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Mr Kila Gulo-Vui
Chief Executive Officer
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By Email & By Hand Delivery

Dear Sirs

SUBMISSIONS IN REPLY TO PUBLIC CONSULTATION ON DRAFT AMENDED WHOLESALE PRICING PRINCIPLES FOR BROADBAND CAPACITY SERVICES AND INTERNATIONAL SUBMARINE CABLE SERVICES

Thank you for the opportunity to make submissions in reply to those made by other parties respecting the said Public Consultation ("**Draft Determination**").

In the event that any such party seeks to raise a new issue(s) at this stage of the consultation process, Digicel would expect to be afforded a fair opportunity to respond to those new issues.

Digicel's submissions herein are consistent with and rely upon our initial submission to NICTA dated 31 August 2020 ("**Digicel Submission**"). Importantly, nothing that has been raised in the DataCo Submission gives cause for us to change our views on any aspect thereof.

*Issues Raised by PNG DataCo Limited ("**DataCo**")*

The DataCo submission appears to raise four main issues in respect of the Draft Determination. We comment on each as follows:

1. Single Price for all Cables

The DataCo Submission asserts that "*the PNG submarine cables provide mutual redundancy and should be considered as a single system*". However, in practice, this is not the basis on which DataCo supplies its services. Specifically, the July 2020 service pricing proposed by DataCo expressly states that "*This service is unprotected. Protection will be at additional cost*". In other words, DataCo is not offering any benefit to its customers that might otherwise arise from having access to multiple cable systems unless they pay a premium but - as yet - unstated additional price. Digicel further notes DataCo's statement that:

"... international connectivity options will be further enhanced with extensions of the Kumul system to Jayapura (Indonesia and then Singapore)

and to Taro (then Honiara and Sydney). As these options are deployed the corresponding costs and volumes can be added into the international cable system cost models.” (emphasis added).

From this statement it appears that DataCo intends to make its customers pay for these additional costs whether or not they use or benefit from those additional “connectivity options”.

In Digicel’s submission, such an approach is wrong in principle as it would mean access seekers end up facing an unfair cost burden whilst DataCo is rewarded for all of its past, present and future investment decisions, whether or not they are efficient or in the best interests of Papua New Guinea.

As we noted in the Digicel Submission, the reason for establishing a single price for all international cable systems is that the price should be set on the basis of the reasonably efficient costs of providing the service. Such efficient costs are most likely to be reflected in the costs of the recently commissioned Coral Sea Cable.

Digicel strongly disagrees with DataCo’s apparently preferred approach whereby all of its costs for all of the cables are loaded into a single price, whether or not those costs have been efficiently incurred. In our view, such an approach would be contrary to the General Pricing Principles and may also violate Section 58 of the *Independent Consumer and Competition Commission Act 2002* as DataCo would, in effect, be taking advantage of its market power to require access seekers to pay for a service they do not require in order to access a declared service.

In Digicel’s respectful submission, there are only two reasonable courses of action available to NICTA to resolve this matter. Either:

- (i) the service specific pricing principles specify a single price based on the reasonably efficient costs of providing the service (as indicated by the Coral Sea Cable when assessed on a stand-alone basis), or
- (ii) each cable should be treated separately with individual maximum prices specified for each cable.

Customers would then be able to choose which cable they preferred to access based on their needs at the time.

2. Maximum Average Price

We maintain our view set out in the Digicel Submission, that specifying a maximum average price is inappropriate and will be unworkable. DataCo’s further redacted submissions in respect of cost and volume information only serves to highlight Digicel’s concerns in respect of DataCo’s ability to game the maximum average price approach that has been suggested.

We also rely on a Memorandum prepared by CEG–Asia Pacific that has been provided previously to NICTA, and which is enclosed herewith for ease of convenience. That Memorandum highlighted a range of serious problems with the cost modelling approach adopted by DataCo and which we understand to have been used by NICTA to underpin the proposed Maximum Average Price approach. As CEG noted in that Memorandum:

“As discussed, there are some other fundamental issues with the model, including the choice of modelling method which does not appear to accord

with the legislative principles in PNG. In addition, the proposal in the RIO for access seekers to insulate DataCo from all volume risk is highly unconventional in regulatory decisions and no detail is provided as to how this will be independently assessed, and price adjustments made. We can provide you further detail on these in due course.”

The fundamental issues that exist in respect of DataCo’s cost modelling approach must first be resolved before any decision is made by NICTA in respect of the adoption of a Maximum Average Price for the declared services.

3. Commencement Date

Digicel agrees with DataCo’s view that it would be inappropriate to backdate the commencement of any amended service specific pricing principles, but not for the reason proposed by DataCo. As stated in the Digicel Submission, it would be contrary to the requirements of the *National Information and Communication Technology Act 2009 (“Act”)* to amend service specific pricing principles with retrospective effect.

4. Service Definitions

DataCo has sought to raise an issue in respect of service definitions when, in Digicel’s submission, no such issue exists. The services that were declared pursuant to the Minister’s declarations in 2019 clearly do not prevent the combination of international submarine cable transmission capacity service and the wholesale broadband capacity service from being combined into a single service. In fact, the only part of the service that may (but not necessarily) fall outside the definitions adopted in the declarations is the IP Transit component of the service. IP Transit costs are very low compared with the overall cost of the service provided by DataCo and can either be specified separately or included in any Maximum Price that is determined in the service specific pricing principles for the declared service.

5. The Cost Mark Up

The DataCo submission includes some largely redacted comments in respect of mark ups to the costs it claims through its undisclosed cost modelling. Regrettably, because DataCo has chosen to withhold nearly all of its cost modelling information, it is not possible for Digicel to make any detailed comments at this time save to refer NICTA to the CEG–Asia Pacific Memorandum. That Memorandum details the minimum information required to be disclosed in order for Digicel to be afforded a reasonable opportunity to review and correct, contradict or comment on critical information that is apparently being relied upon by NICTA.

Issues Raised by Telikom PNG Limited (“Telikom”)

6. Status of *Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019*

In the background section of its submission, Telikom appears to consider that the *Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019 (“2019 Determination”)* has been stayed by NICTA following a decision by the ICT Appeals Panel to affirm the 2019 Determination. This is incorrect. As a matter of law, the 2019 Determination is in full force and effect and will remain so unless and until NICTA amends it in accordance with the requirements of Section 135 of

the Act.

7. Single Price for all Cables

Digicel agrees with Telikom's proposed approach whereby a separate [maximum] price should be established for each cable system. Such an approach would be consistent with submissions that have already been made by Digicel on this issue.

8. Maximum Average Price

Digicel also agrees with Telikom's concerns in respect of NICTA's proposal to set a maximum average price for access.

9. Commencement Date

Digicel agrees that the Commencement Date cannot be 1 September 2020. In our view the Commencement Date must be deferred to a date that is no earlier than the date of any final determination by NICTA.

10. Eligibility to be considered as an Access Seeker

Telikom raises a valid concern in respect of what we understand to be an emerging practice, whereby end-users of DataCo's declared services are being granted licences by NICTA so that they may take advantage of DataCo's wholesale pricing directly without being required to purchase services through another service provider. Digicel further understands that DataCo may be encouraging such a practice in order to limit other service providers from being able to compete in the supply of services provided by DataCo.

The licensing provisions of the Act are clearly intended to apply to persons wishing to exercise a facilities right, or supply any facilities access service, or supply any network service, applications service or content service. They are not, in Digicel's respectful submission, intended to be used as a mechanism by end-users of such services to obtain access to declared services on preferential terms.

This is an important issue that warrants NICTA's further, urgent, consideration. NICTA should deal with it expeditiously in order to avoid unintentionally becoming a party to attempts to undermine service provider competition, or inadvertently facilitating the engagement of DataCo in what appears to be an anti-competitive margin squeeze.

11. Inter-relationship Between the Service Specific Pricing Principles and the DataCo Proposed RIO

Finally, Digicel notes Telikom's apparent preference that NICTA conclude this proceeding and its consideration of the DataCo RIO *"at the same time"*.

Digicel strongly disagrees with such an approach and considers that, as a matter of principle and as a matter of law, the service specific pricing principles must be established before DataCo's RIO is given final consideration. Our reasons for holding this view are that:

- a. It would be illogical for NICTA to consider RIO pricing before the principles applying to such pricing have been established.

- b. This is fortified by Section 142(5)(b)(iv) of the Act, which requires that NICTA must not approve a RIO unless it is satisfied that it is “*consistent with the general pricing principles and any service-specific pricing principles*”. This clearly indicates a legal expectation that any RIO will be considered in the context of service specific pricing principles that exist at the time of the RIO application.
- c. It would also be plainly wrong to try and retrospectively “fit” service specific pricing principles with a RIO that had been prepared by an access provider. Importantly, a RIO is a written undertaking by a service provider setting out the commercial terms on which they would be willing to provide a declared service. They represent that access provider’s (necessarily) self-interested view of the terms on which they would prefer to provide a declared service. This commercially oriented view of the prices that a service provider wishes to charge for its services may not be the same as, or reflect, a Regulator’s properly considered view of the principles that should apply to the calculation of those prices.
- d. Prioritising the RIO Consultation ahead of the SSPP Consultation may be taken to suggest that NICTA has predetermined the outcome of the SSPP Consultation and bring the SSPP Consultation process itself into question.

We look forward to your consideration of our views and to receiving NICTA’s final decision in this matter in due course.

Yours faithfully
Digicel (PNG) Limited



Michael Henao
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