

CEO
15/12/2011



The Bigger, Better Network.

Mr. Kila Gulo-Vui
Chief Executive Officer
NICTA
Frangipani Street, Hohola
PO Box 8444
Boroko
National Capital District

15th December 2011

Dear Mr Gulo-Vui,

Re: Public consultation on a draft rule specifying an acceptable form for reference interconnect offers (RIO)

Digicel's submission on NICTA's *A public consultation document on a draft rule specifying the acceptable form for a reference interconnect offers* which NICTA issued on 15 November 2011 is attached to this letter.

This submission is provided to NICTA for the purpose of the current public consultation only and for no other purpose.

Yours sincerely

A handwritten signature in blue ink, appearing to be "John Mangos", written over a circular blue ink stamp.

Per John Mangos
Chief Executive Officer



The Bigger, Better Network.

DIGICEL (PNG) LIMITED

Submission to NICTA

**A public consultation document on a draft rule specifying the
acceptable form for a reference interconnect offer**

Thursday, 15 December 2011.

*This submission is provided to NICTA for the purpose of the current public
consultation only and for no other purpose*

We refer to NICTA's *A public consultation document on a draft rule specifying the acceptable form for a reference interconnect offers* which NICTA issued on 15 November 2011. Digicel is surprised that NICTA is consulting on a rule on the form of a RIO at this time when there are other important issues that are currently being considered by NICTA and industry at present and when there does not appear to be any pressing need to consider the development of rules in relation to the form of RIOs at this time. Further, the time frame for consultation is too short, bearing in mind that submissions on a public inquiry relating to a retail services determination are due just a day after submissions are due in relation to the present consultation.

For reasons set out in more detail below, Digicel submits that NICTA appears to have misunderstood the legal framework concerning RIOs and the nature and purpose of a RIO. In particular:

- A RIO is an undertaking made by an access provider to NICTA. It is not a pro-forma contract between two parties.
- A rule made by NICTA can only specify the "form" of a RIO, not its contents.
- There is nothing in the legal framework that contains a general prohibition on discrimination. The non-discrimination obligation has a narrow technical meaning. It would be inappropriate for NICTA to extend this obligation to beyond this limited area.
- A RIO is a means for access providers to manage regulatory uncertainty. It is not only about giving access seekers certainty.
- The proposed "one operator, one RIO" rule is an artificial restriction with no legitimate policy justification and which unnecessarily limits the role of a RIO in managing regulatory uncertainty.
- The requirement that a RIO covers both price and non-price terms is contrary to the Act. It is also an artificial restriction with no legitimate policy justification and which unnecessarily limits the role of a RIO.
- In Digicel's view, these artificial restrictions, along with other aspects of the draft rule, are not a rule on the "form" of a RIO and are beyond the power of NICTAS to impose.

Finally, it is inappropriate for NICTA to include a pro-forma interconnection agreement as an annexure to a rule on the "form" of a RIO. It privileges a very specific version of a multitude of possible legitimate contracts that an access provider may wish to use.

1 Introduction

1.1 Misplaced priorities

While Digicel accepts that NICTA may undertake this consultation and publish rules in relation to the form of a RIO, Digicel does not understand why this proceeding is progressing at this time or why the response times are so short. NICTA should provide further detail on why it believes this form of regulation is required at this time. Digicel considers that there is a range of other matters that NICTA should address prior to considering the imposition of a rule in relation the form of a RIO

(see Box 1). Any unnecessary delay in addressing these matters will be likely to hold back development of ICT markets in PNG.

The cost of participating in the consultation will also be significant, particularly given the amount material to be reviewed. Such costs cannot be justified on the basis of the current state of the market.

Rather than propose rules on a form of a RIO at this stage, Digicel respectfully suggests that NICTA first give access providers an opportunity to lodge a RIO under Division 5 of Part VI of the Act. The experience from considering and assessing a number of RIOs (or at least one RIO) would give NICTA a better perspective of the way RIOs are intended to be used by access providers, and to propose rules on the form of a RIO that would be helpful to market participants and not discourage access providers from lodging a RIO. At this stage, it may be more valuable for NICTA to wait and see how the market develops or, at most, to perhaps issue some guidelines in terms of the process that it will adopt in considering any RIO application.

Numbering Plan:

- **Issue:** PNG is currently using 7-digit base. There is an urgent need to move to an 8-digit base. Operator licensees' plans to offer new products and services are being held up. NICTA should commence public consultation on the numbering plan by January 2012.
 - **Impact of delay:** Immediate impact is to hold up investments requiring 8-digit numbers (including for "fixed wireless" services). In addition, to the extent investments have or are being made based on 7-digit numbers, additional costs need to be incurred to migrate the affected products to 8-digit numbers.

Spectrum Migration:

- **Issue:** Spectrum migration is still underway. It is currently scheduled to be completed by December 2012. However, this timing is unlikely to be met.
 - **Impact of delay:** Delay is creating uncertainty for operator licensees. The uncertainty potentially affects financing arrangements with lenders and investors who are concerned to ensure that operator licensees right to use spectrum is secure.

Digital Dividend:

- **Issue:** Parts of spectrum in the 700 MHz range is currently occupied by analogue users. NICTA is in the process of refarming this spectrum. Digicel seeks an allocation in this range for LTE.
 - **Impact of delay:** Holds up investment in LTE; delays introduction of LTE to end users in PNG.

License migration:

- **Issue:** Not all operator licensees have migrated to the new licensing regime. Those that have are still holding discussions with NICTA on the standard licensing conditions and special licensing conditions.

- **Impact of delay:** The delay in completing license migration contributes to regulatory uncertainty. More significant are concerns over whether a “level playing field” applies to operator licensees. Digicel has significant concerns to ensure that conditions relating to network coverage should be the same for all mobile operator licensees.

Enforcement of network coverage obligations:

- **Issue:** Digicel is also concerned that NICTA is not enforcing network coverage obligations with respect to beMobile and Telikom.
 - **Impact of delay:** This places Digicel at a considerable competitive disadvantage, as it has been required to build mobile infrastructure in many areas that are unprofitable. Equally significant is that many potential end users in rural and remote areas are deprived of mobile communications to the extent Telikom and beMobile have not been required to build infrastructure in areas not covered by Digicel’s network.

Access to international capacity:

- **Issue:** Telikom’s “regulatory holiday” ends at the middle of next year. It would be appropriate for NICTA to commence an investigation now into whether or how access to international capacity can be facilitated.
 - **Impact of delay:** International capacity is currently a serious bottleneck in PNG. Telikom appears to be hoarding capacity and limiting its supply with the effect of maintaining artificially high prices for international capacity.

Box 1: Priorities for 2012

1.2 Misapplying the legal framework

Digicel disagrees with some aspects of the way NICTA appears to interpret the legal framework within which the RIO is intended to operate.

In particular, Digicel is concerned that NICTA has annexed what appears to be a draft standard interconnection agreement to the draft Rules and is requiring comments on it. There are three issues:

- First, this is inconsistent with the rule making process under s141 and creates a significant and unnecessary burden on licensees.
- In addition, Digicel is concerned that the draft standard interconnection agreement will, despite NICTA’s assertions to the contrary, become a *de facto* standard against which NICTA will measure any future RIO that may be submitted to it for consideration.
- Finally, it unnecessarily promotes uniformity and standardization. It stifles innovation and experimentation.

While Digicel is, by way of this submission, prepared to comment on the draft Rules by the closing date for submissions, it does not have the time or resources to do the same for the draft RIO that has been provided. Such comments cannot realistically be expected to be made before the end of January 2012. In any event, it is improper for NICTA to seek submissions on the draft RIO as part of the present consultation process. Digicel reserves its rights in relation to making additional comments with respect to the draft RIO.

2 Legal framework

2.1 Definition of a RIO

Section 141 defines a RIO as:

- *“a written undertaking given by an access provider to NICTA”;*
- that contains a written statement of:
 - price-related terms,
 - standard non-price terms, or
 - both;
- *“under which the access provider undertakes to comply with the RIO terms ... so as to discharge the non-discrimination obligations”* applicable for declared services; and
- must be clearly written, organized in a logical and consistent manner, in any form specified by NICTA in rules made for the purpose of section 141.

2.2 Analysis

The RIO is simply an undertaking given by an access provider to NICTA (not to an access seeker). It is an undertaking to discharge certain statutory obligations in accordance with the terms of the RIO. Any assumption that the RIO is or must be a complete “interconnect agreement” between two parties is incorrect.

The phrase “non-discrimination obligations” has a technical meaning under section 136. It concerns ensuring equivalence between the access provider and access seeker in relation to certain technical and operational quality and timing aspects of an active declared service. There is no prohibition against discrimination generally. It would be inappropriate for NICTA to infer such a prohibition from this phrase.

There is no requirement that the RIO covers both price and non-price terms. This is reinforced in section 141(3). Any requirement in the draft rule to this effect is plainly beyond power.

Any rule that NCTA may make should only go to the “form” of the RIO and not its content. It is improper of NICTA to try to impose specific terms on any access provider under the guise of this rule. While the term “form” is not defined in the Act, the normal dictionary definition of the term suggests that the term is intended to describe the shape or configuration of the RIO rather than its content.

The draft interconnect agreement in Annex A should be excluded from the draft Rules.

3 Nature and purpose of RIOs

3.1 A RIO is an undertaking by an access provider to NICTA, not “default terms”

It is not correct for NICTA to state (at page 7) that the RIO provides “the default terms and conditions” on which the access provider will supply a declared service. A RIO is an undertaking made by an access provider to NICTA. The Act provides:

Section 141(1) For the purposes of [Part VI], a “reference interconnection offer” or “RIO” is a **written undertaking given by an access provider to NICTA** ... under which the access provider undertakes to comply with the RIO terms in respect of the access provider’s supply of one or more declared services to any access seeker so as to discharge the non-discrimination obligations that are applicable to the access provider for such declared services (emphasis added)

If NICTA accepts the undertaking, the access provider must offer to enter into the RIO with any access seeker on the terms of the RIO. The Act provides:

Section 141(7) Upon receipt of the written notice [from NICTA accepting the RIO], the access provider shall comply with the RIO in respect of any access seekers that enter into the RIO and shall offer to enter into the RIO with any access seeker on the terms of the RIO.

To illustrate, an access provider could offer a RIO to NICTA that the provider will supply the Domestic Fixed Terminating Access Service (FTA) at PGK [x]. If NICTA accepts the RIO, the access provider must offer to enter into the RIO with any access seeker on the terms of the RIO. To “enter into the RIO”, the parties would negotiate an agreement on terms in which the access provider supplies FTA to the access seeker at PGK [x].

3.2 A RIO is a way for access providers to reduce regulatory uncertainty

NICTA appears to see the role of RIOs as primarily giving access seekers a “framework of certainty” about ordering processes, technical standards, delivery timescales and legal requirements. A RIO does not only give access seekers certainty; it also gives access providers certainty. Arguably, that is at least as important as certainty for access seekers. That is because the entering into a RIO by an access provider is a voluntary process. It gives access providers a potential means to reduce regulatory uncertainty in respect of the terms and conditions of supplying declared services. It lessens the need for disputes to be resolved on a case-by-case basis in an arbitral context. A RIO is a mechanism allowing the access provider to resolve uncertainty over specific aspects of the terms of supply of a declared service by offering an undertaking to the regulator. Unlike arbitral proceedings, which is private and between the parties to the arbitration, a RIO is a public undertaking to the regulator. This additional certainty can provide incentives for further investment.

4 Comments on Draft Rules

4.1 The Draft Rules may only specify the “form” of a RIO

NICTA has no power to predetermine the terms of a RIO, it may only prescribe “form”. The proposed draft Rules goes well beyond “form”. For example, Rule (6) purports to prescribe very specific technical content (such as call handover and routing principles which may be irrelevant to a declared service) that a RIO must address.

While some content such as ordering and provisioning may have more general application, there is no compelling reason for NICTA to require that a RIO contains such content. Nor is there any obligation under the Act for an access provider to provide any undertaking in relation to such matters. Digicel submits that NICTA’s vision of a “comprehensive” RIO is unrealistic and will limit the potential role that a RIO can play in helping to address regulatory uncertainty. In any event, the requirement to address specific content is plainly beyond specifying the “form” of a RIO.

4.2 “One operator, one RIO” rule is an artificial restriction not contemplated under the Act

The “one operator, one RIO” rule is not a rule on the “form” of a RIO. Rather, it is an artificial restriction not contemplated by Division 5 of Part VI. Division 5 contemplates the RIO being an undertaking in respect of the access provider’s supply of “one or more declared services” that are interconnection services, not “all declared services”.

NICTA does not fully explain the policy objective for this rule. The desire to avoid “unnecessary duplication” is not a sufficient reason for the rule. It is up to the access provider to determine whether it is preferable to have a single RIO for all services, or different RIOs for different services as would be likely to happen in a normal commercial context. In this context, any “unnecessary duplication” would seem to be a minor consideration. There may be a legitimate reason to have different RIOs for different services (Digicel submits that this is very likely to be the case). A RIO does not have to be a complete specification of all the terms and conditions of access (although it may do that). An access provider may legitimately specify only price terms for one declared service, and non-price terms for a different declared service.

It is inappropriate to assume or require that a single RIO would be suitable for any future declared services (if there are any). This proposed requirement is, in Digicel’s submission, unquestionably beyond power.

4.3 A RIO does not have to contain both price and non-price terms

The requirement in Rule (6) that a RIO should cover both price terms and non-price terms is not a rule on the “form” of a RIO. Again, it is an artificial restriction that is not contemplated by Division 5 of Part VI. In fact, it is contrary to section 141(3) which specifically states that a RIO “may cover either [price terms], or [non-price terms], or both ...”.

NICTA does not explain the policy objective for this very restrictive rule. The restriction will limit the potential role that a RIO can play in helping to address regulatory uncertainty. It will cause unnecessary delays and expense in preparing a RIO and obtaining approval under section 142.

4.4 A RIO applies only to declared services

The RIO is only relevant to declared services (of which there are currently two). The RIO cannot (under the Act) apply to services that are not declared – nor should the inclusion of other services in a RIO create a basis for NICTA to determine the supply terms of any non-declared services.

4.5 Draft standard contract in Annex A

Annex A to the proposed Rules contain what appears to be a “pro forma” interconnection agreement. Digicel has two concerns:

- (a) First, NICTA appears to equate the pro forma interconnection agreement with a RIO. This is not correct. A RIO could take the form of a standard interconnection agreement, but need not do so. A RIO is simply an undertaking to NICTA that the access provider will supply one or more declared services on the terms contained in the RIO. For convenience, a standard contract could form a part of the RIO, but there is no necessity to do so.
- (b) Second, it is inappropriate for NICTA to publish a pro forma contract as part of its rules on the “form” of a RIO. Doing so privileges a very specific version of a multitude of possible legitimate contracts that an access provider may wish to use. The draft *pro forma* contract should not be seen as having any precedential value and neither its terms nor structure should be binding on any party.
- (c) Finally, Digicel is concerned that the pro forma contract that has been proposed by NICTA may not be suitable for the specific circumstances that exist in PNG.

4.6 Specific comments on the draft Rules

Digicel has set out specific comments on the draft Rules in Schedule 1.

5 Process for NICTA to accept or reject RIO

In terms of rules that may be useful in relation to the form of a draft RIO, Digicel suggests that any draft RIO that is submitted by an access seeker for consideration by NICTA should include a document that explains the purpose and operation of a RIO including any supporting data and analysis that is relevant (particularly in relation to price) to justify the terms that have been proposed. This would add discipline to the RIO process and ensure that the required RIO consultation is as effective as possible.

6 Conclusion

For the reasons set out in this submission, the proposed rule on a “form” of a RIO is deeply problematic. It has been prepared based on a flawed understanding of the legal framework and limited understanding of the nature and purpose of a RIO. A RIO is fundamentally an undertaking to NICTA that has the potentially useful role of allowing an access provider to manage regulatory uncertainty. A RIO is not a standard contract between an access provider and an access seeker.

Digicel respectfully suggests that NICTA should withdraw the proposed rule or defer its consideration for the time being. In any event, the present consultation cannot proceed based on the proposed rule. If NICTA wishes to continue the consultation, the draft rule needs to be revised substantially.

NICTA should give access providers an opportunity to lodge a RIO under Division 5 of Part VI of the Act prior to considering the development of any rules in relation to the form that RIOs should take. The experience from considering and assessing a number of RIOs would give NICTA a better perspective of the way RIOs are used, and to propose rules on the form of a RIO that would be helpful to market participants and not discouraged access providers from lodging a RIO.

Schedule 1 Draft Rules **[Digicel's comments]**

Disclaimer: Digicel has marked up changes to the draft Rules for convenience only, to indicate its comments on the draft Rules. Digicel does not necessarily endorse a version of the draft Rules in which the changes are accepted.

[DRAFT] Reference Interconnection Offer Rule, 2011

1. Name of rule

- (1) This rule is the *Reference Interconnection Offer Rule, 2011*.

2. Preliminary

- (1) This Rule is made by NICTA pursuant to its powers and responsibilities under sections 218 and 141 of the *National Information and Communications Technology Act 2009*.

3. Commencement

- (1) This Rule commences on the date on which its existence is notified in the National Gazette.

4. Interpretation

- (1) In this Rule, unless the contrary intention appears:
 - “Act” means the *National Information and Communications Technology Act, 2009* and includes any regulation made under that Act;
 - “access provider” has the meaning given to it by section 136 of the Act;
 - “access seeker” has the meaning given to it by section 125 of the Act;
 - “RIO” means a reference interconnection offer as described in section 141 of the Act.
- (2) Each of the following terms used in this Rule has the meaning given to it in section 4 of the Act:
 - access;
 - declared service;
 - NICTA;
 - price;
 - publish;

- wholesale service.

5. Rules

- (1) A RIO may relate to one or more declared services. ~~A RIO may also specify terms and conditions that relate to the supply of access to a wholesale service that is not a declared service.~~

[A RIO is an undertaking in respect of the supply of declared services only.]

- (2) ~~If an access provider supplies multiple declared services and intends for more than one of those declared services to be covered by RIOs, it will prepare and submit to NICTA a single RIO document that covers all of the declared services that the access providers wishes to be covered by a RIO. In the event that NICTA has already accepted a RIO that was previously submitted by that access provider (in relation to either the same or a different declared service), the access provider will prepare and submit variation to that existing RIO to expand its scope to cover the additional declared service.~~

[Does not go to form, imposes an artificial restriction not contemplated in the Act.]

- (3) ~~For the purposes of subsection 141(1)(a) of the Act, a RIO should contain both price and non-price terms and conditions. A RIO may contain price terms, non-price terms and conditions, or both.~~

[Beyond NICTA's power to restrict RIOs to containing both price and non-price terms when section 141(3) clearly allows a RIO to cover only price-related terms or only non-price terms and conditions.]

- (4) ~~The prices and charges made available by an access provider under a RIO should be available to all access seekers on a non-discriminatory basis. In the event that the access provider reaches an agreement with any single access seeker on new or different rates for any declared service covered by the RIO, then the access provider should make those rates available to all access seekers.~~

[Does not go to form. Also imposes a general prohibition on non-discrimination that goes beyond the non-discrimination obligation in section 136.]

- (5) ~~Nothing in subsections 5(3) and 5(4) above shall prevent a RIO from including alternative prices that reflect volume or other factors associated with the ordering or delivery of a declared service.~~

- (6) A RIO shall be presented in the form of an undertaking to NICTA. It may (but does not have to) contain a standard contract with and should have the following a general structure comprising of all or any of the following parts:

- (i) 'general clauses', which set out the general conditions of the RIO standard contract;

(ii) one or more 'parts', which are the sections of the RIO that set out the non-price terms and conditions that are specific to particular declared services, ~~and, for each service, defines the services and addresses the following aspects to the extent that they differ from the general terms and conditions that apply to all declared services:~~

- ~~a. — call handover;~~
- ~~b. — supply conditions;~~
- ~~c. — technical requirements;~~
- ~~d. — fault rectification and service restoration; —~~
- ~~e. — calling line identification;~~
- ~~f. — routing principles;~~
- ~~g. — charging.~~

[Goes to content, not form.]

(iii) a series of 'attachments' (as many as are necessary), which set out the general non-price terms and conditions that apply to all declared services that are covered by the RIO, or to all declared services of a particular type, ~~and which address the following aspects as a minimum:~~

- ~~(a) — the procedures that will apply to the handling of requests from access seekers for the supply declared services or for changes to the existing supply of declared services;~~
- ~~(b) — ordering and provisioning processes;~~
- ~~(c) — traffic management principles and processes;~~
- ~~(d) — relevant technical and standardisation matters;~~
- ~~(e) — billing processes and procedures;~~
- ~~(f) — fault detection, handling and rectification processes and procedures;~~
- ~~(g) — matters relating to network protection and system safety; and~~
- ~~(h) — dispute resolution processes and procedures.~~

[Goes to content, not form.]

(iv) a series of 'schedules' (as many as are necessary), which set out additional conditions and particulars that apply generally; ~~and, such as:~~

- ~~(i) — the points of interconnection;~~
- ~~(ii) — the contact details for relevant personnel;~~
- ~~(iii) — relevant technical specifications;~~
- ~~(iv) — interconnection testing procedures and timeframes;~~

~~(v) —relevant forms and templates; and~~

[Goes to content, not form.]

(v) a 'pricing schedule', which lists, for each of the declared services covered by the RIO, the applicable wholesale prices and charges and any other relevant pricing information.

~~(7) —For the purposes of guidance only, a draft RIO is provided at Annex A which reflects the acceptable form for RIOs specified in subsection 5(6). An access seeker may prepare and submit to NICTA a RIO that is based on the example provided at Annex A.~~

[Goes to content, not form.]

(8) An access provider must publish a copy of its RIO on its website, and thereafter maintain its availability there, within one week of receiving written notice from NICTA under subsection 142(6) of the Act informing the access provider that NICTA has accepted its RIO.

~~Annex A: Guidance on an acceptable form for a RIO~~

~~The following pages contain an outline of an acceptable form for a RIO that is to be submitted to NICTA for the purposes of section 142 of the Act. It is provided for the purposes of guidance only. RIOs that adopt a similar form and/or contain different provisions may also be accepted by NICTA. All RIOs that are submitted to NICTA will be considered against the criteria identified in section 142 of the Act.~~

[Annex A goes well beyond form. It is inappropriate for NICTA to publish a standard contract as part of its rules on the form of a RIO. It privileges a very specific version of a multitude of possible legitimate standard contracts that an access provider may wish to employ.]