

---

**DIGICEL (PNG) LIMITED**

**Submission to NICTA**

**Public consultation into proposed amendments to the Standard and  
Special Conditions relating to Digicel (PNG) Limited**

**Friday, 1 March 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. Executive Summary

---

1. On 20 December 2018, NICTA released a Consultation Paper in which it advised it was considering making the following proposed rules under Sections 55 and 218 of the *National Information and Communications Technology Act 2009 (Act)*:
  - a. Draft Operator Licence Conditions (Standard Operator Licence Conditions) 2018;
  - b. Draft Operator Licence Conditions (Kumul Telikom Holdings Limited) Rules 2018; and
  - c. Draft Operator Licence Conditions (Digicel (PNG) Limited) Rules 2018,  
(singularly or together, **Proposed Rules**).
2. Relevantly, the Consultation Paper did not provide any reasons as to why the licence conditions contained in the existing *Standard and Special Conditions of Individual Licences Rule, 2011 (existing licence conditions)* are considered to be unsatisfactory and require amendment or replacement or why the proposed variation to existing licence terms are considered by NICTA to be consistent with the Act.
3. The Proposed Rules, insofar as they apply to Kumul Telikom Holdings Limited (**KTH**), are incomplete and there is no reason provided as to why terms in relation to network coverage obligations differ from those that apply to Digicel.
4. There is no explanation as to why NICTA appears to have considered that it is only necessary to impose operator specific licence conditions on KTH and Digicel and not other holders of individual licences.
5. In the circumstances, Digicel submits that it has not been afforded a fair or meaningful opportunity to consider the proposed changes which, on their face and insofar as they relate to Digicel:
  - a. amount to a material amendment to Digicel's individual licences;
  - b. are discriminatory in effect;
  - c. are harsh and oppressive vis-à-vis Digicel's network and services, and
  - d. if implemented on their current terms, would impose obligations on Digicel which, with respect, NICTA is not lawfully entitled to impose.
6. Digicel submits that, until such time as NICTA is in a position to provide a properly reasoned consultation document, the current consultation is put on hold.

7. Digicel further submits that any licence amendments that may be proposed in the future are in accordance with the requirements of the Act.
8. In the absence of such reasons and based on the apparent unlawfulness of what has been proposed, Digicel submits that the Proposed Rules should not be adopted by NICTA.

## B. Introduction

---

9. The purpose of this submission is to respond to the Proposed Rules issued by the National Information and Communication Technology Authority (NICTA) in its Consultation Paper that was issued on 20 December 2018 (**Discussion Paper**) in relation to its public consultation into three proposed rules which NICTA is considering (**Public Consultation**).
10. This submission does not contain any information that is confidential or commercially sensitive to Digicel. Accordingly, this submission may be disclosed publicly.
11. Digicel looks forward to being able to review and comment on any submissions being made by other parties and to seeing a draft decision from NICTA prior to it issuing a directive or otherwise.
12. Digicel is concerned that apart from stating the basis for its review of the existing Rules, that is, *"to reflect the current state of development of the sector and the changes that have occurred since 2011"*, NICTA has not:
  - a. provided reasons for the proposed changes;
  - b. explained why the proposed changes are necessary; or
  - c. explained why NICTA considers the proposed changes are consistent with the Act.
13. These reasons are a fundamental requirement of the public consultation process in order to afford Digicel (and other stakeholders) a fair and meaningful opportunity to comment on NICTA's objectives which, in the circumstances, remain uncertain. In the premise, Digicel submits that it has not been afforded a fair and meaningful opportunity to be heard on Proposed Rules and requests that such reasons, if any, be made available to it.
14. Digicel is also concerned that the special terms and conditions contained in the Proposed Rules have been targeted solely at Digicel and KTH. This is despite there being more than 70 other Individual Network Licensees and 60 Individual Application Licensees being listed on the NICTA website.
15. Such an apparently discriminatory approach is inconsistent with the Regulatory Principles mandated by section 3 of the of the Act and also the specific requirements of section 55 of the Act.
16. For example, section 3(b)(v) of the Act provides:

*"... regulatory measures should be ... non-discriminatory in application such that, to the extent appropriate, similarly situated ICT licensees are treated on an equivalent basis subject to the recognition of legitimate differences"* (emphasis added)

17. Section 55 of the Act is drafted consistently with this principle as follows:

*"55. TERMS AND CONDITIONS OF AN INDIVIDUAL LICENCE.*

*(1) NICTA shall make rules setting out the standard terms and conditions, **and any special terms and conditions**, for individual licences.*

*(2) All **individual licences** shall include the standard licence conditions set out in rules made under Subsection (1).*

*(3) Special terms and conditions only apply to those **individual licences** to which they are specified to apply in the rules."*  
(emphasis added)

18. Importantly, all references to special terms and conditions of individual licences are made in respect of the licences themselves and not specific individual licensees. Digicel considers this to be an appropriate safeguard to:

- a. ensure that specific licensees are not subject to onerous conditions that do not apply to other individual licensees; and
- b. prevent cherry picking by other existing licensees or new entrants who would seek to gain a competitive advantage from discriminatory licence conditions. This is especially the case in respect of coverage obligations. That is because it is considerably more costly to establish and provide coverage in rural and remote areas than it is to provide coverage in urban areas. In the event that one individual licensee is required to carry the burden of providing more extensive coverage than other licensees, then its average costs of providing service will necessarily be higher and it will be at a competitive disadvantage to those licensees that are able to only provide coverage in lower cost urban areas.

19. A discriminatory approach by NICTA towards the coverage obligations of specific individual licensees is also likely to have far reaching effects with respect to the proper interpretation and application of Parts V and VI of the Act relating to Universal Access and Interconnection and Wholesale Access.

### **C. Proposed Operator Licence Conditions (Standard Licence Conditions) Rules 2018**

20. In the absence of reasons why NICTA considers the new proposals to be relevant, Digicel is not in a position to submit whether the proposals are relevant, meet the requirements of the Act or are otherwise necessary.

21. In that regard, Digicel requests NICTA provide reasons for the proposals.

## **D. Proposed Operator Licence Conditions (Kumul Telikom Holdings Limited) Rules 2018**

22. Digicel notes NICTA's proposed amendments to the conditions and rules concerning KTH are incomplete and, in respect of proposed coverage obligations appear to be materially different to the licence conditions that have been proposed for Digicel for the same type of service.
23. Digicel further notes that no reasons have been provided for the conditions that have been proposed for KTH or why, in respect of network coverage obligations, different terms have been proposed than those which NICTA has proposed to be applied to Digicel.
24. Accordingly, Digicel does not consider that it has been provided with a fair or meaningful opportunity to consider and comment on the licence conditions that have been proposed for KTH and requests that NICTA provide a complete set of proposed conditions including the reasons for them, including as to why there is a material difference in the network coverage obligations that have been proposed.

## **E. Proposed Operator Licence Conditions (Digicel (PNG) Limited) Rules 2018**

25. The Proposed Rules as they relate to Digicel will directly – negatively – impact upon Digicel's network and services.

### *Public Number Directory*

26. NICTA proposes, at Part II of the draft, a mandatory requirement for Digicel to provide directory listings free of charge for its own customers and to include customers of other operators, also free of charge. There is no reason given for this proposed obligation and no indication that any research has been undertaken to establish whether there would be any demand or benefits arising from for the provision of such a service that would outweigh the costs of its provision.
27. The obligation to include directory information of other applications licensees is also provided without any explanation or detail as to how that information is to be provided by those other applications licensees.
28. Digicel notes that access to the directory information is required to be made available free of charge via a voice-based directory enquiry service and an internet-based directory enquiry service. Digicel further notes the directory service is required to be in place by 1 January 2020.
29. Imposing an obligation on Digicel to establish and to run a directory information service would be unduly cumbersome and not practically possible without the cooperation of the entire industry or in the timeframe stipulated. As such it would be harsh and oppressive

as it applies to Digicel. In the absence of reasons why this proposal is being advanced by NICTA, Digicel considers there to be no good reason and therefore, on that basis alone, the proposal should not be adopted at this time.

30. If NICTA is seriously interested in establishing an industry-wide integrated public number database and directory service, then Digicel submits it should be established in accordance with the requirements of section 187 of the Act and be the subject of a separate meaningful consultation with industry as a whole.

#### *Network Coverage*

31. As stated above, Digicel submits that it would be unlawful for NICTA to seek to impose coverage obligations on Digicel that are more extensive than those which are imposed on any other individual licensee.
32. Additionally, no reasons have been provided as to why Digicel should be subject to coverage obligations that are substantially more onerous than those that apply to any other individual licensee.
33. Insofar as the proposed obligation for Digicel to maintain its 2017 coverage levels is concerned, this proposal is oppressive as it impinges upon Digicel's legitimate rights to make informed decisions based on the commercial (including, amongst others, security) realities of the market. This is particularly oppressive to Digicel where its coverage obligations under the present regime have been exceeded whilst those of other operators not have been so and, again, no clear reason for the proposal having been advanced.
34. With respect to the proposal at Part III "Network Coverage", Digicel submits the 12-month notice proposed to be required is cumbersome and unattainable in light of the operating environment in which Digicel operates. For one reason or other, e.g. security, a tower may need to be decommissioned and removed at much shorter notice. Digicel cannot reasonably be expected to await the expiry of such a notice period prior to taking steps to protect its property especially in circumstances where, with all due respect, NICTA has not proactively enforced Part XIV of the Act.

## **F. Conclusion**

35. Digicel submits that, until such time as NICTA is in a position to provide a properly reasoned consultation document, the current consultation is put on hold.
36. Digicel further submits that any licence amendments that may be proposed in the future are in accordance with the requirements of the Act.
37. In the absence of such reasons and based on the apparent unlawfulness of what has been proposed, Digicel submits that the Proposed Rules should not be adopted by NICTA.

38. Digicel welcomes the opportunity to comment on the submissions of other stakeholders and looks forward to continuing to discuss these issues with NICTA as the Public Inquiry progresses.