

31 August 2020

Mr Kila Gulo-Vui
Director, Consumer & International Affairs
National Information & Communications Technology Authority
Punaha ICT Haus
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Dear Sir,

Public Consultation on Draft Amended Wholesale Pricing Principles for Broadband Capacity Services and International Submarine Cable Services

Please find attached Digicel's submission in respect of NICTA's Public consultation on draft amended wholesale pricing principles for broadband capacity services, and international submarine cable services. In making its submission Digicel has focussed on the proposed price terms for access to the declared services and Digicel will be making further comments on both the price and non-price terms of supply to the services in the context of NICTA's current Public consultation on Reference Interconnection Offer from PNG DataCo Limited on various wholesale access services.

Importantly, Digicel's comments should be read on the understanding that, to date, no details of DataCo's underlying costs of service have been provided for analysis and that Digicel has not been afforded a fair opportunity to review and correct, contradict or comment on the materials that we understand have been provided to NICTA by DataCo. We have therefore been forced to rely on international benchmarking information to support our submission. In Digicel's respectful view, it is essential that a mechanism is established by which the cost information that is to be relied upon by DataCo and NICTA is made available for independent expert scrutiny, particularly in the context of the Reference Interconnection Offer consultation referred to above. We suggest that, consistent with international practice and Section 5 of NICTA's own Guidelines on the submission of written comments to public consultations and public inquiries, 22 October 2014, NICTA establishes a confidentiality regime that allows DataCo's confidential information to be made available to specified independent experts of interested parties who have entered into appropriate confidentiality agreements. We consider such an approach to be vital to ensure the integrity of the consultation process and deliver the best possible outcomes for the people of Papua New Guinea.

We look forward to NICTA's consideration of Digicel's submission and welcome any further opportunity to discuss the important issues it traverses.

Yours sincerely
Digicel (PNG) Limited


Michael Henao
Head of Legal & Regulatory

DIGICEL (PNG) LIMITED

Submission to NICTA

***Public consultation on draft amended wholesale pricing
principles for broadband capacity services, and
international submarine cable services***

31 August 2019

***This submission is provided to NICTA for the purpose of the current public inquiry only and
may not be used for any other purpose***

A. Introduction and General Comments

1. This submission sets out Digicel's comments with respect to NICTA's Discussion Paper titled *Public consultation on draft amended wholesale pricing principles for broadband capacity services, and international submarine cable services* ("**Discussion Paper**"), which was issued on 24 July 2020.
2. In making this submission, we reaffirm our support for the establishment of service specific pricing principles that assist in improving certainty and expediting the conclusion of negotiations for access to international submarine cable services that were declared by the Minister pursuant to *Wholesale Service Declaration No. [1] of 2019* ("**Declaration**").
3. Digicel understands that the purpose of the Discussion Paper is to inform NICTA's decision to conduct a review of the *Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019* ("**2019 Determination**") that had a commencement date of 1 January 2020 and which remains in full force and effect.
4. While Digicel notes NICTA's advice that it has undertaken the review as a result of a request by DataCo and that it apparently now has "*access to better information than it had in 2019 on the costs of and demand for the international submarine cable transmission capacity service, as well as a fuller understanding than was possible in 2019 about the way in which the various submarine cable systems provide mutual back-up to enable the provision of a more robust and reliable service*", Digicel notes that none of that "better information" has been shared as part of this review process. This is disappointing and has compromised Digicel's ability to respond to the proposed amendments.
5. Digicel therefore must reserve its rights in this regard, including its right to make further comments in the event that more information becomes available.
6. Digicel further understands that the review is being undertaken pursuant to NICTA's powers under Section 135(3) of the *National Information and Communication Technology Act 2009* ("**Act**"), which stipulates that:

*"(3) NICTA shall make service-specific pricing principles for a declared service within six (6) months after the Minister declares a wholesale service to be a declared service. **NICTA may amend any existing service-specific pricing principles at any time.**"* (Emphasis added)
7. The specific amendments that NICTA has proposed be made to the 2019 Determination are:
 - a. an amendment to clause 6(1) to include a reference to any Reference Interconnection Offer ("RIO") that has been accepted by NICTA pursuant to Section 142 of the Act;
 - b. the deletion of clause 6(2) which made reference to allowable differences in maximum price based on different contract length or payment terms;

- c. the deletion of clause 6(3) which made reference to Schedule 1 which prescribed the maximum price per megabit per second per month for the international submarine cable transmission capacity service;
 - d. the insertion of new clauses 6(2) – (5) establishing a maximum average price scheme and specifying the mechanism by which maximum average prices will be calculated;
 - e. the deletion of clause (7) which made reference to the proposed mechanism for dealing with the allocation of transmission capacity in the context of a fault or other condition reducing the capacity available for a period; and
 - f. the replacement of Schedule 1 with a new Schedule 1 prescribing maximum average prices.
8. NICTA has also identified six key issues that it has considered as part of the review. They are:
- a. Single price for all international submarine cable systems;
 - b. Maximum average price rather than maximum price;
 - c. Indicative prices;
 - d. Compliance;
 - e. Review; and
 - f. Commencement Date.
9. It is in this context that Digicel provides its comments below in respect of NICTA’s proposed amendments to the 2019 Determination (“**Proposed Amendments**”).
10. There is no Digicel confidential information contained in this submission.

B. Digicel Specific Comments

11. Single price for all international submarine cable systems
- a. Digicel agrees that it is appropriate for NICTA to establish a single price for all international cable systems.
 - b. However, we do not agree with NICTA’s stated reasoning for doing so.
 - c. In particular, while Digicel agrees that it is possible for DataCo to use “... *each of the four submarine cable systems that it operates [to provide] mutual support for the service provided using the other systems*”, in practice, the Service Availability level target of 98.5% specified by DataCo in its Telecommunication Service Order Form for services currently supplied by it to Digicel does not reflect such a “protected” service and the

service level is well below any international benchmarks for such service meaning operators will still require alternative solutions to maintain service excellence and as such will not reduce the prices to the consumers, in some cases may increase this as operators are forced to buy redundancy as “insurance” .

- d. That the service offered by DataCo is “unprotected” is further confirmed in the pricing table attached to DataCo’s letter to NICTA dated 8 July 2020 whereby DataCo expressly states *“This service is unprotected. Protection will be at additional cost”*.
- e. In Digicel’s respectful view, the reason for establishing a single price for all international cable systems is that the price should be set on the basis of the reasonably efficient costs of providing the service. Such efficient costs are most likely to be reflected in the costs of the recently commissioned Coral Sea Cable.
- f. In particular, access seekers should not be required to pay a premium on the basis of DataCo’s continued operation and use of the APNG-2cable.

12. Maximum average price rather than maximum price

- a. Digicel strongly disagrees with the “maximum average price” approach that has been proposed by NICTA.
- b. In our respectful view, such an approach, if adopted, would:
 - i. be difficult - if not impossible - to monitor in any meaningful way;
 - ii. be unnecessarily complex;
 - iii. lead to commercial uncertainty;
 - iv. provide strong incentives for DataCo to “game” the system for its own commercial and competitive benefit; e.g. DataCo would have the ability and incentive to offer lower prices to related entities and higher prices to the rest of the market to improve its competitive position while at the same time still meeting the benchmarked price – however, no protection has been proposed to address such a problem; and
 - v. result in a situation where any remedies for failures by DataCo could only be imposed after the fact when damage to access seekers has already occurred.
- c. Digicel is also unaware of any regional precedent where such an approach has been adopted by a Regulator.
- d. Importantly, DataCo has already demonstrated by its past conduct that there is no guarantee that concerns about access seekers acquiring smaller volumes of its services will lead it to charge lower access prices to encourage or reflect larger capacity purchases.

- e. Instead, Digicel proposes that NICTA should adopt a “rate card” approach whereby a set of maximum prices is specified for various capacity volumes. This rate card could then be adjusted annually by NICTA taking into account actual volumes of capacity that have been utilised by any access seekers during the prior period.
- f. Such a rate card approach would be:
 - i. consistent with international practice;
 - ii. mirror DataCo’s existing commercial pricing practices;
 - iii. be practical and simple to implement;
 - iv. provide commercial certainty for access seekers.
- g. For example, Tonga Cable Limited (“TCL”) has successfully used such a rate card approach for its international submarine cable capacity services which are also subject to “declaration” in that country. This is demonstrated by TCL’s most recent rate card (which came into effect on 6 November 2019) which is as follows:

Transmission Capacity (Mbps per month)	Price per Mbps per month (USD)*			TOTAL
	Primary Route	Secondary Route		
		Secondary Route	Via IP transit	
6-10Gbps	10	5	5	20
4-5Gbps	30	6	6	42
2-3Gbps	45	7	7	59
1Gbps	95	8	8	111
600-999	100	9	9	118
500-599	110	10	10	130
400-499	115	11	11	137
300-399	120	12	12	144
200-299	125	13	13	151
155-199	130	14	14	158
100-154	135	15	15	165
<100	140	16	16	172

- h. Digicel further notes that DataCo has already used a rate card approach in its most recent negotiations with Digicel and has proposed its use to NICTA in the context of the RIO consideration process that we understand is now underway.
- i. While we remain of the view that DataCo’s proposed prices include some inconsistencies and are too high (especially for higher volume access seekers), and that they are therefore unlikely to reflect DataCo’s underlying costs (see comments below), they nevertheless provide a useful reference point for the current review.
- j. Digicel therefore proposes that NICTA adopt a “rate card” approach and that each price specified in the rate card is a “maximum price” for that particular volume of capacity.

- k. Aside from the structure of the proposed pricing, Digicel has strong concerns in respect of the level of the proposed “maximum average price” proposed by NICTA in the Draft Amendments. Moreover, no information has been disclosed to Digicel to ascertain whether the proposed maximum average price is a reasonable reflection of DataCo’s costs of providing the service or the likely demand for the capacity that is available and likely to be used during the first time period of the determination.
- l. In the absence of any such information, Digicel suggests that it would be appropriate for NICTA to be guided in its price setting by:
 - i. DataCo’s existing rate card approach and pricing as discussed above; and
 - ii. the international benchmarks that were established by the prices set recently in Tonga.
- m. If such an approach is followed, then Digicel submits that an appropriate set of maximum prices for wholesale services delivered via international submarine cable would be as follows:

	Service	Capacity (Mbps)	Price/Mbps/Month (PGK)
1	Wholesale Internet Service (WIS) delivered to Customer Premises	Up to 100	560
		From 101 – 150	540
		From 150 – 300	490
		From 300 – 500	430
		From 500 – 1000	360
		From 1000 – 2000	280
		From 2000 – 5000	190
		From 5000 – 10000	130
		Above 10000	60
2	International P2P (IP2P) over Subsea Fibre delivered to the CLS	Up to 100	425
		From 100 – 150	415
		From 150 – 300	365
		From 300 – 500	325
		From 500 – 1000	270
		From 1000 – 2000	200
		From 2000 – 5000	125
		From 5000 – 10000	105
		Above 10000	40

Importantly, because of the way Digicel understands costs are likely to be incurred by DataCo, the price band for any capacity purchases made by an access seeker should be determined by the aggregate capacity purchased rather than on an individual Service Order basis.

- n. The prices proposed above are also consistent with the 2019 Determination and, if adopted, could be reviewed on the basis of a transparent review process whereby DataCo's claimed costs and demand data could be subject to objective scrutiny.
- o. In addition, Digicel proposes that the prices specified in the amended service specific pricing principles are "protected" against the possibility that DataCo may unfairly discriminate between the prices it charges to its related entities and other access seekers. In Digicel's view, such protection is essential to ensure the fair application of the service specific pricing principles and to avoid anti-competitive outcomes.
- p. Specifically, we propose that the maximum price that may be charged by DataCo for wholesale services delivered via international submarine cable be the lower of:
 - i. the prices specified in the table in paragraph (m) above and
 - ii. the price it charges itself or any related party for a service that is substantially the same as a service that is provided to any other access seeker.

13. Indicative prices

- a. Digicel agrees with NICTA's proposed approach whereby the Proposed Amendments four time periods (up to the end of the expiry of the current declaration) with a maximum price being set for the first time period and that for any prices for subsequent periods being provided for indicative purposes only. Digicel further agrees that, due to the rapidly growing demand for international submarine cable capacity services that are being experienced worldwide, it is sensible to conduct an annual pricing review to take into account changes in demand that have occurred during the prior year.
- b. However, Digicel is concerned that the proposed first period for the Proposed Amendments is too short to be of practical commercial value. We also note that such a short first period would result in a need for any amended services specific pricing principles to be reviewed immediately on publication, resulting in the imposition of what we consider to be an unnecessary cost burden on the industry.
- c. We therefore propose that the first period extend from the commencement of any amended service specific pricing principles and run through until 31 March 2021. Subsequent indicative periods would then be adjusted accordingly.
- d. Digicel also respectfully disagrees with NICTA's proposed approach whereby:

"NICTA will review each of the amounts shown as soon as possible during Q1 of the period to which it relates taking into account all relevant considerations including actual demand for the service in the previous period."
- e. Such an approach would mean that any review of maximum prices would not occur until after the commencement of the relevant period and would cause three problems. They are:

- i. Firstly, it would mean that both DataCo and access seekers would face commercial uncertainty as to what prices would apply during a substantial part of the relevant period. This would compromise any decisions regarding the amount of capacity to be acquired and how that capacity might then be used (including any downstream service pricing).
 - ii. Secondly, it would lead to more complex implementation issues as, depending on the final pricing determined by NICTA, either service credits or additional charges may be payable.
 - iii. Thirdly, it should be noted that any amendment to the service specific pricing principles, including a change from an “indicative price” to a “maximum price” would need to be undertaken in accordance with the requirements of Section 135(4) of the Act. That is, NICTA will be required to include at least a four week consultation period in the review process. This means that in effect, any such review will be likely to take at least eight weeks to complete. In Digicel’s view, it would be unreasonable for NICTA to begin such a long process after the commencement of the period in which the prices are expected to apply.
- f. Accordingly, Digicel proposes that NICTA begin its annual pricing review three months prior to the commencement of the next relevant pricing period. By doing so, NICTA will be able to fix maximum prices prior to the commencement of each such period.

14. Compliance

- a. As noted above, Digicel considers that the adopting of a “maximum average price” approach to the service specific pricing principles will result in unnecessary complexity and provide strong incentives for DataCo to “game” the system for its own commercial and competitive benefit.
- b. In addition, there would be little transparency in respect of the prices DataCo charged each access seeker and whether such pricing was being applied on a transparent and non-discriminatory basis. While such a problem could potentially be resolved by DataCo entering into a RIO accepted by NICTA in accordance with Section 142 of the Act, there would be no regulatory obligation for it to do so and, in any case, any accepted RIO may be withdrawn by DataCo at any time on 90 days’ notice to NICTA.
- c. The compliance and reporting mechanism proposed by NICTA also does not take into account DataCo’s own use of capacity or the “value” of that usage in comparison to the prices charged to other users.
- d. Digicel is also of the view that, even if transparency and non-discrimination issues are able to be resolved and DataCo is fully compliant with the mechanism described in the Proposed Amendments, problems will undoubtedly arise in the event that the actual average price that was charged by DataCo during the relevant period was above the “maximum average price” specified by NICTA. If that occurred, then what would the remedy be?

- e. While, in theory, the aggregate amount “overcharged” by DataCo could be refunded to access seekers, the distribution mechanism for that aggregate overcharged amount would be problematic. This is for two reasons:
 - i. Firstly, it would not necessarily be obvious which customers had been overcharged. This is because DataCo would no doubt have charged different access seekers different amounts of capacity that had been purchased during the relevant periods. As a result, it would not be at all clear which of the access seekers had been overcharged or how any refunds should be applied.
 - ii. Secondly, it is not clear that NICTA has power to compel DataCo to provide any refunds for overcharged amounts without undertaking enforcement action under Part XII of the Act. In Digicel’s view, reliance on such a process would be costly, complex, uncertain and unlikely to yield satisfactory outcomes.
- f. Importantly, Digicel notes that these compliance issues would only arise in circumstances where NICTA adopted a “maximum average price” methodology and gives further support for our respectful view that such an approach is inappropriate.
- g. Instead, Digicel reaffirms its support of a “rate card” approach to pricing that would be unlikely to give rise to any compliance difficulties and would be straightforward in terms of enforcement.

15. Review

- a. With respect to the proposed annual review of prices, Digicel proposes that as access provider, DataCo should be required to provide the following information to NICTA annually for the 12 month period preceding each of the annual pricing reviews that are discussed in paragraph 13 above:
 - i. the capacity (in Mbps) that has been sold to access seekers during each month of the relevant 12 month period;
 - ii. the capacity (in Mbps) that has been used by the access provider for its own purposes during each month of the relevant 12 month period;
 - iii. the capacity (in Mbps) that has been sold or otherwise provided to any other persons during each month of the relevant 12 month period;
 - iv. the actual chargeable revenue attributable to the capacity that has been sold to access seekers during each month of the relevant 12 month period;
 - v. the imputed chargeable revenue attributable to the capacity that has been used by DataCo for its own purposes during each month of the relevant 12 month period, where such imputed chargeable revenue has been assessed on the same basis as the prices that are charged to access seekers; and

- vi. the actual chargeable revenue attributable to the capacity that has been sold to any other persons during each month of the relevant 12 month period;
- b. This information can then be used to inform NICTA's annual review of "indicative prices" and to set the maximum prices for the next period.
- c. In Digicel's submission any such review process should be conducted in a transparent way that includes the independent expert scrutiny of DataCo's claimed costs and demand information.

16. Commencement Date

- a. Digicel agrees with the NICTA's proposal that the Draft Amendments should take effect from 1 October 2020 (the "**Commencement Date**"). Our reasons for taking this view are that:
 - i. the Commencement Date would immediately follow the period for which Digicel has commercially agreed access prices with DataCo and so would not upset any commercial arrangements that are currently in place; and
 - ii. the Commencement Date would, assuming that NICTA makes its Determination prior to the end of September 2020, be prospective in effect. In our view this is important as the Act does not contemplate NICTA making any amendments to service specific pricing principles that are retrospective in effect and, in Digicel's respectful view, any such retrospectivity would be likely to be found to be unlawful.

17. Other Issues

Form of Amendment Instrument

- a. Digicel notes that the Proposed Amendments have been expressed in the form of a new "*Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019 as amended*".
- b. In Digicel's submission this form of instrument is inappropriate and, instead, we consider NICTA should make an "Amendment Determination" specifying the particular amendments that have been decided to be made to the 2019 Determination. Such an approach would be consistent with the usual approach to amending regulatory instruments and would ensure that the focus of the decision making is squarely on the amendments that have been made.
- c. We also consider this to be very important in the event that any review of the new determination is sought and guard against the possibility of re-litigation of any other aspects of the 2019 Determination which were previously the subject of an Appeal process.
- d. In the event that NICTA considers it to be necessary or convenient, then a consolidated version of the service specific pricing principles can be prepared at a later date.

Non Price terms:

- e. While Digicel understands and accepts that the main purpose of service specific pricing principles is to determine principles relating to the price of access to a particular declared service, Section 135(2) of the Act expressly provides that ***“the service-specific pricing principles may contain price related terms and conditions (whether relating to a price or the method of ascertaining a price) and non-price terms and conditions relating to access to the declared service”*** (our emphasis).
- f. In Digicel’s submission and based on our recent commercial experience, the inclusion of such payment related non-price term in any amended service specific pricing principles would be appropriate at this time.
- g. The reason for this is because Digicel is concerned that DataCo is seeking to impose (or has imposed) on access seekers such as Digicel payment related terms and conditions that DataCo does not apply to its related entities.
- h. Specifically, these conditions include requirements for prepayment or threats of disconnection or suspension of services (without notice) for any delayed payment, even where such payments are in dispute.
- i. In Digicel’s view, such conduct is discriminatory especially given our understanding that DataCo’s related entities (viz Telikom and Bmobile) have consistently delayed or not paid for services provided by DataCo over extended periods of time.
- j. In practise, Digicel has been disconnected for late or short payment in circumstances where it was in dispute with DataCo over the prices that it should have applied while, at the same time, other related entity access seekers (namely Telikom and Bmobile) have not had the same terms applied to their non-payment.
- k. Digicel submits that such discriminatory treatment is anti-competitive in effect and, among other things, amounts to a cross-subsidy provided by DataCo to other members of its Group.
- l. In order to address this and to ensure any price terms are applied fairly, Digicel proposes the inclusion of three additional non-price terms and conditions the amended service specific pricing principles as follows:
 - i. That access seekers are not subject to any requirement to prepay any recurring monthly charges for the declared services; and
 - ii. That access seekers should not be subject to any less favourable payment terms than DataCo’s related entities; and
 - iii. That DataCo not be permitted to suspend or restrict the provision of the declared services by reason that an access seeker has withheld payment in circumstances where the payment is the subject of a bona fide dispute; and

- iv. That, in addition to the above, DataCo not be permitted to suspend or restrict the provision of declared services for non-payment unless the access seeker has been provided with a minimum of 14 (fourteen) days written notice of such suspension, with a copy of that notice also being provided by to NICTA.