page determination. Examples include:

   "Ofcom accepted that on-net/off-net price differentials were not determined solely by cost differences associated with MTRs. Ofcom noted that strategic behavior (eg to encourage club effects) rather than differences in on-net and off-net costs may have been another motivation for lower on-net retail prices. Ofcom considered however that if larger MCPs were successful in attracting consumers via the club effect the smaller MCPs would have to offer more attractive packages overall, which high MTRs would restrict them from doing"[15].

28. In its assessment of the matter, in paragraph 2.292 of the determination, the Competition Appeals Tribunal agreed with Ofcom that subscribers would form an expectation that they would pay higher average call prices if they subscribed to a smaller network. "For the reasons explained by Ofcom, a subscriber may expect to make more off-net calls if they subscribe to a smaller network{...} and, in the presence of on-net/off-net differentials, to therefore pay higher average retail call charges."[16]

29. It went on in its assessment: "we do not consider that the appellants [ie the large mobile networks] demonstrated that Ofcom's retail effects in competition for domestic subscribers are immaterial"[17]

30. Concluding, with particular importance to the case before NICTA that "Ofcom accepted that there were reasons, other than differences in the cost of terminating calls on-net and off-net, why operators may offer tariffs that have some form of preferable rate for on-net calls. This suggests that Ofcom could not reasonably expect the adoption of the LRIC cost standard to result in the elimination of on-net / off-net price differentials".[18]

---

[14] See: http://www.catribunal.org.uk/237-7146/1182-3-3-11-Hutchison-3G-UK-Limited.html

[15] See Competition Commission Determination. 2.271

[16] See Competition Commission Determination 2.292

[17] See Competition Commission Determination 2.299

[18] See Commerce Commission Determination 2.299

31. Given such strong evidence from leading competition and regulatory bodies around the world, we believe that the evidence in favour of NICTA imposing a Retail Service Determination – and indeed go on to investigate the excessive MTR costs in PNG, is now overwhelming and there is a race against time to prevent further harm from coming from the competition damaging practice employed by Digicel..

Digicel has reduced its off-net calling tariff once again at a time NICTA is considering making a key decision on whether or not regulatory intervention is required.

32. We note that on Friday 2 March 2012 Digicel reduced its prepaid off-net call charges during off-peak hours (see Table 1 below). That Digicel has been able to implement a significant off-net price reduction indicates that its previous higher price was excessive.
33. bemobile considers it important to highlight that despite the recent changes to Digicel's off-peak prepaid tariff, very large price differentials remain in place. As is shown below in Table 1, for a 3 minute call Digicel's prepaid charge for an off-net call during peak hours to bemobile is more than 3 times its charge for an on-net call. During peak hours the differential is even greater. Therefore, even after Digicel's price change bemobile remains extremely concerned that Digicel's ongoing price discrimination is restricting competition through strong network effects.

Table 1: Digicel prepaid Flex Rates

	Peak	Off-Peak
Digicel to Digicel	0.99 for the first minute, 0.11 for subsequent minute	0.49 for the first minute, 0.11 for each subsequent minute
Digicel to BeMobile	1.7	0.79
Digicel to Telikom	1.5	0.79
Charge for 3 minute call		
Digicel to Digicel	1.21	0.71
Digicel to BeMobile	5.1	2.37
Digicel to Telikom	4.5	2.37
On-net/Off-net price differential		
3-minute call to BeMobile	321%	234%
3-minute call to Telikom	272%	234%

Notes: Peak hours are 8am to 8pm, 7 days per week. Off-peak hours are 8pm to 8am, 7 days per week

Source: Digicel website, viewed 9 March 2012.

34. Digicel will no doubt claim that its off-net price reduction was as a direct competitive result of a move by bemobile to reduce off-net calling prices and that this is excellent evidence of

competition at work in the market – and presumably evidence that NICTA should not continue its inquiry.

35. We caution NICTA from accepting such claims. It is widely known that incumbents will do all that they can to game the regulatory process while it is ongoing and once the threat of regulation has disappeared, they are free to raise prices at will. The previous reduction in Digicel's offnet retail pricing to bemobile (and only other time we are aware of) coincided with the period that NICTA's Board were scheduled to determine whether or not to hold the current Public Inquiry and Digicel retail rates reverted to the previous level shortly after that NICTA Board meeting concluded.

In a well publicized case last year in New Zealand, the topic of MTRs and the anti-competitive effects of on-net / off-net retail price discrimination had been the subject of an intense debate and a formal regulatory investigation. The Commerce Commission had been persuaded to accept voluntary reductions from the incumbent operators rather than impose cost based MTRs (which would be a lengthy process) and had made a recommendation to the Minister to accept the voluntary reductions. Once the Commission had made its recommendation, Vodafone thought it was 'in the clear' and came out with a deeply damaging offer that penalized off-net calling and priced on-net calling at below MTRs. Fortunately for competition, the recommendation had not been accepted by the Minister at that point and it was sent back for a re-assessment. Vodafone hastily withdrew the new pricing plan but its motives to exploit its dominance once the regulator's back was turned were now laid bare. On (brief) reflection, the Commerce Commission reversed its recommendation and regulation of MTRs with constraints on on-net / off-net price differentials were enacted.[19]

Digicel's submission:

36. In this section we examine the Digicel submission and provide comment on the arguments they present to defend their strategic behavior.

37. Section 2 of Digicel's submission is in essence a review of the benefits that competition can bring to consumers both within ICT and more broadly across the economy at large. bemobile agrees that competition is a good thing and part of the role of NICTA is to ensure that competition can flourish long term for the benefit of consumers and the wider economy.

38. However, we diverge from Digicel when looking at how, given the unique market structure in PNG and clear dominance by a single entity, NICTA can best ensure that competition will flourish for the future. It is clear that there is a real and present danger of market foreclosure, not because of any lack of investment or skill on behalf of bemobile but because of the power of the anti-competitive network effect that comes about as a result of the differential between on-net and off-net retail prices by dominant entities. Foreclosure means greater concentration, higher

[19] See NZ Herald: http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10639703

prices, lower investment in the industry and concomitant adverse impacts on the economy as a whole for many years to come.

39. In contrast to Digicel's baseless assertions, we have provided significant weight of evidence that competition will suffer if NICTA fails to recommend an appropriate Retail Service Determination is imposed by the Minister.

40. Consumer choice is pre-requisite for players in a market to be held to normal competitive constraints and to ensure that those players have incentives to invest, innovate and compete for consumers. However, as we have shown in our submission, the element of choice has all but been removed from PNG consumers already because of the on-net / off-net differentials employed by the dominant operator Digicel.

41. If a consumer were to choose to subscribe to a rival network to Digicel, they would suffer from an unacceptable scarcity of inbound calls and SMS due to the excessive off-net retail price imposed by Digicel on its customers. A customer has a reasonable expectation that they will be able to receive calls as well as be able to make them when they buy a subscription to a mobile operator so the fact that they do not receive calls will likely result in a lower utility of service than expected. The user is then likely to switch to Digicel as that way he will be able to receive calls as well as make them with the majority of his friends and colleagues. That is not an example of competitive choice – the choice is made for him by the people he knows – even if he gets a better deal from one of Digicel's rivals. Nor is that competition at work – competition implies freedom of choice based on price and innovation. It is an anti-competitive abuse of market dominance and needs to be remedied as part of this inquiry.

42. If a customer cannot make a free choice based on the price and quality of the services that they procure but is forced to procure a service so that he and others can enjoy the full suite of services that are anticipated when buying a service, then there is a serious question to answer on whether the market can be described as competitive.

43. Recognition that consumers enjoy receiving calls is fundamental to the strategy employed by Digicel and fundamental to the regulatory intervention required to facilitate competition.

44. When buying a mobile service, it is expected that it can be used for both making and receiving calls. In the near absence of being able to enjoy receiving calls from Digicel customers (which represents upwards of 80% of all users), it is unlikely that a potential customer can subscribe to any alternative to Digicel unless they are happy to lose a large proportion of the usability of the service they thought they were buying.

45. PNG has now passed the tipping point. Low on-net prices in more competitive markets can lead to pro-competitive outcomes for consumers as operators work hard to attract customers with low prices. However, if one operator becomes dominant, the incentives to employ low on-net

prices combined with excessive off-net prices increases markedly. The result becomes anti-competitive such that consumers no longer enjoy the benefits of real choice and their choice of network is effectively made for them by their friends and colleagues who already subscribe to the dominant network. Unless that customer also subscribes to the large dominant network, she will suffer from a scarcity of incoming calls and SMS.

46. Digicel, in an all too infrequent attempt to discuss the specific matter at hand, admits that its customers make relatively few off-net calls and alludes to the fact that this is because they know that the price is high:

"Digicel customers know for example the cost of calls to bemobile numbers and will also know if the price increases[20]"

"Just because Digicel customers make relatively few off-net calls does not mean they will accept a price increase of these calls[21]".

We note that Digicel is causing a significant fuss over this inquiry which would seem odd given that their customers make relatively few off-net calls. The likely reason for the fuss of course is that there are strong, anti-competitive strategic reasons why Digicel wants to maintain these excessive retail price differentials. In fact, we would be surprised if Digicel customers on average made more than 5% of calls to bemobile. This figure can be checked by NICTA as part of this inquiry but if true means firstly that calls from Digicel to bemobile have been effectively choked off by Digicel's pricing strategy – which is hardly encouraging a connected society, and secondly, intervention that prevents any on-net / off-net retail price differentials will have a near negligible effect on Digicel's revenues due to the low volumes of calls placed across networks. In Digicel's conclusion Digicel's description of the current inquiry leading to a "regulatory hand out" which would "progress" market participants other than Digicel, the market leader, confirms that Digicel is also of the opinion that their on-net/offnet retail differentiation does play a part in sustaining their market lead.

47. bemobile believes that the price for off-net calls is already much too high and deliberately so. A price rise may not be acceptable to Digicel's customers but we submit that the current price is not acceptable to its customers either. Digicel's customers make "relatively few off-net calls" because the price is already too high and our view is that the strategy is a deliberate attempt to do the following things:

    a. Penalise Digicel customers who wish to call a rival network's customer through excessive off-net prices.

---

[20] Digicel submission: Paragraph 78 (b).
[21] Digicel submission: Paragraph 78 (b).

b. Penalise a rival network's customer through the use of excessive off-net retail prices by limiting the number and duration of calls that they receive and so reduce the utility and enjoyment that the customer derives from subscribing to the rival network.
c. Reduce the income that its rival would expect to derive from interconnect payments.
d. Push home the network effect to anti-competitive advantage.

Digicel's social and community work is at best irrelevant to this inquiry.

48. The majority of section 2 of Digicel's submission devotes itself to extolling the virtues that Digicel has demonstrated in its community affairs programmes.

49. The contribution Digicel has made to communities is of course welcome and to be congratulated.

50. However, its community work is entirely irrelevant in the context of this inquiry and should be ignored in its entirety.

51. The only relevance that a detailed breakdown of its altruistic behavior may have in this process is if Digicel thought that it could enjoy a degree of regulatory forbearance as a result of its community activity. If indeed, regulatory favours can be enjoyed by positive community affairs policies then it should be made explicit by the regulatory authorities so that all the players are made aware of the weighting that NICTA places on such activities when analyzing competition decisions.

52. If, as we suspect it constitutes no relevance to the inquiry, it should be ignored.

53. The only other possible reason we can find for these details to be included in the submission is if Digicel is delivering a veiled threat that it will cease to provide community activities should regulatory decisions go against them.

54. We believe this to be highly unlikely as there are numerous commercial benefits conveyed on Digicel when pursuing such high profile and positive community policies. For one, it provides excellent marketing and awareness of the brand. The fact that this also delivers benefits to individuals and communities is to be commended but it should also be ignored in this process.

Retail Intervention is the only appropriate course of action.

Section 3.

55. In this section Digicel incorrectly make a case that regulatory intervention in the form of a Retail Services Determination would be:

    a. harmful to competition
    b. send bad signals to potential ICT investors
    c. Lead to adverse long term impact on end users of ICT services
    d. The risk of a false positive exceeds the risk of a false negative

56. These assertions are made without foundation, without reference to any international precedent and without any acknowledgement that a well constructed Retail Service Determination would actually be the most beneficial and low risk option available to NICTA on all the above counts.

57. There would be no harm to competition, quite the reverse is true. A Retail Service Determination banning a dominant operator from imposing on-net / off-net retail price discrimination has been found to be in the interests of consumers in numerous cases across the world as evidenced by bemobile's original submission. Forward thinking regulators are tackling the issue head on with the preservation of competition and the long term benefits of their end users uppermost in their minds. Digicel has provided a rhetorical stream of statements but provided no evidence of any harm that would come from a Retail Service Determination. bemobile however provided example after example of competitive benefits that would arise as a result of appropriate regulatory intervention.

58. It is somewhat spurious to make the assertion that intervention would harm competition when the facts of the case and international precedent demand that competition would be best enhanced by imposing a Retail Services Determination.

59. Intervention would in fact send positive signals to potential ICT investors, not bad ones. The network effect is a well known phenomenon that is being, or has been addressed in many similar markets. International best practice among regulators is to tackle this problem through a ban on on-net/off-net retail price discrimination and investors will be far more comfortable with investing in a nation that follows international best practice than one that allows monopoly rents to be extracted by private firms without constraint and without regard to appropriate regulatory rulebooks.

60. In similar markets where regulators have used pro-competition arguments to impose retail non-discrimination principles, we are unaware of any instance nor any evidence to suggest that these markets have suffered from reduced investment. Perhaps NICTA should seek guidance from its near neighbours in Singapore to understand whether the regulator there believes investment was helped or hindered by their intervention to prevent on-net / off net retail price discrimination behaviours a decade ago.

61. Adverse long term impacts on end users come about through inappropriate regulatory decisions. The art of good regulatory decision making is to balance the risks presented on both sides of the argument and make decisions that will enhance competition, investment and innovation for the long term benefit of end users. Digicel argue that doing nothing will be in the best interests of end users but that fails to consider the circumstances now faced. There is a real danger that market foreclosure will result if NICTA fails to impose a Retail Service Determination. That is a difficult event for competition to come back from and in the meantime the monopoly rents enjoyed by Digicel will be extended long into the future while new entry is considered by potential new investors – if indeed any can be found given the regulatory environment that caused the foreclosure. Far better (and considerably lower risk) to address the issue now and review whether it is still required in 3-5 years time. If it is found to be unnecessary at the review point, the RSD can be removed but in the meantime consumers will enjoy the benefits of choice and competition that they deserve. The low risk, pro-consumer option must be to impose the Retail Service Determination without delay.

Digicel fails to address the very issue identified as a concern by NICTA:

Section 4, 5 and 6.

62. The remainder of Digicel's submission focuses on trying to prevent any further action by NICTA on the basis of process rather than dealing with the main issue – that being the competition issue of concern to NICTA.

63. Digicel suggests that there is no basis for the inquiry and no basis for coming to the tentative conclusion that Retail Service Determination is appropriate but fails to provide any reasoned analysis or compelling arguments to show how they arrive at such conclusions.

64. It is clear that this is a consultation and that as part of any consultative engagement views must be sought and heard from all the stakeholders but those views should consist of more than threats and assertions, they should consist of evidence based arguments that enable NICTA to make the right decisions for the long term benefit of PNG consumers and for the efficiency and competitiveness of the ICT industry (section 2 of the National Information and Communications Technology Act).

65. The fact that Digicel would prefer NICTA didn't look into their anti-competitive practices is clear from the weight of legal posturing brought to bear in the submission but this scaremongering should not discourage NICTA from striving to achieve the right outcomes for PNG and PNG consumers.

72. bemobile largely agree with Digicel's arguments to change the definition of the relevant market. We refer NICTA to the independent report submitted in support of bemobile's original submission that was authored by Emma Lanigan, a leading expert on the matter and respected economist. We ask that NICTA adopt Ms. Lanigan's definition of the relevant market which is: "the national retail market for the supply of domestic on-net and off-net mobile voice and SMS services".

Process observations:

73. We also have some sympathy with Digicel's calls for a robust process to be followed for this entire inquiry as we want to see the best outcome both for competition and for PNG consumers unencumbered by (the inevitable) complaints of process. However, NICTA should not waiver in its duty and it would be completely inappropriate to halt this important inquiry (as is demanded by Digicel) on the basis that Digicel believes it is unlawful to hold the inquiry. NICTA is duty bound to conclude this inquiry and make its recommendation based on the evidence and facts obtained by it and presented to it in the course of the inquiry.

74. The practice of on-net / off-net retail price differentials is so damaging to competition that even giants such as Vodafone group seek regulatory intervention to prevent it from being exploited by dominant operators. The situation in PNG is now on a cliff edge and any delay, uncertainty or pause in the process would play into the hands of Digicel allowing it to cement its dominance still further. The market has already tipped to monopoly through the abuse of tariff mediated network effect exploitation. PNG cannot afford any further delays so we encourage a robust and thorough approach from NICTA to resolving this fundamental competition issue.

75. In the absence of strong and robust competition, a nation's consumers suffer and innovation, investment and competition suffer to the long term detriment not only of consumers but also of PNG as a growing economic success story. The time to act must be now.

SMP Section 6.

76. Digicel expresses the view that NICTA's adoption of a narrow market definition leads it to a flawed conclusion on SMP. As demonstrated in Ms. Lanigan's expert report, adopting a broader definition that is similar to that suggested by Digicel still leads to a finding that Digicel holds SMP in the relevant market.

77. Turning to the specific comments that Digicel has on NICTA's assessment of SMP criteria, Digicel highlights concerns regarding:

- measurement of market share;
- ability of competitors to viably duplicate national coverage;
- network effects;
- economies of scale;

- vertical integration;
- ease of market entry

We provide some comments on each of these points.

Market share measurement

78. Digicel claims that the market share used by NICTA is incorrect because it is based on the wrong market definition. However, it appears that what NICTA has used is subscriber share given that on-net traffic shares are not currently available. If this is the case, then Digicel's concern is invalid. As highlighted in bemobile's previous submission (para 6.2) we would urge NICTA to collect further information from each mobile network on subscriber numbers, traffic volumes and revenues so as to be able to more accurately estimate market share and its trend as NICTA as recently commenced to request.

Ability of competitors to viably duplicate Digicel's coverage

79. Digicel asserts that in other similar countries, including in African countries, first-mover advantage in providing coverage is quickly eroded away. It is difficult to give this very vague assertion any credence, without details of which countries this occurs in, whether they are in fact similar to PNG and if so how, and how competition has developed in those countries. It is however quite common for regulators to recognize that as population density diminishes in more rural parts of a country, there is a tendency towards natural monopoly where it is inefficient for multiple operators to invest in duplicate infrastructure. Often this is tackled by way of a national roaming obligation on the large network to host access for smaller networks on commercially neutral terms. Examples include New Zealand where a national roaming condition is in place, but also national roaming has been mandated in European countries such as UK, Ireland, France, Germany, Italy, Spain, Austria, Sweden, Denmark, Netherlands, Poland to name a few. It is also currently being considered further in the UK to address rural coverage needs where the business case for multiple operators to invest in new rural coverage is limited.

Network effects

80. Digicel comments that NICTA has merely asserted the existence of network effects. The reports submitted by bemobile and Ms. Lanigan address this concern by: (1) explaining in detail how network effects arise from price discrimination where there are large imbalances in market share; (2) demonstrating that the information available indicates that network effects are very likely in PNG; and (3) by providing extensive information on international precedents which highlight that network effects arising from price discrimination are a key issue of concern for regulators. Digicel provides the view that network effects "do not necessarily lessen competition or confer market power, as with network effects there will be a stronger incentive to compete for customers and increase the size of the networks." While network effects can strengthen competition between networks that have similar sized subscriber bases, in the case where there

is a large imbalance in market share the large network has a strong incentive to set large on-net/off-net price differentials so as to restrict competition as was discussed in Ms Lanigan's submission with reference to the relevant economic literature.

Economies of scale

81. Regarding economies of scale, Digicel considers that all operators are able to achieve minimum efficient scale and it expresses the view that previous official decisions regarding roll-out obligations show this. However, it seems obvious that a large operator such as Digicel will be able to achieve significantly lower unit costs through being able to defray overhead costs and fixed costs such as cellsite towers and road access costs over a much greater volume of traffic. Coverage obligations further exacerbate, rather than justify, the cost disadvantages that networks with small subscriber bases face.

Vertical integration

82. Digicel expresses the view that vertical integration is common internationally in mobile industries but dominance is rare. Digicel fails to take into account is that internationally it is common to set mobile termination rates at cost, which mitigates the ability for cross-subsidisation of retail revenues with wholesale revenues. In the presence of above-cost mobile termination rates, a large operator can leverage market power from the termination market into the retail market as described in Ms. Lanigan's submission.

Ease of entry

83. Digicel claims that the mobile market entry by Telikom demonstrates the ease of entry into the PNG mobile market. However, what is relevant is not simply whether market entry can occur but whether it is sustainable. As explained in the previous submissions by bemobile there are a number of significant barriers to sustained entry and expansion – see section 3.2 of Ms. Lanigan's submission.

Potential effects of improved management of smaller networks

84. Digicel claims that "NICTA needs to recognize the potential for much stronger competition without any further capital investments" which it implies could occur with improved management of bemobile and Telikom. While strong management can obviously improve the ability of firms to compete under normal circumstances, this is simply not the case when a dominant firm utilizes price discrimination to restrict competition.

ABUSE OF MARKET POWER Section 7.

85. Digicel's asserts that "NICTA has no jurisdiction to inquire into matters concerning abuse of dominance or anti-competitive conduct" however it is clear that the function of NICTA under Section 9(a) of the National Information and Communication Technology Act 2009 (the Act) is

"to give effect to the objective of this Act and the regulatory principles" and the Section 2 of the Act (Objective of Act) in particular subsection (a)(ii), (c), (d) & (h) and that not only does NICTA have the jurisdiction to inquire into the abuse of dominance or anti-competitive conduct within the ICT sector but NICTA has a statutory obligation to do so.

Conclusion:

86. We are disappointed that Digicel have not addressed the issue at hand in its submission and failed to provide evidence and precedent to show how competitive harm can be avoided whilst allowing the practice of strong on-net/off-net retail price differentials. Perhaps they can find no evidence and rely instead on grand but ultimately baseless statements and rhetoric.

87. We are unmoved in our view that it is essential for NICTA to conduct this inquiry and essential to do so in a speedy yet robust manner. We believe that huge harm is currently being done to the industry and the long term health of the telecommunications sector through the anti-competitive use of retail price differentials by Digicel.

88. It is essential to impose a ban on any discrimination between on-net call and SMS prices and off-net call and SMS prices. That ban should be put in place but a review clause should be inserted to enable NICTA to withdraw the determination at some point in the future if it can be shown that the clause is no longer required.

89. In the attached Appendix to this cross-submission we provide a potential wording for the Ministerial determination to ensure no retail price discrimination can be used by any dominant operator.

90. NICTA not only has the power to impose this Retail Services Determination but it also has the duty to do so for the long term benefits of end users. We encourage NICTA to enact its powers expeditiously and diligently so PNG and competition can benefit from its intervention in this matter.

End.

Appendix I

1. NON-DISCRIMINATION RETAIL SERVICE DETERMINATION SOUGHT BY BEMOBILE

Our submission

1.1 Bemobile seeks a non-discrimination condition be applied to prevent large networks using off-net surcharges to strategically remove the inbound calling utility of the customers of a smaller rival.

1.2 The non-discrimination condition proposed by Bemobile would therefore:

- Apply to Digicel only and not Telikom or Bemobile;
- Apply to all voice calls (Fixed to Mobile and Mobile to Mobile and Mobile to Fixed) and SMS, including calls and SMS which are part of a retail bundle or are charged on a usage or other basis; and
- Prohibit the restricted operator from imposing any charge on their retail customers which would discriminate between calls and SMS made by those customers to customers on the restricted operator's network (on-net calls and SMS) and calls made by those customers to customers on any other Papua New Guinea national network (off-net calls and SMS).

1.3 While we consider there are grounds for the non-discrimination condition to apply to all prepay and on-account plans and tariffs from the commencement date of the Retail Service Determination (RSD), we propose the condition be implemented on a staged basis to allow existing on-account plans to expire and provide a reasonable period for adjustment of current prepay plans and tariffs as follows:

- The restricted operator will be prohibited from launching any new prepay or on-account plans or tariffs that discriminate between on-net calls and SMS and off-net calls and SMS from the commencement date of the RSD;
- All existing prepay tariffs or plans which discriminate between on-net calls and SMS and off-net calls and SMS must comply with the non-discrimination condition within 30 days of the commencement date of the RSD; and
- All existing on-account tariffs or plans which discriminate between on-net calls and SMS and off-net calls and SMS must comply with the non-discrimination condition following the expiry of the current contract term, or within 30 days of the commencement date of the RSD, whichever is later.

1.4 The non-discrimination condition should apply only for that period of time required to address the competitive distortions identified by NICTA. We therefore propose that:

- The non-discrimination condition is reviewed on the third anniversary of the commencement date of the RSD, or such other date as may be determined by

NICTA where NICTA considers that the expiry of the non-discrimination condition on such other date would be in the best long term interests of end users of telecommunications services in PNG.

1.5 We consider 36 months to be an appropriate horizon in that it provides certainty to the parties, while also recognising that the dynamic nature of the industry requires any determination to be flexible in the medium to long run.

A non-discrimination condition can be easily implemented

1.6 There are no material technical impediments to implementing the RSD in the above timeframes.

1.7 In the case where on-net/off-net pricing discrimination is removed, there is no impact on the network build or configuration. Everything will work as before, but the rate applied will be the same for on-net and off-net traffic.

1.8 In terms of the actual changes required to harmonise on-net and off-net retail pricing within the rating engine(s), this is a simple tariff change that is part of Business-As-Usual (**BAU**) processes and would not take an efficient operator more than 30 days to implement. In these circumstances we consider the 30 day implementation period proposed for non-discrimination to be more than adequate to allow for the relatively minor billing and rating changes required.

Non-discrimination condition sought by Bemobile

1.9 The non-discrimination condition as sought by Bemobile is as below:

1. Digicel will not and will ensure that each member of its respective Group operating in PNG does not, impose on any End User any charge and/or incentive which discriminates on the basis of the terminating Network.

2. The following principles apply in respect of the obligations set out in Clause 1.:

2.1. Clause 1 applies in respect of Calls and Text Messages;

2.2. "discriminate" in Clauses 1,2 and 3 means to impose a charge and/or incentive (whether directly or indirectly) on an End User in such a way as to differentiate between the prices payable by that End User:

(a) for any Calls and/or Text Messages terminating on the Digicel network; and

(b) for any Calls and/or Text Messages terminating on any other Network;

2.3 Clause 1 applies regardless of:

(a) the structure of pricing to any End User; or

(b) whether the End User is an "on account", or pre-pay customer (or a combination of any of them); or

(c) whether the relevant Calls and/or Text Messages are part of a retail bundle or charged for on a usage or some other basis.

3. The obligations under Clause 1 are subject to the following transitional arrangements:

3.1. with effect from the RSD date, Digicel will ensure that no member of its respective Group operating in PNG will launch any new tariffs or plans for Calls and/or Text Messages which discriminate;

3.2. in relation to prepay tariffs or plans for Calls and/or Text Messages of any member of the Digicel Group that exist at the RSD Date, Digicel will ensure, respectively, that any such tariffs or plans which discriminate will be amended so as to remove the discriminatory elements within 30 days after the RSD Date;

3.3. in relation to on-account tariffs or plans for Calls and/or Text Messages of any member of the Digicel Group that exist as at the RSD Date, Digicel will ensure, respectively, that any such tariffs or plans which discriminate will be amended so as to remove the discriminatory elements either:

(a) where the relevant contract permits, within 30 days after the RSD Date; or

(b) by not later than the expiry of such longer period as the relevant contract requires.

3.4 Digical shall provide NICTA within 30 days of the RSD Date a complete list of all on-account tariff or plan customers to which 3.3(b) shall apply together with the current expiry date of each contract

4. The obligations under Clause 1 will be reviewed by NICTA on the third anniversary of the RSD Date.