

**DIGICEL (PNG) LIMITED**

**Submission to NICTA**

**Proposed Universal Access and Service Levy for 2018, UAS Strategic  
Plan (2018 – 2022), and Projects and Operating Plan 2018**

**Friday, 16 February 2018**

*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. Executive Summary

1. This submission sets out Digicel's initial comments in relation to the NICTA Consultation Paper titled Proposed Universal Access and Service Levy for 2018, UAS Strategic Plan (2018 – 2022), and Projects and Operating Plan 2018, Issued on 8 December 2017 ("**Consultation Paper**").
2. Digicel has invested more than PGK 2 Billion in network infrastructure and services in PNG since its launch in 2007. That investment is ongoing and includes current work by Digicel to further upgrade and develop its network which includes plans to invest a further PGK150 million this year alone in network upgrades to increase the footprint of existing 4G/LTE coverage and improve 3G coverage.
3. In addition to its network and service investment, Digicel invests in the development of its people in PNG including over PGK6million spent per annum on skills development and training, from technical skills certification to retail training and soft skills development.
4. Aside from Digicel's commercial initiatives and investment in PNG, the Digicel Foundation investment in PNG, since 2008, is over USD22million. The investment from Digicel Group has allowed us to construct over 530 classrooms and 26 libraries across PNG. We have delivered 27 mobile health clinics which have treated 730,000 patients through outreach programmes. Over 18,500 PNG men and women have graduated from Life & Business skills centres.
5. Digicel's investment is a demonstration of its commitment to provide world class services and support the economic and social development of the people of PNG. Also, as the largest ICT business in the country, Digicel will face by far the greatest burden from UAS regulation, including the imposition of UAS levies.
6. Digicel is therefore surprised and concerned that NICTA is seeking to impose such a heavy burden on Digicel through its proposed UAS initiatives.
7. Moreover, NICTA has not properly followed the requirements of the National Information and Communication Technology Act 2009 ("**Act**") and, in some instances, has sought to assume powers that are beyond those available to it under the law.
8. Digicel is very concerned that key details of the analysis and assumptions that have been relied upon by NICTA continue to be withheld from Digicel. Apparently, this is on the basis that NICTA's consultants consider their modelling approach to be proprietary. In Digicel's submission such an attitude is wrong in principle and at law.
9. The ongoing refusal to provide this information is a matter of great concern and raises valid questions about the robustness of the analysis and assumptions that have been relied upon by NICTA.
10. This is especially the case given that, based on the limited information that has been provided, the analysis that has been undertaken has grossly underestimated the network

and service development that has already been undertaken (or is planned) and overstated the likely costs of deploying further network infrastructure and services.

11. This means that NICTA's estimated costs and proposed UAS Levy requirement cannot reasonably be relied upon.
12. Digicel is also concerned that NICTA has erred in its interpretation and application of the Act with respect to "UAS Projects". This means that the programs that have been proposed do not fit with the scheme of the Act and should not be pursued in their current form.
13. Importantly, to date, no specific UAS Projects have been proposed or approved by the Minister for the 2018 fiscal year and the processes required under the Act have not been followed.
14. Moreover, the Draft Report proposes subsidies for initiatives that cannot possibly be completed within the 2018 fiscal year as is required under the Act. This means that NICTA is "out of time" to seek to impose a UAS Levy for the current fiscal year.
15. However, despite Digicel's concerns regarding the approach that has been adopted to date, Digicel is nevertheless genuinely committed to the development of networks and technologies to support the evolving needs of the people of PNG, including those who do not currently have access to adequate ICT services. This is clearly illustrated by Digicel's commercial approach to the provision and continuous upgrade of services.
16. To that end, Digicel would welcome an open dialogue with NICTA and the UAS Board to understand better its specific concerns and priorities for delivery of new or upgraded services and to meet the Government's Policy objectives.
17. Based on such a dialogue, Digicel would be willing to commit to deployment of new upgraded services or infrastructure in accordance with any agreed priorities.
18. Such an approach can be accommodated within the existing Act and would provide an expedited and efficient mechanism by which real benefits could be delivered to consumers within the current fiscal year.

## B. Preliminary

19. This submission sets out Digicel's initial comments in relation to the NICTA Consultation Paper titled Proposed Universal Access and Service Levy for 2018, UAS Strategic Plan (2018 – 2022), and Projects and Operating Plan 2018, Issued on 8 December 2017 ("**Consultation Paper**"). Digicel notes that it only became aware of the Consultation Paper as a result of a separate letter from NICTA dated 15 December 2017 and which was received by Digicel on 21 December 2017.
20. The Consultation Paper is comprised of four parts, namely:
  - a. an introductory document which, among other things, invites submissions from interested parties ("**Introductory Document**");
  - b. a Draft UAS Strategic Plan, 2018 – 2022 ("**Draft Strategic Plan**");
  - c. a draft Report and UAS Operational Plan, 2018 ("**Draft Operational Plan**"); and
  - d. a draft UAS Levy Determination 2018 ("**Draft Determination**").
21. Digicel comments on each of these parts in turn.

## C. Introductory Document

22. The Introductory Document asserts the following:

*"To date the UAS Board has engaged with NICTA to undertake the following tasks as set out in Subsection 108(1) of the Act:*

- (a) identify, develop and estimate the indicative cost of UAS Projects for 2018*
- (b) seek and receive stakeholder submissions on proposals for UAS Projects – identifying in the process ongoing multi-year projects that would carry over into 2018*
- (c) undertake public consultation*
- (d) estimate the proposed aggregate budget for all UAS Projects to be undertaken for the relevant period identified by the UAS Board*
- (e) rank the UAS Projects in order of priority having regard to the criteria in paragraph 108(1)(d)*
- (f) prepare for consideration by the UAS Board a report summarising the UAS Projects under consideration, their respective indicative costing, their proposed ranking and the proposed aggregate budget.*

***These processes have been undertaken.*** (emphasis added)

23. Digicel respectfully disagrees with NICTA's view that all of the required processes under section 108(1) of the National Information and Communication Technology Act 2009 ("Act") have been undertaken in accordance with the law.

24. This is for the following reasons:

- a. NICTA has not properly reflected the requirements of section 108(1) of the Act. In some cases, the wording contained in the Act has been amended and in others, important parts of the Act have been omitted entirely.
  - b. In any case, NICTA has not undertaken the processes required under section 108(1). This is particularly evident given that the publication of the Consultation Paper is the first time that NICTA has undertaken any consultation in relation to UAS Projects for the 2018 fiscal year. For example, NICTA has not prior to the publication of the Consultation Paper:
    - i. engaged in any public consultation to seek and receive stakeholder submissions on proposals for UAS Projects for the 2018 fiscal year as is required by section 108(1)(b) of the Act. As far as Digicel is aware no specific proposals for UAS Projects have been made by any person or group that would benefit directly from them;
    - ii. consulted with Digicel to understand the indicative costings for such UAS Projects as is required by section 108(1)(c) of the Act;
    - iii. sought to calculate the net benefits of the UAS Project to Papua New Guinea, taking into account any costs and detriments to any person as is required by section 108(4)(b) of the Act;
    - iv. sought to ascertain whether any proposed UAS Projects would be sustainable with a one-time capital subsidy; or
    - v. sought to ascertain whether the UAS Project would not otherwise occur but for a subsidy payment under Part V of the Act.
25. Digicel is also concerned NICTA and the UAS Board appear to have predetermined the outcome of this Consultation and have not maintained an open mind with respect to the outcome of this Consultation as is required according the principles of natural justice and procedural fairness. That is evident from a statement made by NICTA on page 2 of the Consultation Paper, whereby NICTA states:

*"The UAS Board **has approved** a report under Section 108(2) of the Act which proposed the UAS Projects for 2018 which are set out in the draft UAS Strategic Plan, 2018-2022 (which forms Attachment A to this Consultation Paper) and which are described with greater particularity in the draft Report and UAS Operational Plan, 2018 (which forms Attachment B to this Consultation Paper)." (emphasis added)*

26. Section 108(2) of the Act contemplates that the UAS Board will consider a report prepared by NICTA *after* the processes required by section 108(1) have been completed. However, those section 108(1) processes cannot reasonably be considered to be complete and, as noted above, have not occurred at all in some cases.
27. Consequently, in Digicel's respectful submission, the UAS Board cannot be in a position to have already approved any report in relation to the 2018 fiscal year.
28. Nor, in Digicel's view, is NICTA in a position to propose any particular UAS Levy for the 2018 fiscal year and should not do so until any relevant UAS Projects have been recommended and approved by the Minister pursuant to section 108(5) of the Act and, following that, the UAS Board advises NICTA of the amount of funding that will be required pursuant to section 107(2) of the Act.
29. Finally, Digicel submits that NICTA has erred in its interpretation of what the Act means by "UAS Project". NICTA has sought to define four UAS Projects, which are:
  - a. Mobile Broadband Network Upgrade and Expansion;
  - b. Community and Institutional Broadband Networks;
  - c. ICT Platform for Future Growth; and
  - d. Extension of broadcasting network coverage.
30. However, these are neither projects in the ordinary meaning of the word nor in the context of Part V of the Act. Rather they are categories in which various UAS Projects may fit.
31. As well as not fitting with the UAS Project assessment and funding mechanisms, NICTA's approach is also at odds with the competitive bidding and Project Agreement and monitoring processes in sections 109 – 116 of the Act, each of which is predicated on an expectation that each UAS Project be discrete in its formulation and assessed, funded and implemented within a fiscal year.
32. This makes sense both in economic, commercial and technical terms. That is because market needs, network and service development and infrastructure costs all change rapidly over time. This means that the boundaries of what might have once been considered to be economically feasible will change from year to year and it does not make sense to seek to define UAS Projects over a longer period.
33. While Digicel does not object to NICTA presenting various categories of UAS Projects or to reflect upon longer-term Government Policy goals, it does object to NICTA seeking to establish UAS programmes that are not in keeping with the requirements of the Act and which do not reflect the dynamic nature of the ICT industry.

## **D. Draft UAS Strategic Plan, 2018 – 2022**

34. Digicel is concerned that NICTA may have misunderstood its role under Part V Act.
35. Instead of providing support to the UAS Board, acting as UAS Fund Manager and overseeing the implementation of approved UAS Projects as is contemplated under section 99 of the Act, NICTA appears to have taken on the role of Policy maker and assumed control of the UAS regime.
36. To the extent that it has done so, Digicel respectfully submits that NICTA is acting *ultra vires* and that any policy, vision, strategies or related initiatives formulated by NICTA have no legal standing.
37. Instead, Digicel submits that such initiatives fall within the ambit of the UAS Board and should be used solely as a means by which the UAS Board may “*provide advice to the Minister in the formulation of Government Policy*” in accordance with its duties under section 91(2)(b) of the Act.
38. Digicel also takes issue with NICTA’s statement at section 2.1 of the Draft Strategic Plan:

*“NICTA will utilize the UAS Fund to support investments in the telecommunications and ICT sector in Papua New Guinea, to promote universal access to and utilization of modern, beneficial services throughout the country. UAS Fund resources may be employed to subsidize the costs of infrastructure, networks, facilities, services, equipment, applications, content, and human resource development. The Fund will be utilized to underwrite investments and costs for market segments that would not otherwise be commercially viable. NICTA will strive to manage the Fund in an equitable, cost-effective, transparent, and competitively neutral manner.”* (emphasis added)

39. This statement highlights the issue in that NICTA appears to be assuming control of the UAS Fund to use for its own purposes. This “scope creep” in NICTA’s role is very concerning and is at odds with the strict controls and protections over the management and application of the UAS Fund that are enshrined in the Act.
40. NICTA’s statement also seems to suggest that the UAS Fund may be used to subsidise a wide variety of initiatives including content and human resource development. However, such initiatives are not contemplated by Part V of the Act, which is focussed on infrastructure deployment through discrete UAS Projects. This is underscored by section 108(4) which requires NICTA and the UAS Board to have regard to whether a proposed UAS Project is “*sustainable with a one-time **capital** subsidy*” (emphasis added).
41. Digicel disagrees with the findings from the Market Gap Analysis that has been undertaken.
42. In addition, Digicel is very concerned that details of that Market Gap Analysis and associated modelling continue to be withheld from Digicel. Apparently, this is on the basis that NICTA’s consultants consider their modelling approach to be proprietary. In Digicel’s submission such an attitude is wrong in principle and at law. Digicel, as an affected party that may be subject to the imposition of UAS Levies up to 2% of its annual revenues, is

entitled as a matter of natural justice and procedural fairness to be able to review the consultant's analysis and assumptions and to correct, contradict or comment on them. To the extent that the consultant's analysis and assumptions contain confidential information then, consistent with international practice, any necessary disclosures may be subject to a strict confidentiality regime.

43. The ongoing refusal to provide this information is a matter of great concern and raises valid questions about the robustness of the analysis and assumptions that have been relied upon by NICTA.
44. Digicel does acknowledge that, in response to Digicel's ongoing requests, certain information was provided to Digicel by NICTA by email on 29 January 2018. In that email NICTA provided some summary results and a brief description of some of the underlying assumptions that had been relied upon. However, there was insufficient detail to enable Digicel to undertake any meaningful analysis of its own.
45. Nevertheless, from the information that was provided, it was clear that NICTA and its consultants grossly underestimated:
  - a. the degree to which coverage and service needs would (and have already been) met through normal commercial initiatives; and
  - b. the likely cost of deploying new network facilities and upgrading existing network facilities.
46. For example, NICTA appears to estimate that it will cost PGK 7,018,474 to upgrade existing 2G network facilities to 3G in the Eastern Highlands Province. However, Digicel has already upgraded its network to 3G in those areas as part of its own commercial investment programme to continually upgrade its network and services.
47. Digicel has plans to upgrade most of its remaining 2G sites to 3G over the next two years and is also progressing with an LTE deployment programme.
48. This means that much of the subsidy that has been identified as being necessary is not needed at all.
49. NICTA also appears to have relied solely (or materially) on traditional network and service solutions for meeting the ICT needs of people in currently unserved areas. This appears to have included an assumption that all 3G cellsites will be linked via fibre optic backhaul at a cost of US\$25K per kilometre. This type of backhaul may be appropriate in some countries where distances are relatively short, populations dense and there are limited challenges in terms of terrain and security of infrastructure. However, it is completely inappropriate and unnecessary in PNG where wireless infrastructure is far more cost-effective and reliable – especially in the outlying areas that are most likely to be relevant to Part V of the Act.
50. The combined effects of these factors are profound. Not only has NICTA materially overestimated the amount of subsidy that may be required in the future, the proposed



imposition of excessive UAS Levies at this point in time is likely to deter or defer the commercial investment that would otherwise occur.

51. For these reasons, Digicel submits that NICTA must adopt a much more transparent approach to its consultation including full disclosure of the analysis and assumptions that it has relied upon.
52. The practical failings of the approach that has been adopted by NICTA also supports Digicel's view and the proper interpretation and application of the Act with respect to the identification of UAS Projects. That is, they must be identified discretely on an annual basis and properly take into account the commercial initiatives that continue to occur.
53. Consequently, NICTA's proposed budget estimates contained in section 6 of the Draft Strategic Plan cannot be considered to be reliable and grossly overstate the amount of funding that may be required in the future.

## **E. Draft Report and UAS Operational Plan, 2018**

54. For similar reasons, Digicel submits that the Draft Report and UAS Operational Plan for 2018 is fundamentally flawed.
55. Moreover, the Draft Report proposes subsidies for initiatives that cannot possibly be completed within the 2018 fiscal year as is required under the Act.
56. Relevantly, the Draft Report does not even attempt to describe these initiatives as UAS Projects but as "programs".
57. This appears to be reflected in the table of "Key Milestones" for the Mobile Broadband Network Upgrade and Expansion Program which provides:

*Projects to be rolled out in two groups during 2018*

<i>Initial project design</i>	<i>April, Sept</i>
<i>Public consultations</i>	<i>May, Oct</i>
<i>RFP release</i>	<i>June, Nov</i>
<i>Bid submission, evaluation of bids</i>	<i>Aug, Dec</i>
<i>Contract award, project launch</i>	<i>Sept, Jan '19</i>
<i>Program implementation, M&amp;E</i>	<i>2019-2020</i>

58. Relevantly, even if the initial stages of the program are commenced on time, which seems unlikely, design of any actual UAP Projects will not be complete until June (at the earliest) and implementation of any UAS Projects that are subsequently approved by the Minister<sup>1</sup>

---

<sup>1</sup> This important step has been omitted from the timeline completely.

will not occur until 2019 at the earliest. This means that no funds will be required to be drawn from the UAS Fund in the 2018 fiscal year.

59. The same can be said of all of the other programs that have been identified in the Draft Report. That is, none are expected to be implemented in the 2018 fiscal year and, therefore, none will require any funding from the UAS Fund.

## F. Draft UAS Levy Determination 2018

60. Digicel submits that NICTA is not currently in a position to be able to assess whether or not a UAS Levy may be required to be imposed in respect of the 2018 fiscal year.
61. To date, no specific UAS Projects have been proposed or approved by the Minister for the 2018 fiscal year and, in any event, the processes required under the Act have not been followed.
62. Moreover, it is clear from the Consultation Paper that there is no realistic prospect of any UAS Projects being implemented in the 2018 fiscal year.
63. Even if NICTA had correctly followed the procedures set out in the Act and the imposition of a UAS Levy was properly determined to be warranted, it is now out of time to impose a UAS Levy in respect of the 2018 fiscal year. This is especially the case when, by NICTA's own admission, no UAS Projects will actually be implemented in the 2018 fiscal year.
64. Relevantly, section 107(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." (emphasis added)*

65. In Digicel's submission, a proper interpretation and application of section 107(2) of the Act would require that any UAS Levy for 2018 would be determined prior to the commencement of the 2018 fiscal year to fund UAS Projects to be implemented within 2018.

## G. Proposed way forward

66. Despite its concerns about the approach that has been adopted by NICTA with respect to the application of Part V of the Act, Digicel is genuinely committed to the development of networks and technologies to support the evolving needs of the people of PNG, including

those who do not currently have access to adequate ICT services. This is clearly illustrated by Digicel's commercial approach to the provision and continuous upgrade of services.

67. To that end, Digicel would welcome an open dialogue with NICTA and the UAS Board to understand better its specific concerns and priorities for delivery of new or upgraded services and to meet the Government's Policy objectives.
68. Based on such a dialogue, Digicel would be willing to commit to deployment of new upgraded services or infrastructure in accordance with any agreed priorities.
69. Such an approach would closely follow the highly successful "Pay or Play" approach to the realisation of Universal Access goals in Vanuatu and, in Digicel's submission, would be possible within the existing legislative framework in PNG. It would also be consistent with the Objectives set out in sections 2 of the Act and in particular:

“ ...

*(g) encouraging, facilitating and promoting industry self-regulation in the ICT industry in Papua New Guinea; and*

*(h) encouraging, facilitating and promoting sustainable investment in, and the establishment, development and expansion of, the ICT industry in Papua New Guinea ...”*

70. For example, NICTA and the UAS Board could still discharge their responsibilities under section 108 of the Act, including to undertake public consultation and receive from stakeholders submissions on proposals for UAS Projects, identify and estimate their indicative costs and rank them in order of priority. NICTA could then discuss those UAS Project proposals with interested parties in accordance with the requirements of section 108(4)(d) of the Act to identify whether they might be undertaken without the need for a subsidy from the UAS Fund. If agreement could be reached on the commercial deployment of network facilities and services to meet the objectives of the proposed UAS Projects, then no subsidies would be required and the need for a UAS Levy would be obviated.
71. Such an approach could commence immediately and results could realistically be expected to be achieved within the current fiscal year. Moreover, it would avoid the need for formal tendering processes which are likely to be expensive and time consuming.
72. In Digicel's submission, this would be far superior to the current approach to UAS issues which, to date, has proven to be unsatisfactory and very costly for all concerned.
73. Digicel would welcome a further opportunity to discuss such an approach with NICTA.

## **H. Conclusion**

74. In conclusion, Digicel reiterates its concerns about the approach that has been adopted by NICTA, which Digicel submits is inconsistent with the requirements of the Act and would cause substantial harm to Digicel and the customers it services.

75. However, Digicel is committed to the ongoing development of the market and supporting PNG's economic and social development.
76. Digicel looks forward to engaging further with NICTA to achieve that goal in the most efficient way practicable.