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10 December 2021

Mr Kila Gulo-Vui
Chief Executive Officer
National Information & Communications Technology Authority
Headquarters
Punaha ICT Haus
PO Box 8444
Frangipani Street
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By Email & By Hand Delivery

Dear Mr Gulo-Vui,

Submission on DataCo further revised RIO Public Consultation

Please find enclosed Digicel's submission on DataCo's revised RIO public consultation.

Yours faithfully
Digicel (PNG) Limited

A handwritten signature in blue ink, appearing to read 'Michael Henao', written over a faint circular stamp.

Michael Henao
Head of Legal & Regulatory

DIGICEL (PNG) LIMITED

Submission to NICTA

***Public consultation on Further Revised Reference Interconnection Offer
from PNG DataCo Limited on various wholesale access services***

10 December 2021

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

A. Introduction and Preliminary Issues

1. This submission sets out Digicel's comments with respect to PNG DataCo Limited's ("**DataCo**") further revised Draft Reference Interconnection Offer ("**Proposed RIO**") which was published by National Information and Communications Technology Authority ("**NICTA**") on 5 November 2021 under cover of a Public Notice from NICTA which, among other things, stated:

"In August 2020 DataCo proposed a Reference Interconnection Offer ("RIO") to NICTA pursuant to Section 141 of the Act. The draft RIO was made the subject of a public consultation, as required by Section 142 of the Act, and subsequently rejected by NICTA in December 2020.

In 2021 DataCo proposed a further draft RIO and that also was subject to public consultation from May to July, 2021. A response report setting out the views of NICTA staff was posted on NICTA's website on 24th September 2021. The response report suggested that certain changes would need to be made before NICTA would be comfortable to accept the RIO. Implicitly, this amounted to a rejection of the RIO pursuant to Section 142 of the Act, and this has now been formally confirmed by the NICTA Board.

DataCo has subsequently proposed a further RIO which has been revised to address the issues noted in the NICTA response report. NICTA is now inclined to accept the latest draft RIO, subject to the comments received as part of the public consultation which will commence on 5th November 2021."

2. We understand that the Proposed RIO contains various amendments that are intended by DataCo to address the issues identified by NICTA in its *NICTA'S Staff Response to Comments Report, dated 15 December 2020* ("**Response to Comments Report**") and which had given rise to the purported implicit rejection of DataCo's previously proposed RIO ("**Rejected RIO**").
3. In this context it is disappointing that neither DataCo nor NICTA has made any attempt to identify the specific differences between the Rejected RIO and the Proposed RIO. Nor has DataCo or NICTA provided an editable version of either document to facilitate a comparison between the two. This is despite Digicel's reasonable request for such documents to be provided. As a result, an additional and unnecessary burden has been placed on submitters who have been required to go through a laborious process to compare the two documents.
4. Relevantly, the review that has been undertaken by Digicel has confirmed that numerous drafting and typographical errors remain. These errors cast a shadow over the Proposed RIO and calls into question whether it is in fact a bona fide proposal by DataCo or whether it is part of some sort of ongoing regulatory gaming process.

5. It is therefore surprising that NICTA, despite the existence of obvious drafting errors and not having provided Digicel details of the actual differences between the Rejected RIO and the Proposed RIO, has advised that it is “ *now inclined to accept the latest draft RIO*”. However, no reasons have been provided for NICTA deciding to adopt this position and it appears that NICTA may have erred by, in effect, predetermining the outcome of this consultation process.
6. Digicel also understands that in accordance with the requirements of Section 142(5)(b)(iv) of *the National Information and Communication Technology Act 2009 (“Act”)* NICTA is not permitted to accept the Proposed RIO “ *unless NICTA is satisfied that the RIO (or proposed variation) is consistent with the general pricing principles and any service-specific pricing principles*”.
7. However, it does not appear that any analysis has been undertaken in this regard. This is despite DataCo proposing various changes to some of the prices it initially proposed around two years ago. Moreover, DataCo has not provided any explanation or justification for its new prices or why the discounts offered exclude the services that are bought by Digicel.
8. Finally, Digicel is concerned that, consistent with the approach taken in respect of the Rejected RIO, DataCo has again failed to provide any detailed supporting reasons to explain the changes contained in its Proposed RIO. This makes it more difficult for submitters such as Digicel to be able to make fully informed comments.
9. In Digicel’s respectful submission, these important procedural issues must be resolved by NICTA prior to it giving any further consideration to the Proposed RIO and Digicel must respectfully reserve its rights in this regard.
10. Notwithstanding the above procedural issues, Digicel submits that the Proposed RIO does still does not satisfy the conditions specified in section 142(5)(b) of the Act for reasons that, among other things, include:
 - a. the Proposed RIO is not consistent with all of the non-discrimination obligations that are applicable to DataCo;
 - b. the Proposed RIO contains terms and conditions that are not reasonable in accordance with Section 126 of the Act; and
 - c. the price terms of the Proposed RIO have not been shown to be consistent with the general pricing principles and the service-specific pricing principles that currently apply to the services intended to be provided.
11. Accordingly, Digicel respectfully submits that NICTA is bound to reject the Proposed RIO.
12. It is in this context that Digicel provides its specific comments below in respect of the Discussion Paper and the Proposed RIO.
13. Please note that the there is no Digicel confidential information contained in this submission.

B. Specific Comments on the Non-Price Terms of the Proposed RIO

14. Based on comments previously provided by Digicel NICTA agreed in its Response to Comments Report that seven material provisions of the Rejected RIO should be changed.
15. While some of those changes have been made in the Proposed RIO it is Digicel's view that it still does not meet the legislative standard required. This is for the following reasons.

Clause 3 – Term

16. Clause 3.2(a) of the Revised RIO states that prices will remain in effect until "*1st January of each year following the date of NICTA's acceptance of the Reference Interconnection Offer*". While at this point in time it is not known when that date might be, it seems unlikely that the Proposed RIO will be accepted by NICTA prior to 1 January 2022.
17. This means that the prices proposed by DataCo would remain in effect until at least January 2023 and would not have been the subject of any formal review process for at least three years from the time they were first proposed.
18. This problem is further exacerbated by the condition that prices shall be revised in accordance with a review conducted before the 1 January review date. The meaning of "review" is not defined and it is not clear:
 - a. whether the review is to be undertaken by DataCo, NICTA or some other party; or
 - b. What the consequence might be if the review process is not concluded before the 1 January review date.

This uncertainty means it is quite possible that prices may not actually be reviewed until January 2024 or later.

19. These problems are further compounded by the lack of any actual review process being identified in the Proposed RIO. On the face of it, the review process is entirely in the hands of DataCo and there is no mechanism included by which there can be certainty that the review will be undertaken in a timely and fair manner.
20. This is clearly unacceptable and does not address the problems previously identified by Digicel and which were apparently accepted by NICTA in the Response to Comments Report.
21. The Proposed RIO should therefore be rejected on that basis.
22. Digicel is also concerned that a new clause 3.4 has been inserted into the Proposed RIO that sets the "standard" term for any service agreement as being 12 months. Any different length of term is subject to the discretion of DataCo. In Digicel's view this is an unnecessary constraint in the context of services for which long-term commercial certainty is required.

23. In Digicel's submission a customer should be entitled to select a contract term that is at least two years.

Clause 7.3 – Service Bond

24. Digicel continues to dispute the proposed wording of clause 7.3 of the Proposed RIO which provides:

*“Service Bonds shall be determined based on Data Co's **reasonable assessment of the creditworthiness of Customer** and shall be no more than is required to protect DataCo's interests in the event of a payment default having regard to the maximum liability incurred for the provision of the Service at any given time in the course of the MSA.”* (our emphasis)

25. This amended provision still does not include any objective criteria that will be used by DataCo in making its assessment and a Service Bond may still be demanded at DataCo's sole discretion, nor does the amended provision provide any objective mechanism by which the quantum of a Service Bond might be calculated in the event that it is required by DataCo.
26. This is clearly unacceptable and is at odds with international industry practice where clear criteria establish the circumstances where a service bond might be required and set out a formula by which any service bond may be calculated. Leaving such an important issue to DataCo's sole discretion runs a real risk that excessive service bonds will be able to be used to discriminate between customers.
27. The Proposed RIO should therefore be rejected on that basis.

Clause 7.6(c) – Amendments to Price

28. Digicel notes DataCo's amendment to clause 7.6(c) of the Proposed RIO as an apparent attempt to rectify the problems identified by Digicel and accepted by NICTA in its Response to Comments Report.
29. However, the changes that have been made still do not provide any certainty for access seekers and lack sufficient detail to have any confidence in their application.
30. The Proposed RIO should therefore be rejected on that basis.

Clause 7.6(d) – Billing Disputes

31. DataCo has amended clause 7.6(d) of the Proposed RIO to extend the period in which a billing dispute may be raised from 5 days to 15 days. However, this is still unnecessarily short and is an unreasonably limited amount of time in which a customer may raise a dispute.
32. No reason has been provided by DataCo for persisting with such a restrictive practise, which appears to be an intentional attempt by DataCo to unreasonably limit a customer's ability to raise a bona fide dispute where it has grounds to believe there is a billing error or there is some other issue with the charges that have been levied by DataCo.

33. In Digicel's submission there is no reason why, consistent with industry practise, the dispute notification period should not be at least 90 days.

34. DataCo's position is clearly unacceptable and the Proposed RIO should therefore be rejected on that basis.

Clause 10 – Termination

35. DataCo has further amended clause 10 of the Proposed RIO in an apparent attempt to rectify the problems identified by Digicel and accepted by NICTA in the Response to Comments Report.

36. However, in Digicel's submission, the changes made by DataCo have not improved the clause and have only further served to further entrench the right DataCo has previously sought to terminate the provision of service to a customer immediately and without notice. For example:

- a. At clause 10.1 of the MSA DataCo reserves the right to *“terminate a Service Agreement to Customer for **reasonable justification**, and where it is reasonable to do so having regard to the other options available to DataCo”* (our emphasis). However, no definition or examples of what might constitute *“reasonable justification”* have been provided. Without such definition this amounts to an ability to terminate immediately *“for convenience”* without any notice being required to be provided.
- b. At clause 10.3(a)(i) of the MSA, DataCo continues to seek to retain the right to terminate immediately for late payment despite DataCo having other rights to charge interest on such late payments and to impose a Service Bond. This is clearly unreasonable. In Digicel's submission, DataCo should not be able to demand a Service Bond, charge interest on late payments and still be able to terminate immediately.
- c. At clause 10.3(a)(ii), DataCo continues to seek to retain the right to terminate immediately for failure to cease any activity considered by DataCo to be a *“violation of the MSA and/or any Service Agreement”* regardless of the nature or materiality of such violation or whether there is a bona fide dispute in relation to the matter.
- d. At clause 10.3(b)(iv), DataCo has sought to retain the right to terminate on 60 days' notice for any regardless of whether the matters giving rise to the notice are trivial or material and whether they are able to be (or have been) rectified.

37. This is clearly unacceptable and does not address the problems accepted by NICTA in the Response to Comments Report.

38. The Proposed RIO should therefore be rejected on that basis.

Annexure C – Service Availability

39. Digicel remains concerned that the service availability promised by DataCo, particularly in respect of its domestic network, still falls well short of accepted international standards.
40. This is particularly concerning given that DataCo has an effective monopoly over the provision of national and international fibre services and the international gateway into PNG. As such the industry is wholly reliant on the quality of service that DataCo chooses to provide.
41. In such circumstances, it is Digicel's respectful view that the position taken by NICTA in its Response to Comments Report is inconsistent with the reasonableness requirement set out in Section 126 of the Act or the Act's broader objectives.
42. Specifically, Digicel submits that the issue of service quality should be resolved as part of this process and not left to be reviewed "*outside the RIO*" as has been proposed by NICTA.
43. The Proposed RIO should therefore be rejected on that basis.

C. Specific Comments on the Price Terms of the Proposed RIO

44. Digicel notes that a number of the prices contained in the Proposed RIO have been reviewed and amended by DataCo. However, none of the changes have been supported by any explanation or justification that has been made available for interested parties to review and consider. This is especially important in circumstances where only some of the prices have been amended.
45. Furthermore, the services and volumes provided by DataCo to Digicel appear to have been excluded from the lower pricing that is apparently being offered by DataCo. No justification has been provided for this apparent discrimination.
46. It is also relevant that no analysis has apparently been undertaken by DataCo or NICTA to determine whether the new prices proposed by DataCo are consistent with the requirements of the *Service-Specific Pricing Principles (Submarine Cable Services) Amendment Determination 2020* (Amended SSPPs). No reason has been provided by NICTA for such an important omission. This is especially problematic in the context of the requirements of Section 142(5)(b)(iv) of the Act which expressly prohibit NICTA from accepting a proposed RIO unless it is satisfied that it is "*consistent with the general pricing principles and any service-specific pricing principles*".
47. It is Digicel's respectful submission that the lack of any meaningful analysis of the proposed pricing, especially in the face of the "targeted" discounts proposed by DataCo, is a serious error and unless and until such an analysis is undertaken and made available to interested parties for their comment in accordance with the requirements of 229 of the Act, NICTA is prohibited by law from accepting the Proposed RIO.
48. In short, it is Digicel's submission that NICTA is bound to reject the Proposed RIO on this basis alone

D. Conclusion

49. For the reasons set out in this submission, Digicel respectfully submits that NICTA has no reasonable option available to it other than to reject DataCo's Proposed RIO.

50. In the event that NICTA wishes to give the Proposed RIO further consideration, Digicel submits that it would be inappropriate for it to do so unless and until the procedural deficiencies identified in this submission have been rectified.

51. We look forward to NICTA's consideration of this submission and to receiving a draft of any determination that is made in order that we can comment on it prior to any final decision being taken.