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30 June 2021

Mr Kila Gulo-Vui
Chief Executive Officer
National Information & Communications Technology Authority
Punaha ICT Haus
Frangipani Street
Hohola
National Capital District

By Email and By Hand Delivery

Dear Mr Gulo-Vui

**PUBLIC CONSULTATION ON REVISED REFERENCE INTERCONNECTION OFFER FROM PNG DATACO LIMITED
ON VARIOUS WHOLESALE ACCESS SERVICES**

Please find *enclosed* Digicel PNG Limited's submission on NICTA's Discussion Paper titled *Public consultation on Reference Interconnection Offer from PNG DataCo Limited on various wholesale access services* issued on 21 May 2021.

We look forward to your consideration of Digicel's submission and welcome any further opportunities to discuss our views.

Should there be any questions, please do not hesitate to contact us.

Yours faithfully
Digicel (PNG) Limited

A blue ink signature of Michael Henao, consisting of a stylized 'M' and 'H' intertwined.

Michael Henao
Head of Legal & Regulatory

DIGICEL (PNG) LIMITED

Submission to NICTA

***Public consultation on Revised Reference Interconnection Offer
from PNG DataCo Limited on various wholesale access services***

30 June 2021

***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 and Preliminary Issues

1. This submission sets out Digicel's comments with respect to the National Information and Communications Technology Authority ("**NICTA**") Discussion Paper titled *Public consultation on Reference Interconnection Offer from PNG DataCo Limited on various wholesale access services* ("**Discussion Paper**"), which was issued on 21 May 2021 and included a Reference Interconnection Offer ("**RIO**") application submitted by PNG DataCo Limited ("**DataCo**") to NICTA on 27 April 2021 ("**Proposed RIO**").
2. We understand that the Proposed RIO has been made in the context of NICTA's rejection of a prior Reference Interconnection Offer that was submitted to NICTA by DataCo on 13 August 2020 ("**Rejected RIO**").
3. We further understand that the Proposed RIO contains various amendments that are intended by DataCo to address the issues identified by NICTA in its *Statement of Reasons for NICTA's Decision, dated 15 December 2020* ("**Statement of Reasons**") and which gave rise to the rejection of the Rejected RIO.
4. In this context it is disappointing that neither DataCo nor NICTA has made any attempt to identify the specific differences between the Rejected RIO and the Proposed RIO. Nor has DataCo or NICTA provided an editable version of either document to facilitate a comparison between the two. This is despite Digicel's reasonable requests to both parties to provide such documents. As a result, an additional and unnecessary burden has been placed on submitters who have been required to go through a laborious process to compare the two documents.
5. Relevantly, the review that has been undertaken by Digicel has uncovered numerous drafting and typographical errors. These errors cast a shadow over the Proposed RIO and calls into question whether it is in fact a bona fide proposal by DataCo or whether it is part of some sort of regulatory gaming process.
6. It is therefore surprising that NICTA, despite the existence of obvious drafting errors and not being able to provide Digicel details of the differences between the Rejected RIO and the Proposed RIO, has advised that "*subject to considering the comments in submissions of interested parties, is inclined to accept the proposed RIO as having met the requirements in Section 142(5) of the Act*"¹. However, no reasons have been provided for NICTA deciding to adopt this position and it appears that NICTA may have erred by, in effect, predetermining the outcome of this consultation process.
7. Digicel also understands that in accordance with the requirements of Section 142(5)(b)(iv) of the Act NICTA is not permitted to accept the Proposed RIO "*unless NICTA is satisfied that the RIO (or proposed variation) is consistent with the general pricing principles and any service-specific pricing principles*".
8. However, it does not appear that any analysis has been undertaken in this regard. This is despite DataCo proposing that prices it initially proposed a year ago should remain

¹ Discussion Paper at Paragraph 4.3.

unchanged and, pursuant to the terms of the Proposed RIO may not be reviewed until a date that is more 12 months after NICTA's acceptance of the Proposed RIO.

9. This problem is further compounded by provisions in the Proposed RIO that only permit prices under any Service Agreement to be reviewed on the anniversary of the Service Agreement. This means that it might be two years before prices under any Service Agreement are able to be reviewed and, even then, as no process has been specified for conducting such a review, actual price changes may take much longer.
10. This is discussed in further detail below.
11. Finally, Digicel is concerned that, consistent with the approach taken in respect of the Rejected RIO, DataCo has not provided any detailed supporting information or explanation to support the proposals contained in its Proposed RIO. This makes it more difficult for submitters such as Digicel to be able to make fully informed comments..
12. In Digicel's respectful submission, these important procedural issues must be resolved by NICTA prior to it giving any further consideration to the Proposed RIO and Digicel must respectfully reserve its right in this regard.
13. Notwithstanding the above procedural issues, Digicel submits that the Proposed RIO does not satisfy the conditions specified in section 142(5)(b) of the Act for reasons that, among other things, include:
 - a. the Proposed RIO is not consistent with all of the non-discrimination obligations that are applicable to DataCo;
 - b. the Proposed RIO contains terms and conditions that are not reasonable in accordance with Section 126 of the Act; and
 - c. the price terms of the Proposed RIO have not been shown to be consistent with the general pricing principles and the service-specific pricing principles that currently apply to the services intended to be provided.
14. Accordingly, Digicel respectfully submits that NICTA is bound to reject the Proposed RIO.
15. It is in this context that Digicel provides its specific comments below in respect of the Discussion Paper and the Proposed RIO.
16. Please note that there is no Digicel confidential information contained in this submission.

B. Specific Comments on the Non-Price Terms of the Proposed RIO

17. NICTA, in its Statement of Reasons, set out ten key provisions of the Rejected RIO that it did not consider to be reasonable in accordance with Section 126 of the Act.

18. While DataCo made a number of changes in the Proposed RIO to address the issues raised by NICTA, it is Digicel's view that the Proposed RIO still does not meet the legislative standard required. This is for the following reasons.

Clause 3 – Term

19. Clause 3.2(a) of the Revised RIO states that prices will remain in effect for one year from the date of acceptance of the RIO. However, at this point in time, it is not known when that date might be.
20. Even if the Revised RIO is accepted by NICTA (which would be an error for the reasons set out in this submission) the earliest that such acceptance might occur based on the timelines that were followed in NICTA's rejection of the Rejected RIO the end of August 2021.
21. This means that the prices proposed by DataCo would remain in effect until at least September 2022 and would not have been the subject of any formal review process for at least two years from the time they were first proposed.
22. The provisions of Clause 3.3 of the Proposed RIO then exacerbate this problem by requiring that *"any rate review for a Service provided under an Active Service Agreement may be reviewed by the parties at each Anniversary of the Service Agreement"*. This means that, in the event an access seeker enters into a Service Agreement in August 2022 (which would still be within 12 months of acceptance of the RIO), that price would then not be able to be reviewed or amended until August 2023.
23. These problems are further compounded by the lack of any actual review process being identified in the Proposed RIO. On the face of it, the review process is entirely in the hands of DataCo and there is no mechanism included by which:
- a. the review may be undertaken in a timely and fair manner;
 - b. interested parties may seek NICTA's intervention in the event that DataCo seeks to impose new prices that are unreasonable;
 - c. any new prices are backdated to the date of the commencement of the review; or
 - d. any new prices are applied to any existing Service Contracts.

24. This is clearly unacceptable and does not address the problems identified by NICTA at paragraph 30(a) of the Statement of Reasons.

25. The Proposed RIO should therefore be rejected on that basis.

Clause 7.3 – Service Bond

26. At paragraph 30(b) of the Statement of Reasons NICTA commented that for a Service Bond requirement to be reasonable it must be subject to the *"inclusion of objective criteria that DataCo will apply when setting such bonds"*².

² Statement of Reasons at page 5.

27. DataCo has amended the Service Bond provision that were included in the Rejected RIO to state:

*“Service Bonds shall be determined based on Data Co's **reasonable assessment of the creditworthiness of Customer** and shall be no more than is required to protect DataCo's interests in the event of a payment default having regard to the maximum liability incurred for the provision of the Service at any given time in the course of the MSA.”* (our emphasis)

28. However, this amended provision still does not include any objective criteria that will be used by DataCo in making its assessment and a Service Bond may still be demanded at DataCo's sole discretion. Nor does the amended provision provide any objective mechanism by which the quantum of a Service Bond might be calculated in the event that it is required by DataCo.
29. This is clearly unacceptable and does not address the problems identified by NICTA at paragraph 30(b) of the Statement of Reasons.
30. The Proposed RIO should therefore be rejected on that basis.

Clause 7.6(c) – Amendments to Price

31. DataCo has amended clause 7.6(c) of the Proposed RIO in an apparent attempt to rectify the problems identified by NICTA at paragraph 30(d) of the Statement of Reasons.
32. However, the changes that have been made still do not provide any certainty for access seekers and appear to suggest that prices under Active Service Agreements may be raised by DataCo on 30 days' notice to the Customer. This appears to be at odds with the 12 monthly review provision described in clause 3.3 of the Proposed RIO and means that any prices that have been agreed by a Customer cannot be relied upon.
33. This is clearly unacceptable and does not address the problems identified by NICTA at paragraph 30(d) of the Statement of Reasons.
34. The Proposed RIO should therefore be rejected on that basis.

Clause 7.6 – Billing Disputes

35. DataCo has amended clause 7.6 of the Proposed RIO in an apparent attempt to rectify the problems identified by NICTA at paragraph 30(e) of the Statement of Reasons.
36. While some of the changes that have been made to this provision appear to be reasonable, the requirement in clause 7.6(d) of the Proposed RIO to raise any billing dispute within five days of receipt of an invoice is not.
37. No reason has been provided by DataCo for allowing such a short period of time, which appears to be an intentional attempt by DataCo to unreasonably limit a customer's ability to

raise a bona fide dispute where it has grounds to believe there is a billing error or there is some other issue with the charges that have been levied by DataCo.

38. This is clearly unacceptable and the Proposed RIO should therefore be rejected on this basis.

Clause 9 – Suspension of Service

39. DataCo has amended clause 9 of the Proposed RIO in an apparent attempt to rectify the problems identified by NICTA at paragraph 30(f) of the Statement of Reasons.

40. While some of the changes that have been made to this provision appear to be reasonable, others are not and, in some cases the poorly drafted provisions make their meaning uncertain at best.

41. For example, clause 9.1 has been amended to state “***Customer may upon fifteen (15) days written notice to DataCo request DataCo to suspend a Service provided under a Service Agreement for cause, and where it is reasonable to do so having regard to the other options available to DataCo ..[sic]***” (our emphasis).

42. Digicel presumes that the last reference to DataCo in this provision is intended to be a reference to the Customer. However, if not, it is unclear what the intended meaning of this provision might be. It is also not clear what the term “request” is meant to mean and whether it carries an implied meaning that DataCo may exercise its discretion when considering any such “request”.

43. This is lack of clarity clearly unacceptable and the Proposed RIO should therefore be rejected on this basis.

Clause 10 – Termination

44. DataCo has amended clause 10 of the Proposed RIO in an apparent attempt to rectify the problems identified by NICTA at paragraph 30(g) of the Statement of Reasons.

45. However, in Digicel’s submission, the changes made by DataCo have only further served to further entrench the right DataCo has previously sought to terminate the provision of service to a customer immediately and without notice. For example:

- a. At clause 10.1 of the MSA Data reserves the right to “***terminate a Service Agreement to Customer for cause, and where it is reasonable to do so having regard to the other options available to DataCo***” (our emphasis). However, no definition of “for cause” has been provided. Without such definition this amounts to a termination “for convenience” provision without any notice being required to be provided.
- b. At clause 10.3(a)(i) of the MSA, DataCo has sought to retain the right to terminate immediately for late payment despite DataCo having other rights to charge interest on such late payments and to impose a Service Bond.
- c. At clause 10.3(a)(ii), DataCo has sought to retain the right to terminate immediately for failure to cease any activity considered by DataCo to be a “***violation of the MSA***”

and/or any Service Agreement” regardless of the nature or materiality of such violation or whether there is a bona fide dispute in relation to the matter.

- d. At clause 10.4, DataCo has sought to retain the right to terminate on 60 days’ notice regardless of whether the matters giving rise to the notice are able to be (or have been) rectified.

46. This is clearly unacceptable and does not address the problems identified by NICTA at paragraph 30(g) of the Statement of Reasons.

47. The Proposed RIO should therefore be rejected on that basis.

Annexure B – Service Availability

48. DataCo has amended Annexure B of the Proposed RIO in an apparent attempt to rectify the problems identified by NICTA at paragraph 30(i) of the Statement of Reasons.

49. However, the service availability promised by DataCo, particularly in respect of its domestic network, still falls well short of accepted international standards.

50. There are also inconsistencies between the service level commitments that have been made and the Outage Credit mechanism described in clause 8 of Annexure C.

51. This is clearly unacceptable and does not address the problems identified by NICTA at paragraph 30(i) of the Statement of Reasons.

52. The Proposed RIO should therefore be rejected on that basis.

Review Mechanism

53. NICTA at paragraph 30(j) of the Statement of Reasons identified a fundamental flaw in the Rejected RIO as it did not contain a *“review mechanism in the RIO to ensure that annual changes to regulatory prices are reflected in the price terms of the RIO from the time those regulatory changes take effect”*.

54. NICTA further suggested that one way to rectify that problem was for the term of the RIO to be limited to 12 months.

55. However, no such mechanism other than a broad and unspecified annual price review by DataCo has been included and the term of the RIO remains at three years.

56. This is clearly unacceptable and does not address the problems identified by NICTA at paragraph 30(j) of the Statement of Reasons.

57. The Proposed RIO should therefore be rejected on that basis.

C. Further Specific Comments on the Non-Price Terms of the Proposed RIO

58. Clause 18.9 of the Proposed RIO has been amended with the apparent intent of making the Assignment provisions of the MSA “mutual” in effect. However, in doing so, the drafting is now so confused as to make the provision unintelligible. In particular:

- a. there appears to be confusion between the term “assignee” and the other party to the agreement; and
- b. There is a fundamental conflict between the convoluted requirements of clause 18.9(a) and the more simple but still erroneously drafted provisions of clause 18.9(b).

59. This is but one example of many drafting and typographical errors contained in the Proposed RIO. This is unacceptable and the Proposed RIO should therefore be rejected on this basis.

D. Specific Comments on the Price Terms of the Proposed RIO

60. Digicel notes that the carry-over of the price terms from the Rejected Rio into the Proposed RIO has been justified by DataCo on the basis of “*service demand being subdued due to the impact of COVID-19*” and “*discovery that actual cost of services has gone up in comparison to the 2019 level*”³. However, these assertions have not been supported by any explanation or justification that has been made available for interested parties to review and consider.

61. Importantly, no analysis has been undertaken by DataCo or any NICTA to determine whether the prices proposed by DataCo are consistent with the requirements of the *Service-Specific Pricing Principles (Submarine Cable Services) Amendment Determination 2020* (Amended SSPPs). No reason has been provided by NICTA for such an important omission. This is especially problematic in the context of the requirements of Section 142(5)(b)(iv) of the Act which expressly prohibit NICTA from accepting a proposed RIO unless it is satisfied that it is “*consistent with the general pricing principles and any service-specific pricing principles*”.

62. It is Digicel’s respectful submission that the lack of any meaningful analysis of the proposed pricing is a serious error and unless and until such an analysis is undertaken and made available to interested parties for their comment in accordance with the requirements of 229 of the Act, NICTA is prohibited by law from accepting the Proposed RIO.

63. In short, it is Digicel’s submission that NICTA is bound to reject the Proposed RIO on this basis alone

E. Conclusion

64. For the reasons set out in this submission, Digicel respectfully submits that NICTA has no reasonable option available to it other than to reject DataCo’s Proposed RIO.

³ Letter dated 27 April 2021 from DataCo to NICTA and which enclosed the Proposed RIO.

65. In the event that NICTA wishes to give the Proposed RIO further consideration, Digicel submits that it would be inappropriate for it to do so unless and until the procedural deficiencies identified in this submission have been rectified.
66. Even then, Digicel considers the proposed RIO to require substantial amendment before it can be used as a NICTA sanctioned basis to provide declared services to access seekers.
67. We look forward to NICTA's consideration of this submission and to receiving a draft of any determination that is made in order that we can comment on it prior to any final decision being taken.