

6 April 2018

Mr Charles Punaha  
Chief Executive  
National Information and Communications Technology Authority  
P O Box 8444  
BOROKO 111  
National Capital District

By Email & By Hand

Dear Mr Punaha

**PUBLIC INQUIRY INTO A POTENTIAL RETAIL SERVICE DETERMINATION REGARDING  
CERTAIN MOBILE TELEPHONY SERVICES SUPPLIED BY DIGICEL**

Further to our recent correspondence, we are writing to you to provide our initial comments in relation to the submissions made in relation to the above Public Inquiry. Those submissions include:

1. Submission by Telikom PNG Limited dated 9 February 2018 ("**Telikom submission**");  
and
2. Letter dated 9 February 2018 to NICTA from the Independent Consumer and Competition Commission ("**ICCC letter**").

We understand that they are the only submissions that have been received by NICTA in relation to the Public Inquiry process and that NICTA is not relying upon any other submissions or information from those parties or any other party.

***Telikom submission***

Digicel notes that Telikom has not sought to introduce any new evidence or analysis other than that provided in relation to its allegation that Digicel did not comply fully with the terms of the 2012 Retail Service Determination "RSD") during the period 2013 and 2014. It is not Digicel's intention to respond in detail to that allegation other than to note:

- a. The allegation is based on events that took place four years ago and are irrelevant in the context of the current Public Inquiry;
- b. Telikom makes no allegations in relation to Digicel's compliance with the 2012 RSD in respect of any period after 2014; and



- c. if Telikom had legitimate concerns with respect to Digicel's compliance with the 2012 RSD during the period 2013 – 2014 it should have raised those concerns at the time.

Telikom has also sought to support and rely upon the findings of the ICT Appeals Panel that were published in 2012. However, as noted by Digicel in its submission to NICTA dated 9 February 2018:

*"47.... NICTA appears to rely heavily on the purported decision of the ICT Appeals Panel that was made on 18 December 2012 . However, the purported decision of the ICT Appeals Panel contained a number of errors, both in law and in substance. It was also not relied upon or given any effect by either the Minister or NICTA. Furthermore, the ICT Appeals Panel's purported decision was made more than five years ago and cannot reasonably be considered to be relevant to the current proceeding.*

*...*

- 50. Moreover, even in circumstances where it was accepted that the purported decision of the ICT Appeals Panel was improperly made, either NICTA or the Minister was still at liberty to use their powers under section 157 of the Act to hold a further public inquiry into whether the 2012 RSD should be varied to take into account the terms of the purported decision of the ICT Appeals Panel. Neither did so.*
- 51. Nor did either Telikom or bmobile seek to have the purported decision of the ICT Appeals Panel enforced in any way."*

Put simply, Digicel submits the ICT Appeals Panel's purported decision of December 2012 is not relevant to this proceeding and cannot reasonably be relied upon by any party.

Crucially, Telikom has also failed to provide any evidence, analysis or even an indication that, if a new RSD is imposed on the terms that have been proposed by NICTA (which are apparently broadly supported by Telikom), there will be any concrete material benefit realised by consumers. In particular, Telikom has not indicated that the imposition of a new RSD will result in any new or greater investment by Telikom or that the retail prices paid by consumers will decrease. In the absence of any such evidence, it can only be assumed that Telikom does not intend to take any positive action of its own to perform its performance and instead will continue to rely on regulatory interventions to, in effect, subsidise its own inefficient operations.

This is an important issue, as Telikom's failure to identify any consumer benefits arising from the proposed RSD simply confirms Digicel's position that there will be no net benefits. At page 5 of its submission Telikom states:

*"Telikom agrees that, at this time, digital voice and other-the-top (OTT) voce services are not part of the relevant national market. No*





*operator in PNG offers voice calls over 4G – they are provided over 3G...” [sic]*

Digicel disagrees and considers Telikom’s statement indicates that it does not fully understand the operation or impact of OTT services on the market. That is because OTT services, by their nature, are almost always provided by 3<sup>rd</sup> parties such as Viber, Google, Facebook, etc., none of whom are licensed operators in PNG. That is why their impact is significant and should be considered as part of any market analysis undertaken by NICTA. Finally, Digicel notes Telikom’s comments that the proposed RSD would be difficult to implement on its current terms, particularly with respect to services bundles which are becoming more prevalent both in PNG and around the world. Digicel agrees. However, Digicel strongly disagrees that the solution to these difficulties lies in even more intrusive regulation that can only have the effect of further limiting the development of the market in PNG and resulting in further detriments to consumers.

### **ICCC Letter**

Digicel notes and agrees with a number of the concerns that the ICCC has raised in relation to NICTA’s analytical approach. These include:

a. The ICCC’s view that:

*“while the entry barrier due to high sunk costs may be true for a potential new entrant, the ICCC considers that this should not be an issue for Telikom and Bemobile. It is understood that both Telikom and Bemobile had entered PNG’s telecommunications market several decades prior to Digicel’s entry in 2007...”*

However, Digicel disagrees that it has any inherent and unassailable advantage because it has met and exceed its licence obligations with respect to providing service coverage to the people of PNG. The fact is that Telikom/bmobile are substantial operators that enjoy the ownership and support of the Government of PNG. They cannot reasonably be considered to be resource constrained or face any unique structural barriers to investment in their infrastructure and services in any part of the country.

- b. The ICCC’s observation that *“market share data alone does not give a clear picture of how powerful a firm is in a market”* and that *“NICTA should be cautious in using market share to determine Digicel’s market power”*.
- c. NICTA has done insufficient work to reach a concluded view of the potential effects of discriminatory pricing on competition. In particular Digicel agrees with ICCC’s statement that the *“preference of a consumer to choose a network may also be affected by different other associated services the network operator is offering (such as data, content, other value added services such as mobile banking, power purchase, etc.) besides the voice services and its rates”*.



- d. The ICCC's observation that *"competition is meant to be ruthless because operators compete to take away market share from each other. This rivalry will ultimately result in benefits such as efficiency, innovation and quality services at affordable prices ..."*.
- e. The ICCC's observation that *"it is not anti-competitive to either have greater market share or attempting to acquire greater market share through the use of innovative measures or capital"*.

However, despite what appear to be clear misgivings with NICTA's analytical approach, Digicel is concerned that the ICCC, apparently without undertaking any additional analysis of its own, has then concluded by saying that it *"fully supports NICTA's Draft Determination"*. This inconsistency is difficult to understand and, in Digicel's submission should not be accepted at face value.

Digicel also disagrees with the ICCC's apparent proposal to seek to introduce some sort of "access regime" in addition to the proposed RSD. As NICTA will be aware, Part VI of the National Information and Communication Technology Act 2009 ("Act") already includes a comprehensive access regime and which has previously resulted in a number of services being considered for declaration. Accordingly, Digicel submits that it is inappropriate and an abuse of process for further access regulation to be considered as a part of this Public Inquiry process.

### **Conclusion**

In conclusion, Digicel submits that neither of the other parties' submissions that have been received by NICTA provide any compelling evidence or analysis to support NICTA's draft findings and both raise further questions about whether the imposition of the proposed (or any) RSD would be appropriate at the present time.

Moreover, neither submission gives Digicel cause to reconsider its own submissions that have been made to NICTA to date. Digicel therefore urges NICTA to reconsider its approach to the proposed RSD.

We look forward to continuing to work with NICTA and to addressing any remaining concerns that you may have.

Yours faithfully  
**Digicel (PNG) Limited**

A blue ink signature of Michael Henao is written over the text "Yours faithfully" and "Digicel (PNG) Limited".

**Michael Henao**  
Head of Legal & Regulatory