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BY HAND / BY EMAIL



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Dear Mr Punaha

Universal Access and Service Projects for 2017

1. Introduction

Thank you for the opportunity to provide comments and make a submission on the NICTA *Consultation Paper Universal Access and Service Projects for 2017, Issued 23 December 2016* ("**Consultation Paper**") and which was notified to Digicel by NICTA in a letter dated 5, January 2017. Digicel also appreciates being given further time in which to make its submission. However, Digicel is concerned that, notwithstanding repeated requests from Digicel and other members of the industry, NICTA still has not provided critical information that it has apparently relied upon in preparing the Consultation Paper. This was highlighted in a letter to NICTA from nine operator licensees (including Digicel) which stated:

"We note in this regard that, over the Christmas break, NICTA has issued a consultation paper in relation to the establishment of UAS strategic goals and possible UAS projects for 2017. While this is a good first step and highlights the inadequate consultation up to this point, the consultation paper fails to provide sufficient detailed information to allow industry a fair opportunity to respond and also sets an unreasonable deadline by which industry is required to provide comments. This includes, for example, details of the projects that have been proposed and copies of the reports that have been referred to by NICTA in the consultation paper, including:

- 1. Report on Determination of UAS Levy Fund Amount, Great Village Consultants; and*
- 2. Rural Communications Project (P107782): Part 2 - Increased Access in Rural Areas: A Review of Circumstances, Drivers and Options for NICTA Consideration, April 2014.*

We therefore propose that this consultation be deferred until after the proposed industry meeting has taken place and that NICTA has provided the above information."

Nor has NICTA provided sufficient detail in relation to its proposed UAS projects that would enable Digicel to form a properly informed view about the proposals that have been made by NICTA or the reasons for them and Digicel is still waiting on NICTA to provide details of a Market Gap Analysis Study that was apparently undertaken in Q3 of 2014 by NICTA and its external advisors. As you will be aware, Digicel has asked to be provided with details of the

Market Gap Analysis Study when it first came to light in previous NICTA correspondence in September 2015. That request has been repeated by Digicel on numerous occasions since that time, most recently at the meeting NICTA convened with industry on 31 January, 2017. However, despite NICTA apparently still relying on the Study as a basis for the assumptions that have been made in the Consultation Paper, NICTA has still not provided this important document.

This means that Digicel and other operators have not been afforded a fair opportunity to understand the nature of the UAS Projects that have been proposed by NICTA or to review the underlying analysis and assumptions supporting NICTA's views and to be able to correct, contradict or comment on them. Digicel considers this to be a very serious procedural error and Digicel strongly encourages NICTA to correct it and to recommence the consultation once the information has been provided.

In the meantime, and as a result of the significant information gaps, this submission can only deal with matters traversed by the Consultation Paper at a principle level and Digicel is not in a position to discuss the merits of the specific UAS Projects that have been proposed by NICTA.

2. Requirement to Consult

Digicel welcomes NICTA's decision to consult on proposed UAS Projects for 2017 and its recognition that:

*"NICTA is required under the Act to seek comments, suggestions and or proposals for [sic] the industry and general public at large on projects that the Secretariat intends to implement. In this regard, the Secretariat invites the industry and general public to submit proposals for consideration by the Secretariat."*¹

Digicel notes that this is the first time that NICTA has undertaken such a consultation on proposed UAS Projects and considers that this is a positive step in the development of the UAS framework in PNG. However, as noted above, in order for any such consultation to be meaningful, it must be properly informed. Unfortunately, that is not the case at present as vital information has not been provided by NICTA. Accordingly, Digicel encourages NICTA to disclose the information that has been requested by industry and to hold further discussion once that has occurred.

3. UAS Vision, Mission and Core Values

Digicel notes that NICTA's proposed Draft Strategic Goals and Guiding Principles are described in section 2 of the Consultation Paper as being *"preliminary and will be subject to consultation"*. Digicel is therefore concerned that NICTA is moving forward to finalise UAS Projects for 2017 when the underlying goals and principles are yet to be decided. Digicel is further concerned that the proposed Draft Strategic Goals and Guiding Principles may not reflect the views of either the Government or the UAS Board which, under the terms of the *National Information and Communication Technology Act ("Act")*, are the proper authorities for determining such matters. Digicel submits that, as a matter of priority and before any further consideration is given to any potential UAS Projects, the goals and guiding principles of the UAS are finalised.

Having said that, Digicel is broadly supportive of the Draft Strategic Goals and Guiding Principles that have been articulated by NICTA at section 2 of the Consultation Paper. However, Digicel considers that two important principles have been omitted. The first of those relates to funding of any UAS Projects and how funds are obtained. The second relates to how UAS Projects are delivered and that there be a preference for such delivery to

¹ Consultation Paper at section 3.

be effected through voluntary build out arrangements as an alternative to the payment of UAS Levies.

Funding of UAS Projects

Digicel submits that the approach to funding UAS Projects is of vital importance and will be key to success of the UAS framework and the ongoing viability of private investment in infrastructure. It is now well recognised internationally that UAS funds are often inefficient and wasteful and in many instances have resulted in large sums of industry supplied funding sitting idle.

As has been noted in a study conducted by Ladcomm Corporation on behalf of the GSM association:

*"Most universal service funds (USF) remain inefficient and ineffective. Together, the 64 USFs covered in this report contain more than USD 11 billion waiting to be disbursed. Of those funds studied, many have not disbursed any money ... more than one third of the USFs in this study have yet to disburse any of the levies collected and very few funds, if any, would appear to disburse all that they collect... Poorly-conceived legal frameworks also pose a major obstacle to the introduction of non-commercially viable broadband through the USF mechanism... ... alternative approaches to achieving universal service goals are often more effective than USFs. In fact, increased availability of telecommunications services has generally been accomplished through alternate solutions, such as the imposition of licence conditions on operators, the establishment of new plans or funds that are separate from the existing USF, or private/public partnerships (e.g., Bangladesh, Brazil, and Finland)."*²

Digicel considers that great care needs to be taken to preserve incentives for private infrastructure investment, including in areas that are either unserved or are underserved by existing networks. This is likely to occur when the following conditions are met:

1. Any UAS Projects are carefully targeted on those areas where private investment is unlikely to be economic in the foreseeable future. This means that data supporting the deployment of any proposed UAS Projects must be up to date and available for scrutiny by existing operators; and
2. Any UAS funding that is sought from industry is kept to the minimum that is needed to support specific UAS Projects that have been identified. This will only occur when industry is consulted on potential technical solutions and implementation plans so that efficient outcomes are achieved; and
3. The legislative requirement that any UAS levies that are required to be imposed are identified and invoiced by NICTA prior to the commencement of the fiscal year in which they are required is observed, and that operators are provided with a reasonable time (no less than three months) in which to pay the relevant Levy. This is critical to ensure that commercial operators are able to plan their financing to take into account the imposition of any UAS levies without unduly impacting on their own capital investment programmes.

² *Universal Service Fund Study Conducted on Behalf of the GSM Association, April 2013, Ladcomm Corporation*

Delivery of UAS Projects

The second principle that has been omitted is that, wherever possible, operators should be given an opportunity to voluntarily build out infrastructure to meet the needs of specific UAS Projects rather than be required to pay a UAS Levy. Such an approach will be more efficient and faster to implement and avoid the wastage that is a common feature of UAS funds worldwide.

An example of how such a scheme works can be found in Vanuatu where the Vanuatu Government has adopted a “Pay or Play” approach to universal access.

In December 2013, the Vanuatu Government decided that a Pay or Play mechanism would be the most effective in delivering the Government’s UAS goals while at the same time establishing a workable mechanism for industry players to participate in the delivery of those goals. The Government’s decision was captured in a Policy statement³ which set out the Government’s objectives with respect to the level of access to telecommunications services and gave direction to the Vanuatu Regulator in terms of the implementation of the Policy including, *inter alia*, that:

- 3.3. *In implementing this Policy the Regulator may:*
 - 3.3.1. ***agree with service providers appropriate commitments that, in aggregate, would achieve objectives of this Policy. Such commitments shall be supported by appropriate remedies that would apply in case of a failure to meet them;***
 - 3.3.2. ***where the Regulator concludes that agreements under paragraph 3.3.1 with any or specific service providers cannot be reached, it may collect a levy to the UAP fund under section 19 (6) of the Act. When apportioning such a levy under section 19 (6) (b) of the Act, the Regulator shall take into account the value of commitments of services providers, undertaken under paragraph 3.3.1; and/or***
 - 3.3.3. *as the trustee of the UAP Fund, provide subsidies from the UAP fund in consideration of the provision of telecommunications services. Such subsidies shall be:*
 - 3.3.3.1. *allocated in a transparent and non-discriminatory manner subject to objective criteria;*
 - 3.3.3.2. *primarily used to subsidize provision of passive infrastructure that would be used by service providers on an open, shared and non-discriminatory basis. Where charges to use of such infrastructure apply, such charges shall be based on costs of provision and maintenance of such infrastructure.” (emphasis added)*

Following the adoption of the Government’s Policy, the Vanuatu Regulator worked with industry to establish an aggregate set of voluntary agreements with operators that met the needs of the Policy. The implementation of the Government’s Policy objectives is now well underway without the need to impose industry levies on those operators who have chosen to enter into the voluntary agreements.

As part of its announcement of the voluntary agreements with operators the Vanuatu Regulator stated:

“The Telecommunications and Radiocommunications Regulator (TRR) is pleased to announce that it has now successfully signed Undertaking Agreements with the three Universal Access Policy

³ Available at http://www.trr.vu/attachments/category/168/universal_access_policy.pdf

(UAP) Players: Telecom Vanuatu Ltd, Telsat Broadband Ltd, and Digicel Vanuatu Ltd.

The Players have committed to multimillion dollar rollouts of new telecommunications infrastructure and/or upgrade of services to 25 rural sites which are currently underserved or unserved. In addition to this commitment the players, through the Undertaking Agreements, have agreed to work in partnership with TRR and the Government in implementing its UAP until 1 January 2018. TRR recognizes and greatly appreciates that commitment.

...

The UAP is a Government Policy that requires the expansion of telecommunication services to underserved and unserved areas and TRR has been designated by the Government as the implementing agency. TRR will provide the required relevant support to the Players to ensure that the Policy aims and objectives are achieved during its implementation.

...

The UAP established a 'Pay' or 'Play' approach. Under the UAP 'Play' approach a service provider must meet its own cost of rolling out telecommunications services to underserved and unserved areas throughout Vanuatu, while the 'Pay' approach enforces non-Playing service providers to pay a levy imposed by the Regulator under the TRR Act 2009. So if a service provider decides to 'Play' under the UAP the Regulator will not impose a levy for the relevant year; provided that the service provider meets its commitment to roll out services to their nominated and TRR approved UAP sites at their own cost. For those service providers that decided not to 'Play' – Payers' - TRR has already and will continue to impose a levy of up to 4% levy of their net revenue each year. For the current year, TRR imposed a 4% levy on 'Pay' service providers.

...

TRR sees this successful signing of the Undertaking Agreements as an excellent outcome for the Government, Businesses and the residents of Vanuatu in the rural communities, and also all three Players. This will afford a more flexible and effective rollout by all Players to achieve the UAP's 98% population coverage goal by 1st January 2018.

*To this end, TRR wishes to thank TVL, Digicel and Telsat Limited for their support and also the Government in developing such an innovative policy to ensure our remote communities enjoy the same rights to communication services as those living in the urban areas."*⁴

Digicel considers that an approach similar to that which has been adopted in Vanuatu could be adopted under the Papua New Guinea legislative framework. In particular, Digicel considers that Part V of the Act is sufficiently flexible so as to permit the introduction of a Pay or Play mechanism and that such an approach would deliver significant benefits to the people of Papua New Guinea.

The Act requires UAS Board, in accordance with Section 108(1) of the Act and Government Policy, engage with NICTA to:

⁴ See <http://www.trr.vu/index.php/en/telecom-industry/universal-access/universal-access-policy/implementation-of-the-universal-access-policy> for further details.

- Receive from stakeholders submissions on proposals for UAS Projects;
- Identify, develop and estimate the indicative cost of UAS Projects;
- Undertake public consultation if NICTA considers it to be necessary or desirable;
- Estimate the proposed aggregate budget for all UAS Projects to be undertaken for the relevant period identified by the UAS Board;
- Rank, in accordance with Section 108(4) of the Act, the UAS Projects identified in order of priority; and
- Prepare a UAS Project Report for the Minister's consideration.

The Minister must then, in accordance with Section 108(5) of the Act, review the UAS Project Report and determine from the list which UAS Projects will be implemented within the proposed aggregate budget.

Digicel considers that it would be entirely consistent with this process for the UAS Board and NICTA to establish a UAP implementation program as follows:

1. As an initial step, the UAS Board and NICTA could seek a Policy direction from Government on what its specific UAS goals are for the next three years and how they should be implemented. This Government Policy could be informed by a consultation between NICTA and operator licensees on what would be achievable and practicable in the Papua New Guinea context.
2. Once the Government Policy has been notified, NICTA, on behalf of the UAS Board, could then engage further with operator licensees to establish specific UAS Projects that would meet the Government's UAS goals (as detailed in the Government Policy) over the course of that three year period and what voluntary binding commitments are able to be made by them in terms of the delivery of those UAS Projects.
3. These binding commitments could then be compared with the Government's UAS goals to see what gaps, if any, exist. Any such gaps could then be filled through the disbursement of any donor or other funding that is available in the existing UAS Fund. To the extent that the UAS Fund or donor funding is insufficient to meet those gaps then, as a last resort, consideration could be given to the imposition of a UAS Levy in order to fund any additional UAS Projects that might be required to meet the Government's UAS goals. Importantly however, in the event that NICTA ultimately determines that a UAS Levy is required to be imposed in order to meet in funding shortfall, the voluntary binding commitments that are made by each operator licensee would be counted as a "credit" against any UAS Levies that are imposed upon that licensee.

In this way Government's Policy goals would be met in a considered and non-contentious manner and operator licensees who choose to "Play" by making acceptable voluntary binding commitments would not be required to make any cash contributions with respect to any UAS Levy that might otherwise be applied to them. Operator licensees who choose not to "Play" would be required to "Pay" their relevant UAS Levy in full.

4. NICTA's "Access Gap Analysis"

Digicel notes NICTA's reference to an Access Gap Analysis that was apparently undertaken by Great Village International Consultants⁵. We note that the consultants did not engage with Digicel, or the the rest of the industry, during the course of their analysis and the production of their report – as key stakeholders, operators should have been consulted as we would have significant input into the state of the market and the identification of any 'gaps'. Further, the date this work was undertaken has not been specified and, as noted above, NICTA has not made the report available to Digicel. As a result, Digicel is not in a position to make any comments on that analysis.

However, Digicel is concerned that the figures that have been used by NICTA in subsequent paragraphs of the Consultation Paper appear refer to the year 2014 (or in some cases even earlier). If that is the case, then it appears that the analysis being relied upon by NICTA is around three years old. Digicel submits that, by placing reliance on outdated data, the state of the market has been substantially misrepresented in PNG and any conclusions that are made consequently are unreliable at best.

Digicel further submits that NICTA cannot reasonably make any recommendations or decisions in relation to any UAS Projects until such time as it has obtained up to date information about the market and its needs.

5. NICTA's Conclusions Regarding Expected UAS Costs in PNG

Digicel notes NICTA's statement that:

*"To meet the UAS needs and **eliminate** the access gaps identified above **in all underserved areas of PNG**, for both voice as well as data /Internet services, the total universal access/service subsidy costs are estimated to be in the range of US\$150 - \$200 million."* (emphasis added)

No data or detailed rationale has been provided by NICTA in support of this conclusion and it is therefore not possible to make any detailed comments on what appears to be an extraordinary claim. However, Digicel does note that by apparently seeking to *eliminate* all access gaps *everywhere* in PNG, NICTA appears to be seeking to achieve something that is not affordable even for developed countries where it is accepted that achieving 100% coverage of all services for everyone is not an achievable or realistic goal.

Instead, Digicel submits that NICTA and the UAS Board should be seeking to establish a UAS programme that is affordable and practical in its scope and which can be deployed in a considered manner.

6. NICTA's Proposed UAS Projects for 2017

Digicel notes NICTA's proposed UAS Projects for 2017 and which have been described in broad terms at section 7 of the Consultation Paper. Unfortunately, the lack of detail, either in terms of proposed technical and service specifications or proposed geographic locations means that Digicel is not in a position to be able to consider the merits of any of the proposed UAS Projects.

However, Digicel is concerned that NICTA has sought to classify the "*Neutral IXP Transmission Links Project*" as a UAS Project. Digicel cannot see how such a Project can fall

⁵ Consultation Paper at page 3.

within the ambit of the UAS. The establishment of a Neutral IXP, while a laudable objective, has little if anything to with the objective of providing Universal Access and should be established and funded separately on a commercially sustainable basis.

Digicel is also unable to comment on the "Indicative Costs" of the proposed UAS Projects that have been identified in Table 2 of the Consultation Paper other than to note that, because details of the specific proposed UAS Projects have not been provided or discussed with the operators most likely to be in a position to deploy them, the numbers must, at best, be regarded as speculative. Accordingly, no weight can reasonably be attached to the numbers for the purposes of determining a UAS Levy for 2017 or any other year.

7. Funding for UAS Projects for 2017

Digicel notes that at section 7.2.3 NICTA has stated that:

"The industry through industry levies will fund these projects and NICTA Board has set 2% of the annual gross revenues for this purpose pursuant to the Operator Regulations 2010 [sic]." (emphasis added)

This apparent decision by the NICTA Board raises a number of serious concerns. They include:

1. NICTA has sought to predetermine the quantum of the UAS Levy in contravention of the law. Section 102(2) of the Act provides:

"NICTA shall set the Universal Access and Service Levy as a percentage of the net revenues of each operator licensee at a level, to be determined annually, to apply from the beginning of each fiscal year —

- (a) to achieve the desired level of funding for the Universal Access and Service Fund for that year as advised to NICTA by the UAS Board, less any amounts paid by NICTA in the previous year under Section 32(2)(a); and*
- (b) not exceeding a maximum percentage as prescribed in the regulations."*

However, the UAS Projects for 2017 have yet to be determined. This means that NICTA has, in effect, sought to predetermine the amount payable at the maximum level of 2% that is prescribed the Operator Regulations 2010 without first knowing how much funding is required or even which UAS Projects will be approved by the Minister pursuant to his powers under section 108(5) of the Act. This is both wrong in principle and a direct contravention of section 102(2) of the Act; and

2. NICTA is out of time to impose a UAS Levy for the 2017 fiscal year. In order for it to have done so, NICTA would have needed to have completed the legislative process described in the Act and issued an appropriate invoice prior to the end of 2016. That legislative process includes (but is not limited to) the following actions:

- The consultation that is underway now (s108(1)(c) of the Act);
- Preparation of a proposed aggregate budget for all UAS projects to be undertaken during the relevant period (s108(1)(e) of the Act);
- Preparation of a report for consideration by the UAS Board (s108(1)(f) of the Act);
- Preparation of a UAS Project Report by the UAS Board for submission to the Minister (s108(3) of the Act); and

- Determination by the Minister of the UAS Projects to be implemented, if any (s108(5) of the Act).

These necessary steps have not yet been completed. This has been recognised expressly at section 8 of the Consultation Paper. Importantly, this does not prevent UAS Projects being undertaken in 2017. However, they will need to be funded through sources other than a UAS Levy.

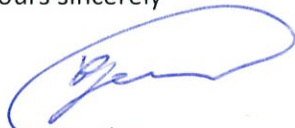
8. Conclusion

Digicel welcomes NICTA's recognition of the importance of consultation in the application of the UAS framework in PNG. However, for that consultation to be meaningful, it is equally important for NICTA to provide the industry with the information and analysis that it has relied upon in reaching its preliminary conclusions. That has not yet happened in this case.

Any final conclusions that are reached with respect to the determination of any UAS Projects and the imposition of any UAS Levy must also be made in accordance with the Act.

Finally, Digicel submits that NICTA and the UAS Board should consider alternative mechanisms for achieving the Government's UAS goals. These include a "pay or play" approach to the delivery of UAS Projects similar to that which is described in this submission. Digicel trusts that you find this submission useful and looks to continuing to work with NICTA and other industry operators to resolve the important issues that have been raised.

Yours sincerely



Brett Goschen
CEO