

16 October 2020

Mr Kila Guo-Vui
Director
Economics, Consumer and International Affairs Department
National Information & Communications Technology Authority
Punaha ICT Haus
Frangipani Street
Hohola
National Capital District

By Email & By Hand Delivery

Dear Sirs

Submission to NICTA on Public consultation on Reference Interconnection Offer from PNG DataCo Limited on various wholesale access services

Please find *enclosed* Digicel PNG Limited's ("**Digicel**") submission on NICTA's Discussion Paper titled *Public consultation on Reference Interconnection Offer from PNG DataCo Limited on various wholesale access services* ("**Discussion Paper**") issued on 19 August 2020, and included a Reference Interconnection Offer ("**RIO**") application submitted by PNG DataCo Limited ("**DataCo**") to NICTA on 13 August 2020 ("**Proposed RIO**").

In making this submission we note that:

1. Notwithstanding NICTA's letter received today responding to Digicel's letter dated 12 October 2020 wherein we sought clarification about the inter-relationship between the public consultation on the Proposed RIO and NICTA's ongoing public consultation on draft amended service specific pricing principles that apply to the provision of Broadband capacity services and International Submarine Cable capacity services, we still have serious concerns about NICTA's approach to the consultations; and
2. We are yet to be given access to the analysis and assumptions that underpin DataCo's cost modelling, without which we continue to be denied a fair opportunity to comment on the prices that have been proposed.

In the circumstances, Digicel makes its submissions under protest and on a without prejudice basis. We reserve our rights, including to make further submissions in the event that the procedural issues that have been identified by Digicel are resolved.

Nevertheless, and putting those procedural issues aside, it is clear from Digicel's analysis of the materials that have been provided that the Proposed RIO does not satisfy the requirements of Section 142(5)(b) of the *National Information and Communication Technology Act 2009* ("**Act**") for reasons that among other things include:

1. The Proposed RIO is non consistent with all of the non-discrimination obligations that are applicable to DataCo;
2. The Proposed RIO contains terms and conditions that are not reasonable in accordance with Section 126 of the Act; and
3. the price terms of the Proposed RIO are not consistent with the general pricing principles and the service-specific pricing principles that current apply to the services intended to be provided.

Accordingly, Digicel respectfully submits that NICTA ought to reject the Proposed RIO.

We look forward to your consideration of Digicel's submission and to receiving a draft of any determination NICTA may make in this matter in order that we may make comments on it prior to any final decision being taken.

Yours faithfully
Digicel (PNG) Limited



Michael Henao
Head of Legal & Regulatory

DIGICEL (PNG) LIMITED

Submission to NICTA

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

16 October 2020

*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 NICTA's Discussion Paper titled *Public consultation on Reference Interconnection Offer from PNG DataCo Limited on various wholesale access services* ("**Discussion Paper**"), issued on 19 August 2020 and included a Reference Interconnection Offer ("**RIO**") application submitted by PNG DataCo Limited ("**DataCo**") to NICTA on 13 August 2020 ("**Proposed RIO**").
2. At the outset, Digicel expresses its concerns about the process that has been adopted by NICTA. It is Digicel's respectful view that, unless those concerns are resolved satisfactorily, NICTA may not have properly discharged its obligation under Section 142(5) of the *National Information and Communication Technology Act 2009* ("**Act**") to engage in meaningful consultation, resulting in interested parties like Digicel being denied their right to natural justice and procedural fairness.
3. 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*".
4. However, it is clear on the face of the Proposed RIO that it is not consistent with the existing terms of either the *Service-Specific Pricing Principles (Broadband Capacity Service) Determination 2019* ("**Broadband Capacity Determination**") or the *Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019* ("**Submarine Cable Services Determination**") which continue to be in full force and effect. That fact remains, notwithstanding that those determinations are currently the subject of their own review proceeding viz *Public consultation on draft amended wholesale pricing principles for broadband capacity services, and international submarine cable services*, issued on 24 July 2020 ("**SSPP Consultation**").
5. Digicel is concerned that DataCo appears to have made its RIO application on the basis and expectation that the service specific pricing principles that apply to the services described in the Proposed RIO - and which are currently in force - have either been (or will be) amended in order to "suit" the price terms proposed by DataCo.
6. DataCo's position was confirmed at a workshop it hosted on Tuesday, 6 October 2020 ("**Workshop**") during which DataCo and its advisors alluded to discussions they had with NICTA the priority of consideration of the Proposed RIO versus the SSPP Consultation. We understand DataCo had requested NICTA to suspend the SSPP Consultation until such time as the RIO Consultation was completed. It was further implied that NICTA had acceded to DataCo's request.
7. This apparent tacit agreement between DataCo and NICTA seems to be supported by paragraphs 3.12 – 3.13 of the Discussion Paper, which states:

"3.13 The prices shown in Schedule 1 to the amended Determination attached to the Discussion Paper published on 24th July 2020 are maximum average prices for each year shown in schedule. The

average is not the price that will be charged to any particular customer, but the weighted average of all of the prices chargeable during the time period shown in the amended Determination. The prices included in the Schedule at Attachment B to the RIO are the actual prices that DataCo is proposing to charge, depending on the capacity purchased by the customer.

3.14 Both the maximum average price in the amended Determination and the proposed prices in Attachment B of the RIO were derived from the same models with the same cost data and demand assumptions as described in paragraphs 3.7 and 3.8 above. In that respect they are consistent in their underlying cost assessments.” (emphasis added))

8. Such an approach seems to indicate that DataCo may have reached some sort of “understanding” with NICTA on the regulatory settings and approach that will be applied in respect of the Proposed RIO and that, to the extent there is any inconsistency between the Proposed RIO and the relevant service specific pricing principles, the pricing principles may be amended to suit DataCo’s application.
9. Digicel would be very concerned if that was in fact the case and considers that such an agreement would be a breach of due process and potentially unlawful for the following reasons:
 - 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 an 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 to 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, as such, bring the SSPP Consultation process into question.

10. For these reasons, Digicel is of the respectful view that the SSPP Consultation should be concluded prior to any further consideration of DataCo's proposed RIO.
11. It is also important to note that this public consultation is being conducted by NICTA in the context of service specific pricing principles that already exist and which remain in full force and effect. This means that, unless and until the SSPP Consultation is concluded, DataCo's proposed RIO must be considered solely within the parameters of the existing service specific pricing principles. Digicel suggests such an approach would have serious ramifications for the pricing that has been proposed by DataCo.
12. That is because:
 - a. the prices in the Proposed RIO are far in excess of the maximum prices specified in the Submarine Cable Services Determination; and
 - b. the price calculation methodology adopted by DataCo and its consultants fails to meet the efficiency requirements specified in both that Determination and the Broadband Capacity Determination.
13. Finally, Digicel is concerned that the Discussion Paper does not contain any detailed information to support the proposals made by DataCo in its Proposed RIO or any preliminary views or analysis that NICTA may have undertaken in relation to it.
14. This is of particular concern in respect of DataCo's pricing proposals that have been made on the basis of undisclosed cost modelling, the details of which have been withheld from affected parties such as Digicel.
15. In fact, Digicel's only exposure to DataCo's cost modelling has only come about after the issue was raised by us in a letter to NICTA dated 8 September 2020. As a direct result of that letter, DataCo conducted the 6 October 2020 Workshop mentioned above.
16. Regrettably, NICTA did not attend or otherwise participate in the Workshop which occurred only 10 calendar days prior to the closing date for submissions on the Discussion Paper.
17. While the Workshop provided some useful insights into DataCo's cost modelling approach and was attended by Digicel and its expert economic advisers CEG-Asia Pacific, detailed information (other than in respect of the calculation of the weighted average cost of capital ("WACC")) was not provided by DataCo. As such, Digicel and its advisers continue to be denied a fair opportunity to consider and correct, contradict or comment upon the analysis and assumptions that underpin the pricing in the Proposed RIO. This is discussed in further detail below.
18. 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. Digicel must respectfully reserve its right in this regard.

19. Notwithstanding the above procedural issues, and turning to the Proposed RIO itself, Digicel submits that the Proposed RIO does not satisfy the conditions specified in section 142(5)(b) of the Act because:
 - 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 are not consistent with the general pricing principles and the service-specific pricing principles that current apply to the services intended to be provided.
20. Accordingly, Digicel respectfully submits that NICTA is bound to reject the Proposed RIO.
21. It is in this context that Digicel provides its specific comments below in respect of the Discussion Paper and the Proposed RIO.
22. 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

23. Digicel notes that the non-price terms of the contained in the Master Service Agreement forming part of the Proposed RIO ("**Proposed MSA**") are blatantly one sided and, in many cases, seek to undermine or frustrate the intent of the non-discrimination obligations that are contained in Section 136 of the Act.
24. In particular, Digicel has serious concerns in respect of the following matters:
 - a. requirement to pay a Service Bond;
 - b. treatment of taxes;
 - c. DataCo's right to amend prices;
 - d. billing disputes;
 - e. dispute resolution;
 - f. suspension and termination of services;
 - g. use of Personal Data;
 - h. mutuality of terms;

- i. decisions in respect of which fibre optic cable facilities DataCo may use to provide its services; and
- j. service quality commitments and the consequences for DataCo in the event those service quality commitments are not reached.

25. Each of these issues is discussed in further detail below.

Requirement to pay a Service Bond

26. Clause 7 of the Proposed MSA provides DataCo with an unrestricted discretion to require a Service Bond from an access seeker prior to it providing any services. That Service Bond may be in any amount and applied to any Service Order.
27. Digicel considers such a discretion to be inappropriate in the context of a Reference Interconnection Offer as could be used by DataCo to unfairly restrict access or discriminate between access seekers.
28. While Digicel acknowledges there may be some very limited circumstances where the provision of a Service Bond may be appropriate, DataCo has not provided any justification for such a requirement. Nor has any detail been disclosed to describe the circumstances in which a Service Bond may be required. Indeed, the maximum amount or method of calculation of any Service Bond has not been specified.
29. In the circumstances, it is Digicel's view that there is little if any justification for a Service Bond to be required by DataCo. This is particularly the case since DataCo also seeks to reserve the right to charge up-front Installation Fees and Monthly Fees in advance of the service being provided. This means that it is difficult to see how the imposition of a Service Bond can be used as a legitimate means to protect DataCo against the risk of non-payment by an access seeker.
30. In the event that a discretion to impose a Service Bond can be justified, it must be non-discriminatory in its application and also be subject to strict limits that have been set in the context of the service to be provided. That is, it must do no more than to provide a mechanism to compensate DataCo for its actual and reasonable costs incurred in the event that an access seeker is in breach of its obligations under the Proposed MSA or any Service Order.
31. Digicel also disagrees that it should be necessary for access seekers to pay for services in advance of receiving them. In Digicel's view there is no reasonable basis for requiring prepayment for services that have yet to be rendered by DataCo.

Treatment of Taxes

32. Clause 7.5(b) of the Proposed MSA requires access seekers to "*indemnify DataCo for all and any Taxes that are asserted and assessed against DataCo or Customer by any governmental or regulatory body or entity with respect to or arising out of a Service Agreement for the Service*".

33. Taxes are defined in clause 7.5(a) of the Proposed MSA to mean “*any applicable taxes, levies, duties, usage or other fees (including, without limitation, withholding taxes, value added taxes, stamp duty taxes, and other similar taxes, if any)*” (emphasis added).
34. Digicel is concerned that DataCo may seek to use this provision to, in effect, require access seekers to reimburse DataCo for any Universal Access and Service (“UAS”) Levies it may be required to pay pursuant to section 107 of the Act. In Digicel’s submission this would be unfair. The definition of “taxes” in the Proposed MSA should be amended to expressly exclude UAS Levies and any other levies lawfully imposed by NICTA.

DataCo’s right to amend prices

35. Clause 7.6(c) of the Proposed MSA provides DataCo with a unilateral discretion to increase prices “*at any time to reflect any increased costs to DataCo incurred in providing the Service to Customer*”.
36. In Digicel’s submission such a unilateral right is inappropriate in any commercial agreement and, even more so, in the context of the provision of a declared service that is subject to the terms of a RIO.
37. There are also other provisions in the Proposed MSA, such as clause 18.11(b), that provide DataCo an unfettered discretion to pass on additional costs to the access seeker without the access seeker’s consent. This too is inappropriate as it undermines the access seeker’s legitimate right to review its service requirements in the face of any such proposed increased costs or changed circumstances.
38. In our view, DataCo should not be permitted to increase its prices unless and until it has sought and obtained approval from NICTA. Where such increases are approved, the access seeker should retain the right to discontinue or modify its service requirements without penalty or imposition of costs by DataCo.

Billing disputes

39. Clause 7.6(e) of the Proposed MSA sets out a requirement for access seekers to pay DataCo invoices in full irrespective of whether there is a bona fide dispute on foot as to any such invoice.
40. In Digicel’s submission, such a requirement is unfair and unreasonable. Any invoiced amounts that are the subject of a bona fide dispute should be able to be withheld provided that, upon resolution of the dispute, any amounts that are found to be due and payable (by either party) are paid promptly and are subject to the payment of interest which, we note, is already specified in clause 7.6(a) of the Proposed MSA to be 12% per annum.

Dispute resolution

41. Digicel disagrees with the proposed dispute resolution process set out in clause 17 of the Proposed MSA. Under that clause, the dispute resolution process is restricted to negotiation

and mediation but without any recourse to arbitration or other binding dispute resolution mechanism.

42. It appears that DataCo is seeking to use the Proposed RIO as a way to avoid the binding dispute resolution mechanism that would otherwise be available to access seekers under Section 143 of the Act.
43. In Digicel's submission, such an arrangement would be highly unsatisfactory, especially in the context of a declared service where DataCo, as access provider, retains a statutory obligation to provide the service and comply with the non-discrimination obligations in Section 136 of the Act.
44. In our view, the Proposed RIO should be amended to include a binding dispute resolution mechanism such as mandatory, binding arbitration. In the alternative, disputes arising in respect of the interpretation and application of the Proposed RIO should be able to be referred to NICTA for determination as if they were disputes brought under Section 136 of the Act.

Suspension and termination of services

45. Digicel submits that the suspension and termination provisions of the Proposed RIO are one-sided, unfair and inappropriate in the context of the provision of a declared service. Our reasons for holding this view are:
 - a. Under clause 9.2 of the Proposed MSA, DataCo may "*in its sole discretion*" choose to suspend service to an access seeker if it considers the access seeker has breached "*a term of the MSA, Service Agreement, Laws, Licence or some practice or procedure related to the provision of the Service*". A similar right of suspension exists under clause 8.2.
 - b. Any such suspension may be made with only one day's notice and without the access seeker being given any opportunity to either remedy or dispute the alleged breach. We note that the access seeker will still be charged for the provision of the service notwithstanding that it has been suspended and without them having any form of redress.
 - c. This provision is expressed in such broad terms that DataCo has essentially reserved itself the right to suspend a service at any time and without the access seeker having any right of redress.
 - d. Under clause 10.3(a)(i) of the Proposed MSA, DataCo also seeks to reserve the right to, without notice, "*terminate this MSA and/or a Service Agreement ... immediately, where ... Customer fails to make payment of any amount due under a Service Agreement for a Service*" (emphasis added). This is despite DataCo being able to charge interest on any late payments and its proposal to require customers to pay a Service Bond in advance of receiving the service.

- e. It is also relevant to note that DataCo may choose to exercise this right irrespective of whether any such payments are the subject of a bona fide dispute.
- f. In Digicel's submission, such provisions are entirely inappropriate in a RIO. If permitted to remain, they will cause serious harm to access seekers and their right to access declared services on fair terms.
- g. We also believe that the terms proposed by DataCo would be discriminatory, especially given our understanding that DataCo's related parties (Telikom and Bmobile) have consistently delayed or not paid for services provided by DataCo for extended periods of time.
- h. In practise, Digicel has been disconnected for late or short payment in circumstances where it was in bona fide dispute with DataCo over the prices that it should have applied while, at the same time, other related party access seekers (namely Telikom and Bmobile) have not had the same terms applied to their non-payment.
- i. Digicel submits that such discriminatory treatment is, in effect, anti-competitive and, among other things, amounts to a cross-subsidy provided by DataCo to other members of its Group.
- j. In order to address this, Digicel submits that the Proposed RIO (and any related Service Orders) should reflect the following minimum requirements:
 - i. that access seekers are not subject to any requirement to prepay any recurring monthly charges for the declared services;
 - ii. that access seekers generally should not be subject to any less favourable payment terms than DataCo's related parties; and
 - iii. that DataCo be prohibited from suspending or restricting, or seeking to suspend or restrict, the provision of the declared services by reason that an access seeker has withheld payment in circumstances where the payment is the subject of a bona fide dispute; and
 - iv. that, in addition to the above, DataCo be prohibited from suspending or restricting, or seeking to suspend or restrict the provision of declared services for non-payment unless the access seeker has first been provided with a written notice setting out the particulars of the alleged breach, and being afforded an opportunity to remedy (or dispute) the alleged breach and, in the event that the alleged breach has not been remedied (or disputed) a minimum period of further 14 (fourteen) days of receipt of the said written notice. A copy of that notice must also be provided by to NICTA.

Use of Personal Data

46. Clause 15 of the Proposed MSA provides DataCo broad discretion to gather and use the personal data of the access seeker and the access seeker's end users. DataCo is then

permitted to use that personal data for a wide variety of purposes, including for market research and marketing of any DataCo services including services that are provided to other parties (including the competitors of the access seeker).

47. In Digicel's submission, this is entirely inappropriate. DataCo should not have any rights to use the personal data of any person without their express consent.

Mutuality of terms

48. Digicel is concerned that the proposed contractual terms such as those relating to liability, indemnity and assignment have been drafted for the sole benefit of DataCo and do not include any standard mutual protections for the access seeker. For example, clause 18.9(a) of the Proposed MSA provides DataCo an unfettered discretion to "*assign its rights and interests under this MSA including any of its rights and obligations under any Service Agreement to a Third-Party*" (emphasis added). There is no recourse in the event that the "Third-Party" is considered by the access seeker to be unsuitable to provide the services. No such similar right is afforded to the access seeker. Similarly under clause 13.1, DataCo expressly excludes any and all liability for its actions or omissions while the access seeker is afforded no protection whatsoever.

49. The approach taken by DataCo is entirely self-serving. It effectively discriminates against the legitimate interests of the access seeker. In Digicel's submission all such "boilerplate" contract terms should be mutual in their expression and effect.

Decisions in respect of which fibre optic cable facilities DataCo may use to provide its services

50. Other than stating that the services are provided "over fibre", Digicel notes that DataCo does not specify anywhere in the Proposed RIO the cable systems that will be used to provide the services. In Digicel's submission, this is a serious omission. It would be appropriate for DataCo to provide a detailed service description of each of its services specifying the technology and systems it intends to use. This is particularly important to ensure consistent service quality and to protect against the possibility that DataCo may discriminate between access seekers in terms of service supply and quality.

Service quality commitments and the consequences for DataCo in the event those service quality commitments are not reached

51. Relatedly, Digicel notes that the service level promised by DataCo is only 98.9% (measured over one month). This is low by international standards, especially since DataCo has multiple cables over which it may provide its services. For example, the Interchange Cable operated by ICL in Vanuatu has a stated minimum service level of 99.995%, while the Tui-Samoa Cable operated by SSCC in Samoa has a minimum service level of 99.5%. In Digicel's submission, DataCo should be required to explain why its promised service level is so low, and it should be made to rectify any underlying issues so that its service quality is improved to meet international standards.

52. It is important to note that under the service level proposed by DataCo, service outages could last up to 475 minutes per month (excluding outages related to Force Majeure and scheduled maintenance) without any available recourse for the access seeker.
53. Digicel is also concerned that an access seeker is not entitled to any Outage Credit when the Outage is due to Force Majeure of a Maintenance Event, which DataCo defines as “any scheduled maintenance activity undertaken by DataCo to a DataCo Equipment, DataCo Facility, DataCo Network or a Service under a Service Agreement”. In each of these cases the access seeker is required to continue to pay for services despite no such services being provided during the time of the outage. This places an unfair burden on access seekers who would be required to, in effect, insure DataCo against its own non-performance.

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

54. Digicel notes that the price terms of the contained in the Proposed RIO are not supported by any explanation or justification that has been made available for interested parties to review and consider. This is despite Digicel’s requests which have, so far, only resulted in DataCo’s Workshop.
55. Importantly, that Workshop did not provide a basis upon which interested parties were then able to make informed submissions. However, the Workshop did highlight the types of information that could and should be made available by DataCo. Respectfully, it also exposed a number of deficiencies in the modelling that was undertaken.
56. In order to progress the matter further, Digicel retained independent expert economists CEG – Asia Pacific to attend the Workshop and to prepare a Memorandum highlighting the issues as they saw them. A copy of that Memorandum dated 13 October 2020 is annexed hereto and forms part of this submission.
57. As CEG noted in its Memorandum:

“The complexity of the model presented by Parcus is such that in order to provide any assurance as to the accuracy or reasonableness of the results we would need to be provided access to the model. The presentation provided was overbroad, focussing primarily on a generic discussion of a fully allocated cost modelling, rather than providing detail on what allocation methods were adopted in the modelling for DataCo. The provision of such models on an advisor only basis is common in regulatory proceedings. In our experience, this type of consultation allows for errors to be found and for improvements in the model to be made.”

58. CEG went on to request eight different categories of information that it required to enable it to undertake an assessment of the DataCo cost models and concluded by stating:

“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."

59. In Digicel's submission, these fundamental issues need to be resolved before any decision is made by NICTA in respect of DataCo's proposed pricing.
60. Digicel further submits that any consideration of DataCo's proposed pricing must be undertaken in the context of the service specific pricing principles that were – and continue to be – in effect at the time of DataCo's application. In this case the relevant service specific pricing principles are contained in the Broadband Capacity Determination and the Submarine Cable Services Determination ("**Existing Determinations**").
61. In our strongly held view, it would be inappropriate and perhaps even unlawful for NICTA to consider DataCo's proposed pricing on the presumption that the service specific pricing principles contained in those determinations will be amended to fit DataCo's pricing preferences.
62. Digicel submits that the pricing proposed by DataCo is inconsistent with the requirements of the Existing Determinations. This is because:
- a. DataCo's proposed Wholesale Internet Service ("**WIS**") pricing and International P2P ("**IP2P**") pricing far exceeds the maximum prices permitted by the Submarine Cable Services Determination; and
 - b. Digicel understands that DataCo's cost modelling has not made any attempt to take into account efficiencies that are described in the Determinations and which are required to be considered under section 134(1)(a) of the Act. On the contrary, we understand that DataCo's cost modelling approach has been to load all of its legacy costs for various cable and satellite infrastructure into the price of services to access seekers regardless of whether that legacy infrastructure is actually being used to provide the services. This means, for example, that based on DataCo's cost modelling approach, the only thing that the introduction of the Coral Sea Cable has achieved is to drive up DataCo's costs and increase the prices of its services. This is the exact opposite of what was expected to happen when the Australian Government decided to provide the majority of the funding necessary to deploy the Cable.
63. Moreover, DataCo's cost modelling does not meet the efficiency objectives mandated under Section 2 of the Act which provides:

"The objective of this Act is to ensure that the ICT industry contributes to the greatest extent possible to the long-term economic and social development of Papua New Guinea, by means that include –

- (a) providing a regulatory framework consistent with the regulatory principles in Section 3 that promotes –*

- (i) *the long-term interests of Papua New Guinea and its people, taking account of the National Goals and Directive Principles and the Basic Social Obligations of the Constitution; and*
- (ii) *the **efficiency** and competitiveness of the ICT industry in Papua New Guinea; and*
- (b) ***ensuring that ICT services of social importance are supplied as efficiently and economically as practicable and supplied at performance standards that reasonably meet the social, industrial and commercial needs of Papua New Guinea and its people; and***
- (c) *promoting the development of an ICT industry in Papua New Guinea that is **efficient**, competitive and responsive to the needs of Papua New Guinea and its people; and*
- (d) *promoting and maintaining fair and **efficient** market conduct and effective competition between persons engaged in commercial activities connected with the ICT industry in Papua New Guinea, including by assisting the ICCC to achieve this..." (emphasis added)*

64. It is Digicel's respectful submission that, in the premise, NICTA is duty bound to reject the Proposed RIO on this basis alone.
65. Digicel is also concerned that the Proposed RIO does not include any mechanism for the review of the service pricing that has been proposed. On the contrary, it appears to be DataCo's intent that the service pricing will remain in effect for the full three-year term of the RIO.
66. If Digicel's understanding is correct, it would seem that DataCo's pricing approach is intended to undermine and frustrate the requirements of the Broadband Capacity Determination and the Submarine Cable Services Determination which intends that prices be reviewed on an annual basis.
67. In Digicel's submission the Proposed RIO needs to be amended to provide for both an annual review and price protection to ensure that no access seeker is disadvantaged as a result of making a longer term commitment to the purchase of capacity.
68. In addition, Digicel proposes that the prices specified in the Proposed RIO are protected against the possibility that DataCo may unfairly discriminate between the prices it charges to its related entities versus the prices it charges other access seekers. In Digicel's view, such a protection is essential in order to ensure the fair application of the terms of the Proposed RIO, and to avoid anti-competitive outcomes.

D. Conclusion

69. For the reasons set out in this submission, Digicel respectfully submits that NICTA must reject DataCo's Proposed RIO.
70. 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.
71. Even then, Digicel considers the Proposed RIO would require substantial amendment before it can be used as a NICTA-sanctioned basis upon which to provide declared services to access seekers.
72. 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.



Memorandum

To: Michael Henao
From: CEG – Asia Pacific
Date: 13 October 2020
Subject: **Parcus model – Preliminary observations**
Status: Confidential

Thank you for the opportunity to participate in the workshop with Dataco and its advisors.

The complexity of the model presented by Parcus is such that in order to provide any assurance as to the accuracy or reasonableness of the results we would need to be provided access to the model. The presentation provided was overbroad, focussing primarily on a generic discussion of a fully allocated cost modelling, rather than providing detail on what allocation methods were adopted in the modelling for Dataco. The provision of such models on an advisor only basis is common in regulatory proceedings. In our experience, this type of consultation allows for errors to be found and for improvements in the model to be made.

Below are some notes we made during the presentation of the model. These are presented in the form of an information request.

1. Provide a **map of the internal products** (A1, B1, C1, etc) to the regulated products.
 - a. Details on the allocation method used between international and domestic services.
 - b. Details on the allocation of ‘add ons’ including the Kumel cable to the regulated products.
2. The **direct allocation** of costs appears very low at less than 3%. Further detail is needed to confirm this allocation.
3. Please provide **allocation keys** for the most significant cost items including for the following:
 - a. The basis of allocating Satellite costs (\$23 million kina) – “As per actuals”
 - b. The basis of allocating RTU costs (\$21 million kina) – this was referred to as the “RTU calc”



- c. The basis of allocating depreciations (\$23 million kina) – this was referred to as “DPRE – Daniel’s file”
 - d. Submarine – PIPE – there is a range of traffic measures that may be used for allocating the costs of this cable¹ – please provide detail on “platforms” allocation
 - e. Submarine – APNG 2 as for PIPE
4. Please provide details on the cost **uplift between 2019 and 2020**:
- a. The cost uplift to international was 23 million kina or over 65% - this is a very significant incremental increase in costs (it was stated that the CS cable was not significant, however there was and 11 million incremental increase in international costs.
5. The basis of the **allocation** of internal products between **international and domestic**, including:
- a. Provide details on the allocation of 80% of satellite costs to international (which we understand to not include satellite services)
 - b. Provide details on the 90% allocation of dark fibre costs to international
 - c. Provide details on the 80% allocation of domestic lease line satellite services to international
 - d. Provide details on the 100% allocation of colocation services to international (are there no domestic colocation services)
6. The basis of the calculation of the **RAB** and the details of the calculation including written down value of assets and adjustments made to this value:
- a. The presentation indicated that this element added around 18 million kina to the 92 million total revenue in 2020 – so it appears significant
7. The **255 kina per Mbps** appears to be an average cost for international across a range of internal products:
- a. Please provide the basis on which this cost has been allocated to each bandwidth in the RIO
 - b. The expected demand for each product in the RIO to confirm it sums to 255 kina per mbps
 - c. The costs per Mbps fall from 255 kina/Mbps to 201 kina/Mbps – it is not clear how this is reflected in prices from July 2020 (which will apply in 2021)

¹ It is incorrect to say “the data is the data” as there are a range of different traffic statistics which may be used to allocate these costs.



8. Potential **errors**:

- a. There appeared to be discrepancies in the total revenue reported in parts of the model (e.g., in the WACC and declared service calculation)
- b. There appears to be a mismatch between depreciation in the RAB model and the depreciation in the cost allocation.

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 provide as to how this will be independently assessed, and price adjustments made. We can provide you further detail on these in due course.