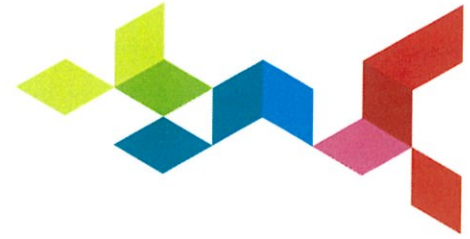


Friday, 8 September 2017

BY HAND / BY EMAIL

Mr Charles Punaha
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Dear Mr Punaha

Proposed Universal Access and Service Levy for 2017

1. We refer to NICTA's Consultation Paper on Proposed Universal Access and Service Levy for 2017, and which is dated 24 August 2017 ("**2017 Consultation Paper**"). The 2017 Consultation Paper was notified to Digicel by way of an email from NICTA to Digicel dated 31 August 2017 and which itself referred to a public notice that had been published on 30 August 2017 ("**Public Notice**").
2. The 2017 Consultation Paper is a document totalling 58 pages and includes a number of other documents including a document entitled *Draft Determination: 2017 Universal Access and Service Levy* ("**Draft Determination**"), annexed to which were the following documents:
 - a. *NICTA Consultation Paper on Universal Access and Service Projects 2017*, dated 23 December 2016 and which was published by NICTA on 6 January 2017 ("**2016 Consultation Paper**");
 - b. *NICTA's response to the comments received in response to the Consultation Paper on Universal Access and Service Projects for 2017 (23 December 2016)* ("**Response to Comments**"), which was purportedly issued on 19 May 2017;
 - c. *NICTA's Report on Proposed 2017 UAS Projects from NICTA to the UAS Board*, dated 26 April 2017; and
 - d. *The UAS Board's Report on Proposed 2017 UAS Projects from the UAS Board to the Minister*, dated 18 May 2017.
3. Importantly, none of these documents, other than the 2016 Consultation Paper, have previously been published by NICTA or otherwise made available to Digicel.
4. The 2017 Consultation Paper and Public Notice specify the due date for any submissions on the 2017 Consultation Paper to be "*noon Friday 8 September*", a period of only six business days from the time of notification to Digicel. This is despite the lengthy nature of the 2017 Consultation Paper and the potential impact on Digicel if the proposals in the Consultation Paper and Determination are given

effect. This short period of time is insufficient to afford Digicel a fair opportunity to review the 2017 Consultation Paper and to correct, contradict or comment on the information contained within it.

5. Moreover, NICTA has yet to respond meaningfully to the request by Digicel and other industry participants to provide additional information in relation to the 2016 Consultation Paper. This request was included in a letter dated 19 January 2017 to NICTA from nine operator licensees (including Digicel) which stated:

"We note in this regard that, over the Christmas break, NICTA has issued a consultation paper in relation to the establishment of UAS strategic goals and possible UAS projects for 2017. While this is a good first step and highlights the inadequate consultation up to this point, the consultation paper fails to provide sufficient detailed information to allow industry a fair opportunity to respond and also sets an unreasonable deadline by which industry is required to provide comments. This includes, for example, details of the projects that have been proposed and copies of the reports that have been referred to by NICTA in the consultation paper, including:

1. *Report on Determination of UAS Levy Fund Amount, Great Village Consultants; and*
2. *Rural Communications Project (P107782): Part 2 - Increased Access in Rural Areas: A Review of Circumstances, Drivers and Options for NICTA Consideration, April 2014.*

We therefore propose that this consultation be deferred until after the proposed industry meeting has taken place and that NICTA has provided the above information."

6. Nor has NICTA provided details of a Market Gap Analysis Study that was apparently undertaken in Q3 of 2014 by NICTA and its external advisors. As NICTA will be aware, Digicel asked to be provided with details of the Market Gap Analysis Study when it first came to light in previous NICTA correspondence in September 2015. That request has been repeated by Digicel on numerous occasions since that time, most recently at the meeting NICTA convened with industry on 31 January 2017 and in Digicel's letter to NICTA dated 28 February 2017.
7. As a result of the significant and continuing information gaps and the lack of time that has been afforded by NICTA, this letter must be considered to be Digicel's preliminary response to the 2017 Consultation Paper and Digicel reserves its rights to make further submissions or take any other action that it considers necessary to protect its legitimate interests in this matter.
8. In addition to the denial of natural justice and procedural fairness described above, Digicel is concerned that NICTA has not followed the clear procedures that are set out in the National Information and Communication Technology Act 2009 ("Act") with respect to the determination of any UAS Levy.

9. Section 108(1) of the Act sets out a number of tasks and pre-conditions that NICTA must undertake and satisfy in order to be able to set the amount of the UAS Levy to achieve the desired level of funding for the Universal Access and Service Fund for any particular fiscal year. These include:

- “(a) identify, develop and estimate the indicative cost of UAS Projects; **and***
- (b) receive from stakeholders submissions on proposals for UAS Projects; **and***
- (c) undertake public consultation, if NICTA considers it necessary or desirable, to identify UAS Projects and their indicative costing; **and***
- (d) estimate the proposed aggregate budget for all UAS Projects to be undertaken under this Part for the relevant period identified by the UAS Board; **and***
- (e) rank the UAS Projects identified and developed under Subsections (1)(a) or (b) in order of priority with regard to –*
 - (i) their affordability within the proposed budget; **and***
 - (ii) the remaining factors listed in Subsection (4); **and***
- (f) prepare for consideration by the UAS Board, a report which summarises the UAS Projects under consideration, their respective indicative costing, their proposed ranking (and the reasons for their ranking), and the proposed aggregate budget, as identified above.” (emphasis added)*

10. NICTA (along with the UAS Board) in assessing the ranking of UAS Projects, is also required, pursuant to section 108(4) of the Act, to have regard to the following factors:

- “(a) whether the proposed UAS Project would promote the objectives of the Universal Access and Service Fund; **and***
 - (b) the net benefits of the UAS Project to Papua New Guinea, taking into account any costs and detriments to any person; **and***
 - (c) whether the UAS Project is sustainable with a one-time capital subsidy; **and***
 - (d) whether the UAS Project would not otherwise occur but for a subsidy payment under this Part; **and***
 - (e) the likely efficiency and effectiveness of the proposed UAS Project and whether it, is financially and technically feasible; **and***
 - (f) any other information the UAS Board considers relevant; **and***
- shall ensure that –*
- (g) any UAS Project does not include services under a mandatory coverage obligation; **and***
 - (h) any UAS Project is not otherwise provided by a pre-existing UAS Project.” (emphasis added)*

11. These tasks are required to be completed before the UAS Board can complete its UAS Project Report to the Minister in accordance with the requirements of section 108(2) of the Act and for the Minister, pursuant to section 108(5) of the Act to review the UAS Project report and determine from the list which UAS Projects will be implemented within the proposed aggregate budget.
12. It is only once this process has been completed that the UAS Board can be in a position to determine the desired level of funding for the Universal Access and Service Fund for that year.
13. However, the process specified in the Act has not been followed. For example:
 - a. By NICTA's own admission, it has not received from stakeholders any submissions on proposals for UAS Projects¹ as is required under section 108(1)(b) of the Act. As such, serious questions arise in respect of the specific UAS Projects that have been proposed and whether the implementation of any UAS Projects is warranted at this time;
 - b. NICTA has not sought to ascertain whether any of the UAS Projects it has identified would not otherwise occur but for a subsidy payment as is required under section 108(4)(d) of the Act. This is despite NICTA being aware that operators such as Digicel continuing to make private investments in the extension and upgrade of their networks. NICTA has expressly recognised that these private investments in the Draft Determination, where it states:

"... since NICTA's initial analysis in 2014 of the likely telecommunications "access gap" in PNG that could be addressed through UAS Projects, there have been substantial increases in telecommunications coverage and access. This expansion in access and coverage was due in part to commercial activities of operators, and in part to projects implemented by NICTA, with World Bank funding."

However, despite this, no apparent effort has been made by NICTA to ascertain whether further planned "commercial activities of operators" will deliver the outcomes anticipated as a result of the UAS Projects that have been proposed in the 2017 Consultation Paper without the need for any additional funding. For example, Digicel is currently planning to upgrade more than 200 of its sites to LTE by the end of March 2018. This is being undertaken on a commercial basis without the need for any finding assistance and calls into question the relevance of NICTA's proposal in relation to "Accelerated Mobile Phone Expansion and Upgrades" which only assumes the upgrade of 40 sites.

Digicel further submits that NICTA and the UAS Board are wrong to dismiss alternative mechanisms for achieving the Government's UAS goals. These include a "pay or play" approach to the delivery of UAS Projects similar to that

¹ NICTA notes in its Response to Comments Paper that the only responses it received in relation to the 2016 Consultation Paper were from Mr Christopher Odorry and Digicel. Importantly, no proposals for specific UAS Projects were included in those submissions.

which has been successfully implemented in Vanuatu and which could be accommodated within the existing legislative framework in PNG.; and

- c. The Minister has yet to approve any UAS Projects for 2017 as is required under section 108(5) of the Act; and
 - d. NICTA has not considered other sources of funding that may be available to support any approved UAS projects, including funding from donor agencies. Such funding has been made available in the past and there is good reason to expect that additional funding would be made available for any further UAS Projects that are determined to be necessary.
14. In Digicel's submission, it is clear that NICTA has not followed the clear procedures that are specified in the Act and it is of utmost concern to Digicel that NICTA continues to hold the view "[t]here is no requirement in the Act for NICTA to consult with operator licensees or other parties in setting the percentage levy for any particular year under Subsection 107(2) of the Act"².
 15. Consequently, Digicel submits that NICTA and the UAS Board should, prior to consulting on the imposition of any potential UAS Levy, correct the procedural failures that have occurred to date and engage meaningfully with stakeholders in the consideration of whether any UAS Projects are warranted and, if so, how they may be funded in ways that are consistent with the objectives of the Act and the interests of operator licensees.
 16. Even if NICTA had correctly followed the procedures set out in the Act and the imposition of a UAS Levy was properly determined to be warranted, it is now out of time to impose a UAS Levy in respect of the 2017 fiscal year.
 17. Section 107(2) of the Act provides:

"NICTA shall set the Universal Access and Service Levy as a percentage of the net revenues of each operator licensee at a level, to be determined annually, to apply from the beginning of each fiscal year –

 - (a) to achieve the desired level of funding for the Universal Access and Service Fund for that year as advised to NICTA by the UAS Board, less any amounts paid by NICTA in the previous year under Section 32(2)(a); and*
 - (b) not exceeding a maximum percentage as prescribed in the regulations."* (emphasis added)
 18. In Digicel's submission, a proper interpretation and application of section 107(2) of the Act would require that any UAS Levy for 2017 would be determined and applied prior to the commencement of the 2017 fiscal year.
 19. Moreover, there is no reasonable prospect that any UAS Projects can be undertaken and completed within the 2017 fiscal year. This is despite NICTA's unfounded

² 2017 Consultation Paper at page 1.

assertion that “NICTA considers that it is feasible to tender, award and implement these projects and budget during the remainder of 2017”³.

20. Digicel’s view is based on its experience in participating in the World Bank funded projects that were established between 2013 and 2016 and which were administered by NICTA. The tender, award and implementation of those projects took many months and it is not reasonable to suggest there is any prospect that the current process could be completed or that tenders for similar projects could be concluded and implemented before the end of the 2017 fiscal year. The table below provides the relevant dates in relation to the projects referred to - it is apparent from the table that time between a bid notice and the signing of the contracts was quite significant (up to a year and more in some circumstances) and this does not even include the time to actually implement the project. This is a clear indication that the current expectation of NICTA to implement projects by the end of this year is overly optimistic and, in our view, unrealistic.

Project	Bid Invitation Notice	Bid Submission & Opening	Contract Signing following bid review and award
Rural Communications Project CSTB 2832	27 May 2013	10 September 2013	16 May 2014
3G Mobile Internet Project – CSTB 3336	25 May 2015	30 July 2015	17 August 2016
3G Mobile Internet Project Additional Funds – CSTB 3634	13 July 2016	16 August 2016	17 March 2017
Connect the Schools – NICTA-UAS-5061950-1-2016-1A	7 June 2017	12 July 2017	Yet to be awarded as at the date of this letter

21. Digicel therefore submits that, prior to proceeding to consider the imposition of any UAS Levy, NICTA and the UAS Board must correct the procedural and legal errors that have occurred to date, and in the event that a UAS Levy is subsequently determined to be warranted, any such Levy must not be applied any earlier than the 2018 fiscal year.
22. Digicel reserves all rights, including but not limited to challenging any purported imposition of a UAS levy for 2017..

³ Draft Determination at paragraph 28(b).

23. Digicel trusts that you find this submission useful and looks to continuing to work with NICTA to resolve the important issues that have been raised in this letter.

Yours sincerely, etc.

Oliver Coughlan
Group CEO
Digicel Group

A handwritten signature in black ink, appearing to read "Oliver Coughlan", with a horizontal line extending to the right.