

# SUBMISSION

## GENERAL

- 1 Digicel welcomes the opportunity to participate in NICTA's public inquiry ("**Inquiry**") into the potential renewal of the declaration of the Domestic Mobile & Fixed terminating Access Services (respectively, "**DMTAS**" and "**DFTAS**") and an opportunity to comment on its discussion paper ("**Discussion Paper**").
- 2 The Public Inquiry is the first declaration renewal inquiry held by NICTA under the *National Information and Communication Technology Act 2009* ("**Act**"), and is especially noteworthy since the declaration that is under review was made by the Government through the deeming powers that were contained in Section 131 of the Act. This means that the original declaration of the DMTAS and DFTAS was never the subject of a declaration inquiry and, consequently, the decision by the Government to declare the services was not made as a result of an application of the declaration criteria set out in Section 128 of the Act. Nevertheless Section 128 of the Act is the statutory starting point from which NICTA must undertake this Inquiry and any recommendation decision that is made by NICTA must be consistent with the declaration criteria and the scheme of the Act. Given that the original decision to declare the services was not made on the basis of the declaration criteria in Section 128, Digicel submits that NICTA has a special obligation to undertake its own thorough analysis before any recommendation for renewal can be made. Digicel is therefore concerned at the apparent assumptions and lack of analysis that is included in the Discussion Paper. There is no indication that any empirical analysis has been undertaken by NICTA, and no evidence other than a claim that it is "*consistent with well-established and accepted reasons and standard international regulatory practice*"<sup>1</sup> has been provided to support NICTA's view of the markets that are relevant to this Inquiry. It is particularly disappointing that there has been no attempt by NICTA to analyse the potential impact of an extension of the existing declarations to include calls that have originated on networks outside PNG.
- 3 Digicel submits that the Discussion Paper fails to make a reasonable case for the continued declaration of the DMTAS or DFTAS, or provide a reasonable basis for deciding that the declaration criteria have been met. Digicel further submits that it is incumbent upon NICTA to establish a proper basis for recommending declaration rather than seeking to require that other parties' "*[a]rguments and assertions (as distinct from statements of opinion) should be supported with evidence and data, particularly if they are contrary to the current understanding or proposed conclusions of NICTA staff as set out in this discussion paper*"<sup>2</sup>. This reversal of the burden of proof is, in Digicel's view inappropriate and contrary to the principles of natural justice and procedural fairness.
- 4 Digicel is also concerned that a response time of only 25 working days (which includes the day the paper was issued and the Independence Day public holiday) has been provided for Digicel and other respondents to make submissions on such an important issue.

---

<sup>1</sup> Discussion Paper at section 3

<sup>2</sup> Discussion Paper at section 2.2

- 5 Digicel submits that all of the declaration criteria of Section 128 of the Act are not met by the renewal of the declaration of the DMTAS and DFTAS and that, consequently, NICTA should not recommend declaration of those services. If, contrary to Digicel's views, those services are recommended for declaration by the Minister, the scope of the services should not be expanded to include the termination of incoming international calls. To do so would be wrong in law and would result in significantly adverse outcomes for investors in infrastructure and the people of Papua New Guinea. Our reasoning is detailed below.

## RISKS ASSOCIATED WITH WHOLESALE REGULATION

- 6 Regulatory intervention for any wholesale services is a very serious matter and can have significant downstream impacts on investment, innovation and competition. This is particularly the case in markets that are subject to innovation and competition and where entry and investment in new network infrastructure has been relatively recent, i.e. markets are still growing and developing, as is the case in Papua New Guinea. Presumably this why the legislators made the declaration of wholesale services subject to very strict criteria and provided a two-step "approval" process (NICTA makes a recommendation for that Minister may either accept or reject), both of which steps are subject to appeals processes.
- 7 While Digicel understands that certain types of *ex ante* regulation can be important to safeguard the development of competition, it can undoubtedly be harmful if:
- it is misapplied (the regulation is unnecessary or is poorly targeted);
  - it is too broad in its scope (not properly focussed on the perceived problem it is intended to correct);
  - the regulation extends beyond the period of its usefulness; or
  - the costs of the regulation outweigh the benefits arising from its imposition.
- 8 In particular, Digicel submits that regulation should never be imposed for the sake of "regulatory neatness" or because it is assumed to be standard international practise.
- 9 One of the risks with ill-advised or inappropriate wholesale regulation is that the regulation becomes a disincentive to investment and innovation. For example, in competitive and nascent markets, minimal penetration acts as an incentive to rivals to seek or increase market share by entering un-served or underserved areas by, inter alia, investing in infrastructure. If a regulator prematurely or inappropriately regulates wholesale access, it removes the incentive to invest in infrastructure both from the perspective of an access provider and an access seeker.
- 10 NICTA is proposing not only to renew the existing declarations of DMTAS and DFTAS but also to extend their scope to apply to calls that have originated outside of Papua New Guinea. Not only is out of step with the wholesale declaration criteria ("**WDC**") set out in section 128 of the Act, this approach is contrary to the scheme of the Act and would be contrary to the Act's objectives and Government Policy.
- 11 Digicel contends that a renewal of the declaration of DMTAS and DFTAS is unnecessary because there are already commercial arrangements in place for the provision of those services. Consumer buying behaviour is also changing whereby the rapid developments in

social networking mean that communication via non-traditional telecommunications mechanisms such as data based services, e.g. Facebook, Skype, Facetime, etc., is preferred over voice communication by an ever increasing number of customers.

- 12 Even if the continued declaration of the DMTAS and DFTAS (where those services are confined to the termination of calls that have originated within Papua New Guinea) could be justified, any recommendation in favour of extending the scope of the DMTAS and DFTAS to include calls that have originated overseas would be contrary to the WDC and would have serious long-term implications for Digicel, for investment in ICT markets and for end users of ICT services.

12.1 There will be an **adverse financial and commercial impact on Digicel**. Digicel's revenues will be severely compromised and will no longer be able to afford to roll out new infrastructure and services in accordance with its current plans. It follows from this that Digicel will not be free to make optimal decisions that maximise the profitability of Digicel's business or that provide maximum benefit to its customers in Papua New Guinea. Digicel's financial position will therefore be undermined.

12.2 There will be an **adverse impact on infrastructure investment in ICT markets in Papua New Guinea**. It would send a bad signal to existing and potential ICT investors which would chill investment (as any investment decision would have to be considered in light of the threat of regulation).

12.3 Finally, any adverse impact on investment incentives will also lead to **adverse long-term impact on end users of ICT services** in Papua New Guinea, both current and future end users. The central role that ICT services play in the lives of Papua New Guinea's people is obvious. Just as important is the significant contribution that ICT services make to the long-term productivity of other sectors of the Papua New Guinea economy. These long-term benefits will be adversely affected if NICTA wrongly recommends extending the scope of the DMTAS and DFTAS to include calls that have originated overseas.

## THRESHOLDS FOR WHOLESALE REGULATION

### Introduction

- 13 NICTA must meet a number of thresholds before it can recommend declaring any wholesale services. The thresholds concern:
- (a) First, meeting the **requirements of the Act**. Specifically, **all** the WDC set out in section 128 of the Act for recommending wholesale regulation must be met;
  - (b) Second, articulating a coherent and comprehensive **analytical framework** that is consistent with the WDC. The framework links the requirements of the Act to the factual data that NICTA must obtain, and helps determine what factual data is relevant to the WDC, and what factual data is irrelevant to the WDC;

- (c) Third, ensuring that the data collected does in fact meet the requisite **standard of proof**. Digicel submits that, because of the significant impact that any declaration will have on the legitimate interests of both private investors and the people of Papua New Guinea a high standard of proof must be met before NICTA can recommend the declaration of any wholesale services;
  - (d) Fourth, fully discharging the **burden of proof**. Digicel submits that unless the requisite standard of proof has been met in respect of each of the WDC, NICTA cannot recommend wholesale regulation. For example, it is impermissible for NICTA to conclude that a WDC is met based merely on an asserted presumption that has not been rebutted;
  - (e) Finally, ensuring that the **means of proof** employed meet the minimum standards of evidence that include relevance, reliability, objectivity and accuracy. Conjecture, speculation, non-expert opinion, suppositions, guesswork and mere theoretical propositions do not meet the minimum criteria of evidence.
- 14 In addition to the foregoing thresholds that go to the substantive decision in question – i.e., whether to recommend declaring a wholesale service – NICTA must also meet minimum procedural requirements as well as minimum standards for regulatory decision-making under Papua New Guinea’s administrative law. The principles of natural justice are enshrined in the Constitution of the Independent State of Papua New Guinea (in Division 4 of Part IV).

#### **Wholesale Declaration Criteria**

- 15 NICTA rightly states at section 2.1 of the Discussion Paper that “*NICTA may only recommend that the Minister declare a particular wholesale service if NICTA is satisfied that such a declaration would satisfy **all** of the declaration criteria set out in section 128 of the Act*” (our emphasis).
- 16 Section 128 of the Act provides:
- “128. Declaration criteria.*
- The “declaration criteria” are as follows —*
- (a) *that declaration of the wholesale service will further the achievement of the objective of this Part as set out in Section 124; **and***
  - (b) *specifically, in relation to the competition objective, that —*
    - (i) *access or increased access to the wholesale service (as a consequence of declaration) is necessary for the promotion of effective competition in at least one market other than the market for the wholesale service; **and***
    - (ii) *the wholesale service is supplied in whole or in part via a facility that cannot feasibly be substituted, as a matter of commercial reality, via another facility in order to supply that wholesale service; **and***
  - (c) *specifically, in relation to the efficiency objective, that —*

- (i) *declaration would not materially compromise the incentives for efficient investment in any facility over which the wholesale service may be supplied; and*
- (ii) *access or increased access to the wholesale service (as a consequence of declaration) is technically feasible having regard to the specific factors identified in Section 124(2)(a); and*
- (iii) *in the case of wholesale services that are facilities access services, increased access to the wholesale service would avoid inefficient replication of underlying facilities that may be efficiently shared.” (Emphasis added)*

17 Section 124 of the Act provides:

- “124. *Objective of this Part.*
- (1) *The objective of this Part and Part VII of this Act is to —*
    - (a) *promote effective competition in markets for ICT services in Papua New Guinea, to be known as the "competition objective", subject to—*
    - (b) *promoting the economically efficient use of, and the economically efficient investment in, the facilities by which ICT services may be supplied, to be known as the "efficiency objective".*
  - (2) *In determining the extent to which a particular thing is likely to further the achievement of the efficiency objective, regard shall be had (without limitation) to all of the following matters —*
    - (a) *whether it is technically feasible for the relevant ICT services to be supplied, having regard to —*
      - (i) *the technology available or likely to become available; and*
      - (ii) *the reasonableness of the costs involved; and*
      - (iii) *the effect of supplying the ICT services on the integrity, operation or performance of other ICT services or facilities; and*
    - (b) *the legitimate commercial interests of the access provider in supplying the ICT services, including the ability of the access provider to exploit economies of scale and scope; and*
    - (c) *the incentives for investment in the facilities by which the ICT services may be supplied, including the risks involved in making the investment.”*

18 “Market” is defined under the Act to mean:

*“a market in the whole or any part of Papua New Guinea for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them”*

That, is only markets within Papua New Guinea are relevant to WDC.

19 It is clear that the threshold for declaring a wholesale service is high. If any one of the WDC are not met, NICTA cannot recommend that the wholesale service be declared. The WDC are discussed in further detail below.

### **Analytical framework**

20 NICTA must apply an analytical framework to ensure that its consideration of all of the WDC is rigorous and convincing. The analytical framework should be:

- (a) comprehensive – it must address **all** of the WDC; and

- (b) coherent – it must be relevant to the WDC, be in line with Government Policy and the objective of the Act which is -

*“to ensure that the ICT industry contributes to the greatest extent possible to the long-term economic and social development of Papua New Guinea, by means that include:*

- (a) providing a regulatory framework consistent with the regulatory principles ... that promotes:
  - (i) the long-term interests of Papua New Guinea and its people ...; and*
  - (ii) the efficiency and competitiveness of the ICT industry in Papua New Guinea;**
- (b) ensuring that ICT services ... are supplied as efficiently and economically as practicable and supplied at performance standards that reasonably meet the social, industrial and commercial needs of Papua New Guinea and its people;*
- (c) promoting the development of an ICT industry in Papua New Guinea that is efficient, competitive and responsive to the needs of Papua New Guinea and its people;*
- (d) promoting and maintaining fair and efficient market conduct and effective competition ...;*
- (h) ... encouraging, facilitating and promoting sustainable investment in, and the establishment, development and expansion of, the ICT industry in Papua New Guinea, including via the exercise of facilities rights.”*

- 21 Unless and until NICTA has undertaken coherent and comprehensive analysis and satisfied itself that all of the legislative and procedural requirements have been met, Digicel submits that it is not open to NICTA to recommend the declaration of any wholesale service including the DMTAS and the DFTAS.

**Standard of proof required is very high**

- 22 The standard of proof in respect of each matter that NICTA must be satisfied of is very high and certainly much higher than merely considering that declaration would be *“likely to satisfy”* the WDC, or that NICTA staff *“believe”*, the declaration would meet the WDC, or that *“all of the declaration criteria **would appear** to be met”* (our emphasis). The requirement to be “satisfied” must be based on **cogent and compelling evidence** which, at present, does not appear to exist.

- 23 Before NICTA can recommend to the Minister that a wholesale service should be recommended for declaration, section 129 requires NICTA to be:

*“satisfied that all of the declaration criteria would be met* by the declaration, or continued declaration, of a wholesale service on particular terms.”(Emphasis added)

- 24 The requirement to be “satisfied” that all of the WDC would be met is a high threshold, particularly given the uncertainties associated with predicting how markets will evolve with and without a regulation, and what this implies for investment, competition and efficiency. This goes to the nature and level of evidence that NICTA must have before it can be satisfied that the WDC are met. The burden of showing that the evidence obtained is sufficient to meet the requisite standards on cogency rests with NICTA. This makes sense given the interventionist nature of wholesale service regulation and the harmful impact it could have on the industry and on Papua New Guinea if not done properly.



- 25 Because of the serious nature of a wholesale declaration and the consequences that follow, the law requires a very high standard of proof before NICTA can be satisfied that all of the WDC are met.

#### **Burden of Proof – on NICTA**

- 26 If the evidence before NICTA falls short, NICTA cannot require Digicel or any other party to prove that there is no evidence available that would enable NICTA to be satisfied that each of the WDC are met. Rather, the burden lies on NICTA to be satisfied that it has gathered all the information and evidence relevant to the matter and is therefore in a position to reach a conclusion that all of the WDC would be satisfied. This burden flows from the nature of NICTA's regulatory function, which is to make a decision in relation to a matter based on evidence.

#### **Means of Proof**

- 27 Digicel does not wish to instruct NICTA as to how it should discharge its responsibilities, but some comment on the means by which a proposed wholesale regulation should be assessed is appropriate. Without suggesting this is a complete description, at least four distinct tasks can be identified.
- (a) First, markets must be defined properly. This must be a fact-based analysis, drawing on information and data from the actual markets in Papua New Guinea. For example, primary survey data, data showing usage patterns, econometric estimates of price elasticities, and documented interviews with market participants could all be useful inputs. Importantly, it is only markets that are within Papua New Guinea that are relevant to a consideration of the WDC.
  - (b) Secondly, the actual service that is being considered for declaration needs to be described in detail. It is impossible to properly analyse the merits of a declaration in the abstract. It is relevant in this regard that services should be described in the context of the WDC and the objective set out in Section 124 of the Act. That is, the service description must be relevant to the objective that is to "*promote effective competition in markets for ICT services in Papua New Guinea*" (our emphasis). Whether or not it is technically feasible for two services (or variants of the same service) to be provided by the same facilities is irrelevant to the question of whether they should be included in the service description. The starting point must be the Section 124 objective.
  - (c) Third, the future evolution of the relevant markets must be compared with and without the specific declaration in place. This is a predictive analysis, and requires that NICTA consider how consumer and operator behaviour including (in the event that the scope of the DMTAS and DFTAS are expanded to included calls that have originated outside of Papua New Guinea), the behaviour of overseas operators that set the wholesale and retail rates to originate a call into PNG from outside of PNG will change as a consequence of the declaration.

- (d) Fourth, the outcome of the predictive analysis must then be translated back to the variables of interest, which in this case means determining what the predictive analysis implies for competition and efficiency in the future.
- 28 Digicel emphasises that the above is not a complete prescription of NICTA's obligations. In addition, we note that it is clearly not sufficient for NICTA to base its views on conjecture, speculation, its own unsupported opinion, or on un-referenced claims about what others have found, or might be "standard international regulatory practice". Such an approach does not meet the minimum criteria of evidence (e.g., relevance, reliability, objectivity, accuracy).
- 29 There are minimum standards of evidence that NICTA (along with any regulator) should meet to ensure that its decisions are based on reliable and accurate information.
- (a) Evidence may be quantitative or qualitative. Quantitative evidence includes quantitative estimates of demand elasticity and regression analysis. Qualitative evidence may include customer surveys, expert opinion and written testimony from individuals who have actual knowledge of a matter.
- (b) Conjecture, speculation or opinion (other than expert opinion) is not evidence. They do not meet minimum criteria of evidence, for example, relevance, timeliness, reliability, objectivity and accuracy.
- (c) Where the issue at hand concerns a future matter – for example, the likely state of competition over the next five years – the quality of the evidence is important. It must not be assumed that historical evidence is an unbiased predictor of the future. Historical evidence has to be assessed critically to determine to what extent they are relevant to the future. The quality of evidence required to reach a view on a future matter is likely to be higher than the evidence required to establish a current or past matter.

### **Natural justice**

- 30 The public inquiry is governed by the rules of natural justice. Section 59(2) of the Constitution of the PNG state provides that:

*The minimum requirement of natural justice is the duty to act fairly and, in principle, to be seen to act fairly.*

- 31 The Constitution emphasises the central role of the principles of natural justice and administrative law in the development of rules of the "underlying law". Section 60 provides:

*In the development of the rules of the underlying law in accordance with Schedule 2 (adoption, etc., of certain laws) particular attention shall be given to the development of a system of principles of natural justice and of administrative law specifically designed for Papua New Guinea, taking special account of the National Goals and Directive Principles and of the Basic Social Obligations, and also of typically Papua New Guinean procedures and forms of organization*

- 32 The "underlying law" refers to the unwritten law of Papua New Guinea based on the decisions of Papua New Guinea courts. While decisions made by NICTA are not part of the



underlying law, they are subject to the principles of natural justice and administrative law, which form part of the underlying law of Papua New Guinea.

33 There are two requirements that NICTA must observe:

- (a) **Due process:** NICTA must give Digicel a reasonable opportunity to be heard at every step of the public inquiry process; and
- (b) **Impartiality & non-discrimination:** NICTA's conduct of the public inquiry must not give rise to an apprehension of bias or discriminatory application or regulatory measures. It is not sufficient for NICTA to be impartial; NICTA's conduct of the inquiry must also not create an appearance of bias and must be non-discriminatory.

## THE CANDIDATE WHOLESALE SERVICES

34 Digicel agrees with NICTA that it is appropriate to use the descriptions of the existing declared services as a starting point for its analysis. However Digicel does not consider that it is appropriate for NICTA to effectively extend the scope of those services to expressly include the termination of calls that have originated outside of Papua New Guinea simply on the basis that some of the same network facilities are used for the termination of those calls as those that are used for the origination and termination of domestically originated calls.

35 Nor does Digicel agree with NICTA's contention that:

*"The addition of text clarifying that the scope of the services includes the termination of calls (and messages) that have originated outside PNG does not constitute a change to the effective terms of the declaration of either service and is proposed now only to clarify some licensees' misunderstanding of the scope and effect of the declaration of domestic terminating access services."*<sup>3</sup>

36 The apparent difference in view about the intended scope and effect of the existing declaration of the DMTAS and DFTAS is not a "misunderstanding". Nor, in Digicel's submission, is the effect of the proposed additional text a "clarification". Digicel submits that, if the legislators had intended the deemed declarations to apply to calls that originated outside of Papua New Guinea, the wording of the declaration would have expressly stated that to be the case. That it did not is not surprising. The declaration of a service for the termination of calls that originate outside of Papua New Guinea would not promote competition in a market in Papua New Guinea, nor would it promote the principle of any-to-any connectivity as it applies to calls made between the customers of two Papua New Guinea service providers. As well as being contrary to the scheme of the Act, such a declaration would also have been contrary to the legitimate commercial interests of the access provider in supplying such a declared service, including the ability of the access provider to exploit economies of scale and scope in its network and the incentives for investment in the facilities by which the declared service would be supplied, including the risks involved in making the investment.

---

<sup>3</sup> Discussion Paper at section 4

## PROCESS – WHOLESALE DECLARATION CRITERIA (Section 128 of the Act)

### A. THE COMPETITION OBJECTIVE IS NOT SATISFIED

- 37 NICTA, in the Discussion Paper apparently believes the renewal of the declaration of DMTAS and DFTAS and the extension of the scope of the declaration to include the termination of calls that have originated outside of Papua New Guinea will further the achievement of the “*competition objective*” to promote effective competition in markets for ICT services in Papua New Guinea. Digicel respectfully disagrees. This is, in part because, in Digicel’s submission, NICTA has erred in two key respects.
- 38 Firstly, NICTA has erred by assuming that the markets that are relevant to the proposed intervention are:

- “i. voice call and SMS/MMS termination **on individual mobile networks** in PNG; and
- ii. voice call termination **on individual fixed networks** in PNG” (Emphasis added)

This view has apparently been reached on the basis that NICTA considers it to be “*consistent with well-established and accepted reasons and standard international regulatory practice*”. NICTA then goes on to conclude as an inevitable consequence and matter of logic that “*each network operator has significant market power (“SMP”) in the market for termination of calls/messages on its own network*”<sup>4</sup>. This “traditional” view of the world is not based on any actual evidence or analysis of the actual market in Papua New Guinea and, in Digicel’s view fails to take into account the rapidly changing communication habits of consumers. For example social networking and communication via the internet has exploded in recent years with many people preferring to use that form of communication as a substitute for voice calls or SMS/MMS services. This is particularly the case for international communications and is illustrated clearly by the following graphs.<sup>5,6</sup>

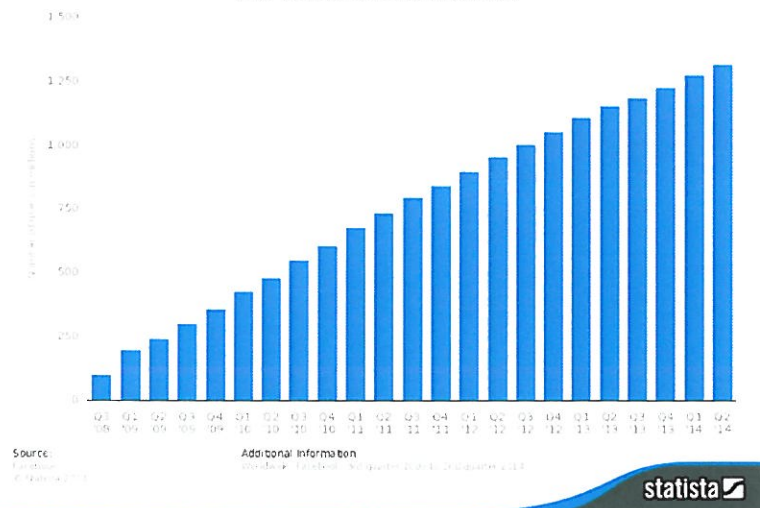
---

<sup>4</sup> Discussion Paper at section 3(a)

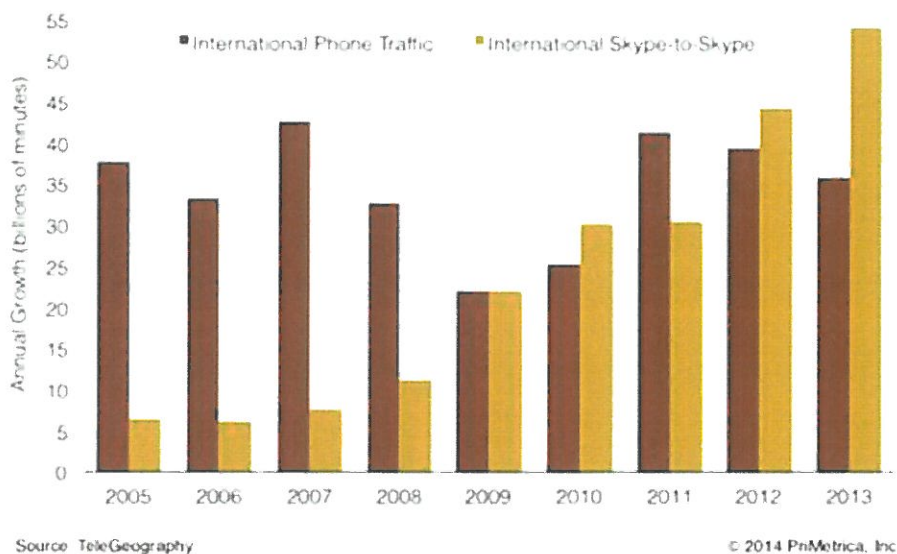
<sup>5</sup> <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>

<sup>6</sup> <http://www.inferse.com/12039/microsoft-skype-generated-36-international-calls-telegeography/>

Number of monthly active Facebook users worldwide from 3rd quarter 2008 to 2nd quarter 2014 (in millions)



Increase in International Phone and Skype Traffic



These changes have been brought about by rapid advances in network technology and the applications such as Facebook, Skype, etc. that are now available to consumers. In Digicel's view, this raises real questions about the ongoing appropriateness of the market definitions that have been adopted by NICTA and suggests that further work is required to be undertaken prior to any decision is made about whether or not the declaration should be renewed.

- 39 Secondly, NICTA appears to have concluded that the relevant downstream market is the *"retail mobile services market"*<sup>7</sup>, although no analysis appears to have been undertaken to support such a conclusion. Interestingly no mention seems to have been made of the retail fixed services market which, at least for the sake of consistency should have been considered by NICTA.

<sup>7</sup> Discussion Paper at section 3(c)

Importantly, NICTA's conclusions with respect to the markets that are relevant to this Inquiry do not appear to be connected to the definition of the term "market" under the Act. Digicel also considers that the lack of any actual analysis of markets has also considered to the error that has been made by NICTA in attempting to include the termination of calls that have originated outside of PNG in the description of DMTAS and DFTAS. Had such an analysis been undertaken it would be clear that including the termination of such calls in the description would be irrelevant to any markets within Papua New Guinea.

#### **A.1. Necessary for the Promotion of Effective Competition in a Market**

- 40 Specifically, having regard to the obligations of Section 128(b)(i) of the Act, access or increased access to each of the declared wholesale services is **necessary** for the promotion of effective competition in at least one market other than the market for the Declared Wholesale Services.
- 41 Once the relevant market has been defined, it is necessary to examine the effective competitiveness of this market, including an examination of:
- the appropriate metrics of the market in question;
  - sunk investment, proposed investment and investment incentives;
  - the conditions for rivalry;
  - the rivalry itself; and
  - other related factors affecting the relevant market.
- 42 The 'other' market which NICTA refers to is the "retail mobile services market".
- 43 For the purposes of the above criterion and each of the wholesale services that are proposed to be declared, Digicel notes again that no actual analysis has been undertaken by NICTA and that recent developments in technology and consumer behaviour mean that old assumptions may no longer be a reliable indicator of future outcomes.
- 44 Digicel further notes that being "necessary" is a very high threshold. "Necessary" is defined by the Merriam Webster dictionary as meaning:
- "1 a: of an inevitable nature : inescapable  
b: (1) : logically unavoidable (2) : that cannot be denied without contradiction  
c: determined or produced by the previous condition of things  
d: compulsory  
2: absolutely needed: required"
- 45 No evidence has been provided to suggest that the promotion of competition (in any market) will not occur absent a declaration of either of the proposed services. Accordingly, Digicel does not consider that it has yet been shown that declaration of either of the proposed services is "necessary" for the promotion of competition in any other market.
- 46 Digicel submits that it is also clear, even if the declaration of the DMTAS or DFTAS can be justified for domestically originated calls, it certainly cannot be the case that an extension of scope to include calls that have originated outside of Papua New Guinea can be justified on the basis of the competition objective. That is because there are no markets within Papua New Guinea would be affected by such an extension.

- 47 For these reasons, this WDC has not been shown to be met and could not be met in the case of calls that have originated outside of Papua New Guinea.

**A.2. Facility Cannot Feasibly be Substituted as a Matter of Commercial Reality**

- 48 Having regard to Section 128(b)(ii) of the Act, each of the Wholesale Services that are proposed to be declared must be shown by NICTA to be supplied in whole or in part by a facility that cannot feasibly be substituted, as a matter of commercial reality, via another facility in order to supply that Declared Wholesale Service.
- 49 Digicel submits that the DMTAS (certainly) and the DFTAS (possibly) do not meet this WDC. As a matter of fact, there are two geographically extensive mobile networks in Papua New Guinea. It is also a matter of fact that both mobile networks offer call termination services and compete for customers in Papua New Guinea and that customers are free to choose from whom they buy their mobile service (including call termination). Digicel submits that it is not relevant to this particular WDC whether or not one network currently has more customers than the other or that one network currently has greater geographic coverage than the other.
- 50 For this reason, this WDC is not met and Digicel submits that NICTA cannot make any recommendation to the Minister to declare the DMTAS.
- 51 However, Digicel submits that the situation with respect to the DFTAS is not so clear. At present there is only one fixed access network in Papua New Guinea (operated by Telikom). Based on the technologies that are currently available, it is unknown to Digicel whether it would be feasible, as a matter of commercial reality, to substitute Telikom's fixed access network with another fixed access network.

**B. THE EFFICIENCY OBJECTIVE IS SATISFIED**

- 52 NICTA must show that the declaration of each of the proposed Wholesale Services will further the achievement of the "*efficiency objective*" of promoting the economically efficient use of, and the economically efficient investment in the facilities by the ICT services may be supplied in PNG. Digicel submits that NICTA has not done so in this case.

**B.1. No Material Compromise of the Incentives for Efficient Investment**

- 53 Having regard to the obligations of Section 128(c)(i) of the Act, it must be shown by NICTA that declaration of the Declared Wholesale Services would not materially compromise the incentives for efficient investment in any facility over which the Declared Wholesale Service may be supplied.
- 54 As stated above, Digicel considers that any declaration that included the regulation of calls that originate outside of Papua New Guinea would be a disincentive to investment for network operators such as Digicel. Digicel relies heavily on revenues earned from the termination of calls that have originated outside of Papua New Guinea to support its ongoing investment in infrastructure and its ability to be able to offer affordable telecommunications services within Papua New Guinea. Any erosion of that revenue through a declaration such as that which has been proposed by NICTA would inevitably impact on Digicel's future



investment decisions and in all likelihood would result in consumers paying higher prices for domestic telecommunications services or facing reduced levels of service. This would be particularly harmful in a developing economy such as Papua New Guinea where affordability and availability of world class telecommunications services are critical to underpin the growth and development and make critical services such as education and health available to as many people as possible.

- 55 Importantly, as well as being harmful to the access provider, Digicel submits that a declaration which includes the termination of calls that have originated outside of PNG would not provide any long term benefits to an access seeker in Papua New Guinea. That is because any brief opportunities that might result from a difference between existing international settlement rates and the current domestic termination rates would quickly be eroded with the only real beneficiaries being network operators domiciled outside of Papua New Guinea who have little incentive to offer lower rates to consumers calling Papua New Guinea from their networks and would be more likely (as has been seen with other South Pacific markets in past) to simply “pocket the benefit” and increase their own margins on calls to Papua New Guinea customers that originate on these overseas networks.
- 56 For these reasons, this WDC is not met and Digicel submits that NICTA cannot make any recommendation to the Minister to declare the relevant services, insofar as such a recommendation included the termination of calls that originate outside of Papua New Guinea.

#### **B.2. Access to the Declared Wholesale Services is Technically Feasible**

- 57 Having regard to Section 128(c)(ii) of the Act, NICTA must show that access or increased access to the Declared Wholesale Services (as a consequence of declaration) is technically feasible having regard to:
- (a) the technology available or likely to become available;
  - (b) the reasonableness of the costs involved; and
  - (c) the effect of supplying the Declared Wholesale Services on the integrity, operation or performance of other ICT services or facilities.
- 58 Digicel notes that, as the DMTAS and DFTAS have previously been declared, it can reasonably argued that a renewal of the declaration would meet this WDC.

## **THE OBJECTIVES OF THE ACT AND THE REGULATORY PRINCIPLES**

- 59 Digicel submits that the broadening of the scope of the existing declarations to include the termination of calls that have originated outside of Papua New Guinea would be contrary to the Objective of the Act and the Regulatory Principles that support those objectives.
- 60 The Act’s objectives are (rightly) focussed on bringing benefits to the people of Papua New Guinea. They do not consider the need to provide benefits to people of firms that are outside of Papua New Guinea. Digicel submits that this is exactly what would happen in the



event that the scope of the existing declarations was broadened to include calls that have originated outside of Papua New Guinea. As Digicel has noted earlier, the only beneficiaries of such regulation would in the medium term be international telecommunications carriers who would fatten their margins at the expense of investment by network operators in Papua New Guinea. In addition the Government of Papua New Guinea would also suffer directly as a result of reductions in taxes and in terms of balance of trade via the loss of foreign currency transactions favourable to Papua New Guinea that would otherwise occur.

61 Digicel also notes that NICTA has not provided any basis for broadening the scope of the declarations other than to argue that the termination of calls that originate from outside of Papua New Guinea is technical similar to the termination of calls that originate within Papua New Guinea.

62 However, regulating for the sake of regulatory neatness is not something that is contemplated by the Act. For example, Section 3(b) of the Act provides, among other things that:

*“... regulatory measures should be –*

- (i) proportionate and drafted to achieve results that are no more burdensome than necessary to achieve their stated regulatory objectives; and*
- (ii) based on sound economic principles and, to the extent feasible, should be technology-neutral to reflect the potential for convergence of technologies ...”*

63 Digicel submits that the proposed broadening of the scope of the declarations is not consistent with either of these principles. In particular, no regulatory objective has been articulated by NICTA and no principled economic analysis has been undertaken to support the proposed regulation. Nor has NICTA sought to consider whether broadening the scope of the regulations would satisfy all of the WDC.

## DESIGNATED INTERCONNECTION SERVICES

64 Digicel notes and supports NICTA’s view that:

*“...it is essential that if the DMTAS and/or DFTAS are declared that they **are made designated interconnection services for the purposes of section 137 of the Act**. It is clear from subsection 137(3) of the Act and also the very nature of the any-to-any connectivity obligation that the Act that **terminating access services are the type of service that the Act envisages would be made designated interconnection services**. Further, the any-to-any connectivity obligation fundamentally applies to voice and related complementary services (such as SMS in the case of mobile telephony services) rather than to access to data and it precisely these services that the DMTAS and DFTAS are intended to cover.”*

65 However, it is clear from a reading of the definitions of “interconnection” and “any-to-any connectivity” that are contained within the Act that designated interconnection services are, necessarily, domestic services and only apply to the termination of calls that are made from the customers of one network in Papua New Guinea to another network in Papua New Guinea. This can be seen clearly when the two definitions are read into each other. That is:

*“interconnection means the physical and/or logical linking of one network to another network to achieve the ability of a retail customer connected to one network to send communications*

*to, and/or receive communications from, a retail customer connected to another network, where those communications are conveyed in whole or in part via the two networks"*

Digicel submits that this means that the principle of any-to-any connectivity refers specifically to the passing of communications between the retail customers of the two networks that are interconnected. It does not contemplate that two networks will be required to interconnect so that one network may act as a transit operator for incoming international calls that are handed to it by a wholesale network operator that is located outside of Papua New Guinea where the party handing over the call to the network on which the call terminates has no relationship whatsoever with the customer originating the call.

- 66 Digicel respectfully submits that it is untenable for NICTA to argue that the DMTAS and DFTAS are designated interconnection services and then also seek to expand the scope of those services to include the termination of incoming international calls, a service that is clearly not a designated interconnection service for the purposes of the Act.
- 67 Digicel also notes that, as well as proposing to describe the DMTAS service as a designated interconnection service, it also uses the terms "interconnection" and "any-to-any connectivity" in the DMTAS service description<sup>8</sup>. This simply reinforces the view that the service description may only be considered to relate to calls between the retail customers of two networks in Papua New Guinea who are interconnected. Adding paragraph 5(2) to the Draft Declaration cannot be considered to be a "clarification" to the service description. Rather, it is a fundamental change that in Digicel's view is contrary to the scheme of the Act.

## CONCLUSION

- 68 In conclusion, it is clear that NICTA has not undertaken sufficient analysis to support its belief that the declaration of the DMTAS and DFTAS would satisfy all of the WDC and, in Digicel's view, it is unlikely that at least two of the WDC could be met by the proposed declaration. Consequently, Digicel submits that, at this time, NICTA cannot make any recommendation to the Minister to declare the wholesale services in question.
- 69 Furthermore, even if NICTA does reach a conclusion that the DMTAS and DFTAS should be declared, it would be contrary to the interests of the people of Papua New Guinea, unreasonable and an error of law for NICTA to seek to broaden the scope of the declared services to include the termination of calls that have originated outside of Papua New Guinea.

---

<sup>8</sup> Discussion Paper, Draft Declaration at paragraph 5(1)(b)