

DIGICEL (PNG) LIMITED

Submission to NICTA

***Guidelines on Sharing of Telecommunications Towers & Service Specific
Pricing Principles for UAS Funded Towers, issued on 8 April 2019***

Monday, 3 June 2019

***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. Introduction

1. This submission sets out Digicel's initial comments with respect to NICTA's Discussion Paper titled *Guidelines on Sharing of Telecommunications Towers & Service Specific Pricing Principles for UAS Funded Towers* ("**Discussion Paper**"), which was issued on 8 April 2019.
2. In making this submission, Digicel notes its support the establishment of guidelines that assist the smooth operation of industry and understanding of NICTA's intentions with respect to the exercise of its powers and duties under the National Information and Communication Technology Act 2009 ("**Act**").
3. In that regard, Digicel welcomes the Discussion Paper. However, Digicel is concerned that, with respect to NICTA's treatment of roaming and backhaul transmission services, what has been proposed is outside of the ambit of the Act.
4. Digicel is also concerned that some aspects of the proposed Service Specific Pricing Principles go beyond what is intended by the Act and would, if adopted, not be enforceable.
5. Further details of Digicel's concerns are set out below.

B. Draft Tower Sharing Guideline – Specific Comments

1. Section 7.2
 - a. Digicel notes NICTA's position that the Proposed Tower Sharing Guideline ("**Draft Guideline**"):

*"... does not signal any regulatory change or any move to introduce any obligations to share towers and associated facilities, such as sites and access roads, over and above the limited extent to which such obligations exist at present. **The guideline sets out the special sharing obligations that arise when sites and towers have been built with full or part funding from the Universal Access and Service Fund (UAS Fund).**"* (emphasis added)
 - b. Accordingly, Digicel understands that the Draft Guideline is not intended to apply to any sites or towers that have not been constructed pursuant to the terms of Project Agreement as that term is defined in the Act. These comments are provided in that context.
2. Section 8.3
 - a. Digicel notes NICTA's comments in section 8.3 of the Draft Guideline. While Digicel respects NICTA's desire to include the terms described in that section, Digicel notes that the final terms of any Project Agreement will ultimately be the result of what is

agreed pursuant to and in accordance with the processes and requirements set out in the Act.

- b. Digicel further notes that only services that are *facilities access services* and which are supplied *by means of any facility constructed under a Project Agreement* are deemed to be declared for the purposes of section 131(5) of the Act.
- c. However, neither roaming services nor backhaul transmission services are “facilities access services” as that term is defined under the Act, which defines facilities access services as:

*“the supply of access to, or use of, a **facility**, but only to the extent that the facility may be used to supply a network service”* (emphasis added)

- d. The Act further defines “facility” as:

*“any element or combination of elements of **physical infrastructure** (including any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, pit, pole or other structure or thing) used principally for, or in connection with, the provision of a network service, but excluding any customer equipment”* (emphasis added)

- e. Accordingly, whether or not a backhaul transmission service or “a roaming service to the nearest feasible network node in the access seeker’s mobile network” is provided under a Project Agreement is purely a commercial matter. While a party may choose to enter into a Project Agreement on the basis that it provided such a service, there is no regulatory obligation for it to do so.

3. Section 9.2

- a. Digicel agrees NICTA should refrain from seeking to impose facilities access charges under the “standard clauses in UAS Project Agreements”. That is because any such charges will be highly dependent on the nature of the specific service or services that may be sought by an access seeker and which, in most cases, will be unknown at the time the Project Agreement is concluded.
- b. Nevertheless, Digicel suggests it would be appropriate for NICTA to expressly contemplate the possibility that a party to a Project Agreement may wish, in parallel with entering into that Agreement, also make a Reference Interconnection Offer under section 141 of the Act in respect of any facilities access services that may be provided by means of the facilities constructed under a Project Agreement.

4. Section 9.3

- a. As noted above, neither backhaul transmission services nor roaming services are facilities access services and are not deemed to be declared under section 131(5) of

the Act. Accordingly, subsection (d) of section 9.3 of the Draft Guideline is inappropriate and should be deleted.

5. Section 11 (Annex A)

- a. As noted above, neither backhaul transmission services nor roaming services are facilities access services and are not deemed to be declared under section 131(5) of the Act. Accordingly, the section of Annex A referring to those services is inappropriate and should be deleted.

C. Annex B – Draft Service-Specific Pricing Principles for UAS-Funded Towers Determination – Specific Comments

1. Section 4 –

- a. The reference to “facility” should be amended to be a reference to a “tower” as that is the specific type of facility that is the subject of the Draft Service-Specific Pricing Principles for UAS-Funded Towers Determination (“**Draft Pricing Principles Determination**”).
- b. Furthermore, access to a backhaul transmission service and other services described in sections 4(a) – (e) should not automatically be included in the Draft Pricing Principles Determination unless the facilities that are used to provide each service are also constructed under the relevant Project Agreement.
- c. Note that section 131(5) of the Act provides that “*all facilities access services that may be supplied by means of any facility constructed under a Project Agreement for the life of that facility*” (emphasis added) are deemed to be declared. This creates a relationship between the facilities access services and the specific facility that is specified pursuant to a Project Agreement. Seeking to broaden the scope of that facility in the way NICTA is proposing would essentially mean that any service provided by any party (including those provided by access seekers) would be deemed to be declared simply by virtue of having some connection with the facility that is constructed under a Project Agreement.
- d. Importantly, as submitted above, backhaul transmission services are not a “facilities access service” for the purposes of the Act.
- e. Accordingly, backhaul transmission services cannot properly be considered to be a “facility” for the purposes of the Act and access to such services cannot be properly considered to be a “facilities access service” that is deemed to be declared pursuant to section 131(5) of the Act. This means that NICTA does not have any regulatory power to determine the price terms of provision of backhaul transmission services in respect of backhaul that is provided from towers that are constructed under a Project Agreement.

2. Section 5

- a. Digicel notes that the General Pricing Principles specified in section 134 of the Act provide considerable detail on the cost-based pricing principles that are required to be followed when determining the terms of access to a declared service. Specifically

- i. “cost-based pricing” is defined to mean:

“(a) the application of the cost recovery principle; and

*(b) **the need for the pricing to make a fair and reasonable contribution to the access provider's common costs; and***

(c) the need for the recovery of the reasonable costs, incurred in the provision of access and interconnection by the access provider, that would not have been otherwise incurred but for the requirement to provide such access or interconnection; and

(d) the availability and capacity of the facilities operated by the access provider and the timeframe reasonably required to provide access to additional capacity; and

*(e) **any other factors that NICTA considers relevant, to the extent that such factors are consistent with the cost-recovery principle and Subsections (a) to (d) of this definition.**” (emphasis added)*

- ii. The “cost recovery principle” is defined to mean:

“[a] declared service should –

(i) be set so as to generate expected revenue from that declared service that is sufficient to meet the efficient costs of providing access to that declared service; and

(ii) include a reasonable return on investment, over the economic life of the assets employed, commensurate with the regulatory and commercial risks involved, this principle is known as the “cost recovery principle””

- iii. “Efficient costs” is defined to mean:

“efficient costs” include the direct and indirectly attributable capital, operating and maintenance costs actually incurred by the access provider in providing the declared service to itself and access seekers (including a reasonable contribution to any common costs), unless NICTA determines that such costs are inefficient having regard to the efficiency objective and any evidence before it.”

- b. Given the detailed nature of these definitions. Digicel submits that the principal purpose of the Draft Pricing Principles Determination should not be to “rewrite” or replace the principles already set out in the Act but to provide details of any other factors NICTA considers to be relevant pursuant to section 134(2)(e) of the Act.
- c. It is in this context that Digicel respectfully submits NICTA has erred by, in effect, seeking to rewrite or ignore various provisions of the Act.
- d. For example, in section 5(4) of the Draft Pricing Principles Determination, NICTA has sought to prevent the inclusion of *“indirect costs and overheads, such as the costs associated with the access provider’s headquarters operations and back office functions”*.
- e. However, the Act’s definition of “efficient costs” expressly includes *“direct and indirectly attributable capital, operating and maintenance costs”* and *“a reasonable contribution to any common costs”*. In Digicel’s view *“indirect costs and overheads”* fall squarely within the ambit of this definition.

3. Section 6

Digicel further submits that this error has been repeated in other parts of the Draft Pricing Principles Determination. For example, section 6(2)(d) seeks to only permit operating and maintenance costs that are *“directly attributable to the operation of the tower and site”* (emphasis added). This is in direct contravention of the Act’s definition of “efficient costs” which provides that both direct *and indirectly* attributable costs may be recovered.

4. Sections 7 & 8

It also appears that, in sections 7 and 8 of the Draft Pricing Principles Determination, NICTA has sought to exclude the capital costs of onsite shelters and access roads from the calculation of annual access charges. If so, then that is also inconsistent with the General Pricing Principles specified in the Act. In Digicel’s submission the access provider is entitled to recover a fair contribution to all of its capital costs that are either directly or indirectly attributable in the provision of the service.

5. Section 9

With respect to section 9 of the Draft Pricing Principles Determination Digicel submits that in most, if not all, cases the operator will have been required to establish its own power supply

for the site. Given that, access to power should be provided on the same basis as access to other facilities. That is, where power capacity is available and is provided to the access seeker, the access provider is entitled to recover both the capital and the operating costs of that provision in accordance with the General Pricing Principles.

6. Section 10

As noted above, Digicel disagrees that backhaul transmission services should be included within the ambit of the Draft Pricing Principles Determination and it is not a facilities access service and, even if it was, would only be relevant in cases where all of the facilities that have been used as a means to provide such services have been constructed under a Project Agreement. In such a case the should be covered by a separate set of Service Specific Pricing Principles.