

28 May 2019

Mr. Charles Punaha
Chief Executive Officer
National Information and Communications Technology Authority
Savannah Heights
Waigani
National Capital District

By Email & Hand Delivery

Dear Mr Punaha

Response to submissions made in respect of NICTA's Consultation Paper on Draft Licence Conditions

Thank you for the opportunity to respond to other parties' submissions in respect of NICTA's Consultation Paper titled *The Draft Operator Licence Conditions (Standard Licence Conditions) Rules 2018, the Draft Operator Licence Conditions (Kumul Telikom Holdings Limited) Rules 2018 and the Draft Operator Licence Conditions (Digicel (PNG) Limited) Rules 2018*, which was issued on 20 December 2018.

Digicel's comments are included in the attachment to this letter and should be read in the context of Digicel's prior submission to NICTA dated 1 March 2019, which continues to be relevant and relied upon by Digicel.

Please do not hesitate to contact us should require any further information from us at this time.

Yours faithfully,
Digicel (PNG) Limited



Michael Henao
Head of Legal & Regulatory

Attachment 1

A. Kumul Telikom Holdings Limited ("**KTHL**")

1. Single Licence for KTHL

Digicel understood that the Draft Operator Licence Conditions for KTHL that were made available by NICTA as part of this consultation were intended to be replicated as relevant and appropriate for each of its Group entities, i.e. Telikom PNG Limited ("**Telikom**"), PNG Dataco Limited ("**Dataco**") and Bemobile Limited ("**Bemobile**").

Digicel is therefore concerned with the apparent proposal that the individual licences currently held by KTHL's Group entities be replaced with a single licence to be held by KTHL.

The reason for Digicel's concern is that such an arrangement appears to be inconsistent with section 49 of the *National Information and Communication Technology Act 2009* ("**Act**") which provides:

"49. NETWORK LICENCE.

- (1) Subject to Section (3), **no person** shall exercise a facilities right, or supply any facilities access service, or supply any network service, unless they hold a network licence, that is an individual licence or a class licence, that authorises them to do so.*
- (2) A network licensee shall comply with the terms and conditions of its network licence.*
- (3) Notwithstanding Subsection (1), the Head of State, acting on advice, may make regulations that identify (without limitation) the procedure, circumstances and consequences associated with NICTA exempting a person, by way of a published declaration, from any obligation under this Act to hold a network licence, where a network licensee has agreed to assume all obligations under this Act that would apply to that person if they were to hold such a network licence."*

Based on Digicel's current understanding of KTHL's corporate structure, KTHL is not the legal person that is to provide the services contemplated under the terms of the proposed Operator Licence Conditions. Unless and until KTHL Group companies are folded into the KTHL legal entity, Digicel submits that separate licences for each operating company will continue to be required.

Digicel further notes that the provision of a single licence at the KTHL level may frustrate and confuse the operation of other parts of the Act including those that confer express obligations on the holder of the Licence. Examples include:

- a. section 107(2) of the Act provides that “*NICTA shall set the Universal Access and Service Levy as a percentage of the net revenues of each operator licensee...*” (emphasis added). Operator licensee is defined under the Act to mean “*the holder of a [network licence, an applications licence and/or a content licence, whether in the form of an individual licence or a class licence]...*” (emphasis added); and
- b. The rights and obligations specified in Part VI of the Act are only imposed in respect of operator licensees. As noted above an operator licensee is defined in the Act to be the holder of a licence.

In Digicel’s view, this is a fundamental issue that must be resolved prior to NICTA taking any further action on this matter.

2. Mandatory Performance Bond

Digicel disagrees that the amount proposed for a performance bond for KTHL is impracticable or harsh. Digicel understands that, to date, KTHL Group companies have never met their mandatory coverage obligations despite having had ample opportunity to do so. Those ongoing failures have had far reaching effects on the industry and especially on Digicel. That is because:

- a. Digicel, by virtue of its greater investment and network coverage has (incorrectly) been considered as being dominant in the market and has therefore been subject to more intrusive regulatory obligations than KTHL; and
- b. there has generally been an expectation that, due to the shortcomings of KTHL Group companies, Digicel will be the “default network” that is expected to support the Government’s social objectives in terms of network and service coverage. This can be seen by the attempt to place unreasonable network coverage obligations on Digicel through this regulatory process.

In Digicel’s submission, it is appropriate that KTHL be subject to a substantial performance bond and, to the extent it is called upon in the future, then any amounts claimed should be deposited into the Universal Access Fund.

3. Operational Separation

In Digicel’s submission, KTHL appears to have misunderstood the nature of operational separation and what would be necessary for it to meet the requirements proposed by NICTA. Importantly, KTHL’s existing Group structure would not meet the requirements of the rules proposed by NICTA and, in the case of Dataco and Telikom substantial changes would need to be made in order to meet the proposed rules.

Nevertheless, if KTHL is ready and willing to make those substantial changes then Digicel considers that would aid in the transparent operation of the access regime as it applies to the provision of access to submarine cable and domestic fibre optic cable capacity.

4. Accounting Separation

Digicel holds similar views in respect of KTHL's submissions on accounting separation except that Digicel disagrees that it should be subject to a similar regulatory obligation. That is because Digicel does not provide any declared wholesale services that would warrant such an imposition. Any operational or accounting separation obligations would be superfluous in the context of the services provided by Digicel and any such attempted imposition would, in Digicel's submission, be contrary to the regulatory principles enshrined in section 3 of the Act.

5. International any-to-any connectivity

Digicel does not understand the reference to international any-to-any connectivity that has been made by KTHL in the context of this consultation. Any-to-any connectivity is appropriately dealt with by section VI of the Act. Any further obligations sought to be imposed through licence conditions would, in Digicel's submission, be contrary to the scheme of the Act.

B. Independent Consumer and Competition Commission ("ICCC")

1. Digicel notes the ICCC's apparent desire for NICTA to "declare" mobile terminating access services, fixed terminating access services and mobile tower sharing services through the imposition of additional licensing rules. This is despite the existence of a comprehensive access regulation regime already being specified in Part VI of the Act.
2. Digicel strongly disagrees with the approach proposed by the ICCC and considers its proposed approach would be contrary to the scheme and intention of the Act.
3. Digicel further submits that, as the services described by the ICCC have only recently been investigated by NICTA, any further efforts to impose regulation at this time are unnecessary and unjustified.

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