

DIGICEL (PNG) LIMITED

Submission to NICTA

**Public Inquiry into the Service-Specific Pricing Principles for Domestic
Mobile and Fixed Terminating Access Services – Methodology and
Principles**

05 July 2024

*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

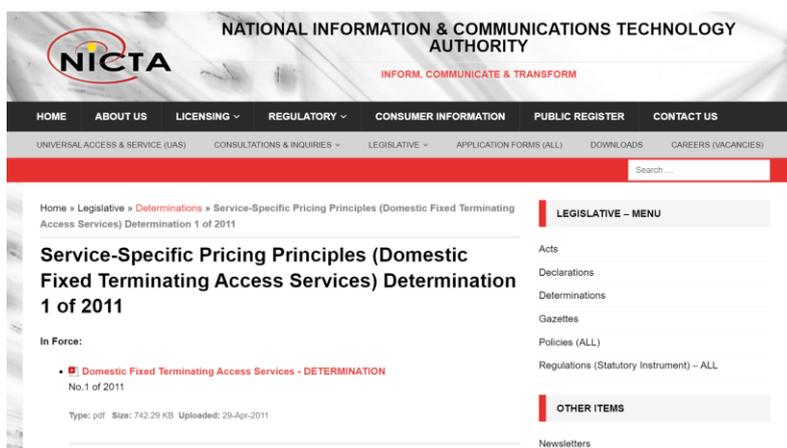
1. The purpose of this submission is to respond to the issues raised by the National Information and Communication Technology Authority (**NICTA**) in its Discussion Paper titled *Public Inquiry into the Service-Specific Pricing Principles for Domestic Mobile and Fixed Terminating Access Services – Methodology and Principles* issued on 05 June 2024 (**Discussion Paper**).
2. Digicel understands the Discussion Paper was released in the context of the Minister's decision to make *Wholesale Service Declaration No.1 of 2023* by way of a Declaration Instrument (**Declaration**), which was uploaded onto the NICTA website on 23 April 2024. The Declaration was also notified by way of an undated Ministerial media statement that was uploaded onto the NICTA website on 13 December 2023.
3. The Declaration was also published in the National Gazette on 07 December 2023 (**Gazettal**) which was uploaded onto the NICTA website on 23 April 2024.
4. The Declaration, which was stated to commence "30 calendar days after the date on which it is notified in the National Gazette", declared the mobile terminating access service (**MTAS**) and the fixed terminating access (**FTAS**).
5. Part VI of the Declaration further specified the "General Terms and Condition for the Supply of the Declared Services" to be as follows:

"8 General Terms and Conditions

- (1) The price of access to the above mentioned declared services ("Declared Services") shall be set in accordance with the General Pricing Principles under Section 134 of the Act; and*
- (2) the Declared Services shall be supplied in accordance with the Non-Discrimination Obligations under Section 136 of the Act; and*
- (3) the Access Seeker and the Access Provider of the Declared Services shall comply with the Any-to-Any Connectivity Obligations under Section 137 of the Act."* (emphasis added)

6. The very prescriptive wording of this provision, whereby the price of access "shall be set in accordance with the General Pricing Principles under Section 134 of the Act", raises a serious question with respect to whether or not any pricing principles or pricing mechanism other than the General Pricing Principles (**GPPs**) may be considered by NICTA if it is required to "set" prices for the declared services at any point in the future.

7. Digicel considers this to be a particular issue given that previous declarations of the mobile terminating access service¹ did not include any such mandatory conditions relating to the setting of prices.
8. In the circumstances, and given the apparently deliberate inclusion of the mandatory wording in Part VI of the Declaration, it is Digicel’s respectful view that NICTA is constrained to only using the GPPs if and when it is required to set or determine prices for the declared services.
9. In any case, the Discussion Paper makes no mention of the service specific pricing principles (SSPPs) for the MTAS and the FTAS that were established in 2011 pursuant to *Service-Specific Pricing Principles (Domestic Mobile Terminating Access Services) Determination 2 of 2011* and *Service-Specific Pricing Principles (Domestic Fixed Terminating Access Services) Determination 1 of 2011 (existing SSPPs)*². Importantly, the NICTA website still describes the existing SSPPs to be “In Force” (see below the relevant screenshots of the NICTA website that were taken on 5 July 2024).



¹ The mobile terminating access service and the fixed terminating access service had previously been deemed to be declared under section 131(1)(a) of the NICT Act and were further declared by the Minister pursuant to *Wholesale Service Declaration No 1 of 2015* and *Wholesale Service Declaration No. [3] of 2019*, although that particular Declaration was not subsequently published in the National Gazette and so was never brought into effect.

² The existing SSPPs were uploaded onto the NICTA website on 29 April 2011 and notified in the National Gazette on 10 February 2012.

10. No explanation has been given for this important omission or why, in the event that SSPPs do become relevant to the determination of prices for the declared services in the future, use of the existing SSPPs would not be a sufficient or appropriate consideration.
11. This is particularly concerning given that the existing SSPPs already speak to and have determined a number of key issues that are raised in the present Discussion Paper.
12. While Digicel has no objection to NICTA undertaking a review of the existing SSPPs in accordance with the provisions of section 135(3) of the *National Information and Communication Technology Act 2009 (Act)*, it is important that the reasons they were made are given due consideration and that any decision to modify, revoke or replace them is properly reasoned.
13. Digicel also has serious concerns relating to NICTA's statement that it "*intends to use the methodology and principles (i.e., the service-specific pricing principles) resulting from this public inquiry to determine the maximum allowable prices for the Declared Services in accordance with Section 135 of the Act*"³.
14. This is because section 135 of the Act does not provide NICTA with an express power to "*determine maximum allowable prices for the Declared Services*".
15. In particular, section 135(2) of the Act only permits the SSPPs to "*contain price related terms and conditions (whether relating to a price or the method of ascertaining a price) and non-price terms and conditions relating to access to the declared service*"; it does not provide an express power for NICTA to set the actual price (or maximum price) of the declared service itself.
16. This interpretation is fortified by section 133 of the Act which permits NICTA to determine model terms for declared services but restricts the ambit of any such model terms to be "*a selection of model **non-price** terms and conditions relating to access to a declared service*" (emphasis added).
17. Instead, the power conferred on NICTA by section 135 of the Act is to determine SSPPs for a declared service that NICTA "*shall have regard to ... if it is required to arbitrate an access dispute under this Part in relation to that declared service*". It is not intended to elevate the SSPPs to becoming the sole mechanism relied upon by NICTA for setting access prices.
18. Indeed, section 149 of the Act provides that:

“(1) NICTA shall take the following matters into account in making a final determination

*(a) the extent to which the determination is likely to further the achievement of the objective of this Part as set out in Section 124; **and***

³ Discussion Paper at page 2.

- (b) *the legitimate business interests of the access provider, and the access provider's investment in facilities used to supply the declared service; and*
- (c) *the interests of all persons who have rights to use the declared service; and*
- (d) *the general pricing principles and any relevant service-specific pricing principles; and*
- (e) *the value to the access provider of extensions or enhancements of capability whose cost is borne by the access seeker pursuant to Section 134(1)(d); and*
- (f) *the operational and technical requirements necessary to protect the integrity of, or for the safe and reliable operation of, an ICT service, a network or a facility; and*
- (g) *may take into account any other matters that it thinks are relevant.” (emphasis added)*

19. Moreover, section 143 of the Act only intends for NICTA to intervene and determine terms and conditions for the supply of declared services in circumstances where an access dispute exists. That is, where commercial negotiations between service providers are unsuccessful and they are unable to commercially agree terms and conditions for supplying the declared service or where such a commercial agreement is materially inconsistent with the general pricing principles or any service specific pricing principles. This is consistent with objectives and regulatory principles that are enshrined in the Act.
20. In this case Digicel is unaware of any access dispute ever having been notified to NICTA with respect to the MTAS or the FTAS, and no cogent evidence or analysis has been provided by NICTA that indicates the MTAS or FTAS have been (or are) materially inconsistent with the GPPs or the existing SSPPs⁴.
21. Accordingly, Digicel recommends that NICTA refrain from seeking to fix a maximum allowable price for the MTAS or the FTAS, and focuses instead on the SSPPs that it would consider (among other things) if ever called upon to arbitrate an access dispute.
22. In the balance of this submission Digicel provides its initial comments on issues that are raised and discussed in the Discussion Paper. Please note that where Digicel does not comment on a particular issue, that should not be taken as support for the views held by NICTA in relation to that issue.

⁴ Digicel has previously expressed its concerns with NICTA's benchmarking analysis that was included at section 3 of its Recommendation Report, *A Report to the Minister recommending the declaration of Domestic Mobile and Fixed Termination Access Services under Division 3, Part VI of the NICTA Act 2009*, issued by NICTA on 3 November 2023.

23. 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 NICTA making any decisions regarding the adoption of any service specific pricing principles.

B. Specific Issues raised by NICTA

Appropriate approach to determine cost-based prices for the Declared Services: international benchmarking or cost modelling?

24. At the outset, Digicel considers it important to recognise that there is no right answer to the question of “*what is the cost-based price for the MTAS or the FTAS?*”.
25. Any form of cost analysis that is undertaken, whether it is based on some form of cost modelling or international benchmarking, will necessarily rely on a range of assumptions, estimates and judgements on approaches to the analysis and the data that is relied upon. This means that any results obtained by NICTA from any such cost analysis will themselves always be estimates that may then be taken into account when making a final determination on access pricing.
26. Importantly, in the Papua New Guinea context, any such determination will also be required to take into account and deal with the matters specified in sections 147 – 149 of the NICT Act.
27. While it is generally accepted that forward-looking cost-based termination rates are consistent with policy objectives of promoting competition among telecommunications operators and promoting efficient use of and investment in telecommunications infrastructure, as noted above, any forward-looking cost modelling exercise only produces an estimate of efficient costs and relies on many assumptions and forecasts about demand and cost drivers, and how costs are allocated between telecommunications services.
28. This is becoming ever more challenging as rapid changes in demand (e.g. between traditional voice versus data and OTT services) mean that historical approaches to cost allocation may not continue to apply. Rapid changes in broader economic conditions are also occurring, such as uncertainty around the cost of capital. Together these factors mean that benchmarking which combines the results from a variety of cost models is arguably more accurate than a single local cost modelling exercise that may be affected by information gaps or flaws in the methodology and assumptions.
29. Benchmarking is a relatively straightforward and pragmatic approach to setting termination rates, and it makes use of the extensive termination cost modelling work that has been done in other countries, without having to re-do this expensive and time-consuming work. Given the relatively small size and cost challenges already faced in the telecommunications market in Papua New Guinea, any benefits of greater accuracy in estimating termination costs via a local cost-modelling exercise would likely be more than offset by the cost and duration of that exercise, relative to benchmarking.
30. For these reasons international benchmarking continues to be used by regulators to set or inform fixed and mobile termination price regulation in many countries.

31. It is also important to note that, even in circumstances where a cost modelling exercise is undertaken, international benchmarking is still widely used to inform modelling assumptions and decisions. It's relevance in this regard was recognized in the existing SSPPs which, among other things, provide:

“2. In determining the availability of efficiencies that may be considered and which may reduce the cost of the Domestic Mobile Terminating Access Services, NICTA shall consider:

(a) relevant information provided by the access provider in relation to its own costs and potential efficiencies; and

(b) relevant information provided by other operators in relation to their costs and potential efficiencies in Papua New Guinea;

and NICTA may consider benchmarked information from countries that, in the opinion of NICTA, are reasonably similar to Papua New Guinea for the consideration of telecommunications costs.

3. *In determining its view on the economic life of the assets employed in the provision of Domestic Mobile Terminating Access Services, commensurate with the regulatory and commercial risks involved, NICTA may consider:*

*(a) the economic lives accorded to similar assets by other regulatory authorities **in other countries considered by NICTA to be similar in this regard to Papua New Guinea;** and*

*(b) the practices of the access provider and other operators in the use and replacement of similar assets in Papua New Guinea **and in other countries considered to be similar by NICTA** for this purpose.*

4. *In determining a reasonable return on investment, over the economic life of the assets employed in the provision of Domestic Mobile Terminating Access Services, commensurate with the regulatory and commercial risks involved, NICTA may consider the actual risks and returns accepted by providers of debt and equity capital to the operator providing Domestic Mobile Terminating Access Services, and the actual risks and returns accepted by providers of debt and equity capital to other operators*

*providing such services both in Papua New Guinea **and in countries considered by NICTA to be similar for this purpose.***” (emphasis added)

32. Digicel therefore supports NICTA’s preliminary view that it should not rule out the use of an international benchmark approach to set the price of the MTAS and the FTAS and that the considered use of international benchmarking would be consistent with the GPPs specified in section 134 of the Act.
33. Digicel further supports NICTA’s view that, where international benchmarking is used, it would be necessary *“to account for differences in scale, topography, and technology, to name a few an international benchmark approach would need to develop appropriate selection criteria to discard jurisdictions that are **too different** from PNG”*.
34. However, in providing this support, Digicel submits that, rather than automatically excluding jurisdictions or benchmarks based on their differences, consideration be given to making adjustments to benchmarks to reflect any relevant differences that are observed.
35. Digicel disagrees with NICTA’s preliminary view that there should be a preference for cost modelling over international benchmarking. While cost modelling may be appropriate in circumstances where relevant and reliable international benchmarking is unavailable, it will also be far more costly (at least 10 times more costly than a comparable international benchmarking exercise), will be much slower (at least six months compared with one month) and may not yield results that are more reliable or certain than international benchmarking.
36. Cost modelling often becomes an adversarial process where modelling approaches and assumptions are subject to dispute and differences between networks are difficult to capture. This can result in further dispute, appeals costs and uncertainty for all parties.
37. There is also the risk that, depending on how it is undertaken, cost modelling may or may not be consistent with the requirements of the GPPs which require that each service providers costs be considered and which therefore may require multiple models to be prepared, further increasing the complexity (and cost) of the modelling process.
38. In summary, cost modelling may often lead to the imposition of very substantial costs on the industry but without resulting in a superior (or any) outcome.
39. Instead, Digicel proposes that a hybrid approach should be adopted towards the analysis of efficient costs in the event of an access dispute. As a first step, Digicel proposes that international benchmarking be undertaken to inform an arbitration in any dispute. If the access dispute is unable to be resolved through the use of international benchmarking, then it may be appropriate to undertake a cost modelling exercise as a last resort.

If cost modelling is appropriate, what modelling approach should NICTA use? Top-down, bottom-up, or another?

40. As noted above, Digicel disagrees that there should be a preference for cost modelling over international benchmarking.
41. However, in the event that cost modelling is used in the context of NICTA's determination of an access dispute, Digicel submits that the only approach that is consistent with the GPPs is the "hybrid approach" referred to in the discussion paper.
42. Digicel's reasons for holding this view are set out in the following paragraphs.
43. Section 124(1) of the NICT Act requires that that the price of access to a declared service should promote the achievement of the "efficiency objective".
44. Section 124(2) of the NICT Act requires NICTA, when determining the extent to which a particular thing is likely to further the achievement of the "efficiency objective", to have regard to all of the following matters:

"(a) whether it is technically feasible for the relevant ICT services to be supplied, having regard to –

(i) the technology available or likely to become available; and

(ii) the reasonableness of the costs involved; and

(iii) the effect of supplying the ICT services on the integrity, operation or performance of other ICT services or facilities; and

*(b) **the legitimate commercial interests of the access provider in supplying the ICT services, including the ability of the access provider to exploit economies of scale and scope; and***

*(c) **the incentives for investment in the facilities by which the ICT services may be supplied, including the risks involved in making the investment.**" (emphasis added)*

45. Section 134(2) of the NICT Act defines "cost-based pricing" so as to expressly require NICTA to have regard to the following factors:

"(a) the application of the cost recovery principle; and

*(b) the need for the pricing to make a fair and reasonable contribution to **the access provider's** common costs; and*

*(c) the need for the recovery of the reasonable costs, incurred in the provision of access and interconnection by **the access provider**, that would not have been otherwise*

incurred but for the requirement to provide such access or interconnection; and

*(d) the availability and capacity of the facilities operated by **the access provider** and the timeframe reasonably required to provide access to additional capacity; and*

(e) any other factors that NICTA considers relevant, to the extent that such factors are consistent with the cost-recovery principle and Subsections (a) to (d) of this definition.” (emphasis added)

46. The term “efficient costs”, which is used in reference to the cost recovery principle, is also defined by the same section of the NICT Act as follows:

*“efficient costs” include the direct and indirectly attributable capital, operating and maintenance costs **actually incurred by the access provider** in providing the declared service to itself and access seekers (including a reasonable contribution to any common costs), unless NICTA determines that such costs are inefficient having regard to the efficiency objective and any evidence before it.” (emphasis added)*

47. Importantly, when determining whether or not the efficiency objective is met, the NICT Act requires the analysis of cost-based pricing and efficient costs to be undertaken with reference to an actual service provider and that service provider’s actual costs. The analysis is not permitted to be undertaken in isolation of that reality. This means that sole reliance on a bottom-up model would not be consistent with the GPPs.

48. Similarly, the NICT Act requires NICTA to make an assessment of whether or not a service provider’s stated costs “*are inefficient having regard to the efficiency objective and any evidence before it*”. This may not be able to be achieved by looking solely at a service provider’s top-down modelling results in isolation and is likely to require NICTA to undertake an independent assessment either by way of benchmarking against other networks (or other cost information) or through a bottom-up analysis of a hypothetical efficient network.

49. This means that either an “optimized” top-down approach or a hybrid approach toward cost modelling is more likely to be consistent with the GPPs than relying solely on a bottom-up analysis that may not capture either the service provider’s or Papua New Guinea’s unique circumstances.

What approach should NICTA use for allocating costs?

50. Digicel agrees that a “pure LRIC” approach is inconsistent with the mandatory requirements of the GPPs and is not suitable for use in the determination of MTAS and FTAS pricing.

51. While Digicel agrees that either a FAC or LRIC+ approach to cost modelling might be consistent with the GPPs, we are of the view that a FAC approach is more likely to reflect the actual costs of a service provider (subject to any efficiency adjustments that may be required). In Digicel's submission a decision on this issue will depend on the circumstances that exist at the time of the cost assessment and it is not necessary or appropriate to make any final decision at this time.

How should NICTA treat capital related costs?

52. Digicel considers that the appropriate starting point to determining capital related costs is to determine the value of a service provider's assets at a particular date based on current accounting cost principles. This value represents the depreciated value of current asset reflecting their age (or remaining life). Anticipated future capital expenditures (or capex) are then added each year reflecting the replacement of assets used to provide services; with the aggregate amount (including annual capex) then being depreciated each year in line with the remaining life of assets. The asset base is therefore updated each year reflecting the remaining or unrecovered value of the network used to provide services.
53. In Digicel's submission any attempt to determine a service provider's capital related costs will be inconsistent with the requirements of the GPPs which make repeated and express references to the requirement to consider a service provider's actual costs.

What network topology should NICTA use for the cost model?

54. As stated above, Digicel considers a "hypothetical efficient operator" approach to cost modelling to be entirely inconsistent with the requirements of the GPPs, which clearly require *"the direct and indirectly attributable capital, operating and maintenance costs actually incurred by the access provider in providing the declared service to itself and access seekers (including a reasonable contribution to any common costs)"* to be used as a starting point, unless *"NICTA determines that such costs are inefficient having regard to the efficiency objective and any evidence before it"*.
55. Given this clear requirement, the use of a "hypothetical efficient operator" and a "scorched node" approach to network topology would be unlawful.
56. Moreover, the a "hypothetical efficient operator" and a "scorched node" approach proposed in the Discussion Paper could not possibly take into account the reality of building and operating a telecommunications network in Papua New Guinea to service the needs of a very diverse range of customers with continually changing needs.
57. While the approach espoused in the Discussion Paper might be suitable to highly developed markets in Europe, it is patently unsuitable in Papua New Guinea where there are significant and complex challenges around security, access to sites and power, affordability of devices, universal access and many other issues that drive decisions on technology, deployment and services that are offered to customers. In addition, new challenges are emerging as Internet based OTT services become ever more widely adopted and new technologies such as those by LEO satellite service providers become available.

58. In these circumstances a hypothetical approach to network modelling can never reflect the real world and any claims of improved efficiency that are indicated in a theoretical model must, at best, be viewed with suspicion.

Definition of the reference operator for modelling purposes

59. Digicel's mobile network coverage is driven in large part by the requirement to meet the network coverage obligations that are mandated by the *Standard and Special Conditions of Individual Licences Rule, 2011*. Digicel is the only network to have met those network coverage obligations fully and, as such, the Digicel mobile network should be considered to be the reference network for modelling purposes.
60. This is particularly important as Digicel is likely to face much greater unit costs than any other mobile network operator and should not be disadvantaged by any comparison with other networks with much more limited coverage and which have focused their efforts on easier to reach, higher population centres.
61. However, in terms of demand, it would be wrong to use Digicel's historical market share as a reference point. As NICTA is well aware, there have been material changes to Digicel's market share since Vodafone entered the market. For example, in its Public Consultation on the *Proposed Business Rule for Mobile Number Portability* issued on 20 October 2023 NICTA commented that "*Not only has the size of the mobile communications market grown since 2016-17 but the network operator market shares have materially changed, Digicel has dropped from 92.8% to 73.9%, which indicates a more balanced and competitive landscape.*" It is therefore disappointing that, in the Discussion Paper, NICTA persists in mischaracterising Digicel's market position and the state of market development by claiming that Digicel has "*an estimated market share of 97% of the domestic mobile traffic volume*".
62. As noted above, further changes to the competitive landscape are also occurring which further undermine the credibility of any claims as to Digicel's enduring market position (or alleged market power).
63. In the circumstances, Digicel is of the view that the only rational option when taking a forward looking view of the market would be to model on the basis of a reference operator with 33% market share.

The appropriate service increment to consider in the cost model

64. Digicel is of the view that the relevant service increment to be considered should be consistent with the service that has been declared. In the case of the MTAS that service is defined as a Network Service for the carriage of any combination of voice Communications and/or short messaging services from a Point of Interconnection, or potential Point of Interconnection, to any B-party connected to the Access Provider's Mobile Network. Similarly, the FTAS service is defined as a is a Network Service for the carriage of any combination of voice Communications from a Point of Interconnection, or potential Point of Interconnection, to any B-party connected to the Access Provider's Fixed Network.

65. NICTA's preliminary view that the relevant service increment to be used should be wholesale DMTAS (or DFTAS) provided to third parties appears to be consistent with that approach.

What depreciation method should NICTA use in the cost model?

66. In Digicel's submission there is no need to decide on a depreciation approach at this time and, in fact, both approaches could and perhaps should be modelled to assist in understanding the confidence around any particular modelled numbers.

What approach should NICTA follow to determine a reasonable rate of return?

67. Digicel is of the view that any calculation of the Weighted Average Cost of Capital ("WACC") should be calculated on a pre-tax basis to allow the access provider to be compensated for the cost of taxation in Papua New Guinea.
68. Digicel is also of the view that the calculation should, to the extent possible, reflect the WACC of the modelled operator in Papua New Guinea. Where any necessary data is not available for the modelled operator, Digicel is of the view that, to the extent possible, any derived information should reflect the risk profile and circumstances that exist in Papua New Guinea.

C. Conclusion

69. Digicel is concerned with NICTA's apparent intention to undertake cost modelling of the MTAS and FTAS with the apparent intention to *"use the methodology and principles (i.e., the service-specific pricing principles) resulting from this public inquiry to determine the maximum allowable prices for the Declared Services in accordance with Section 135 of the Act.*
70. In Digicel's submission such an approach would be inconsistent with the requirements of the Act and open to challenge.
71. Digicel is also concerned that the current consideration of the SSPPs fails to take into account the terms of the Declaration of the MTAS and FTAS or the existing SSPPs that, according to NICTA's website, remain in force.
72. In the event that any dispute arises, Digicel is of the view that, as a first step, international benchmarking be undertaken to inform an arbitration of that dispute. If the access dispute is unable to be resolved through the use of international benchmarking, then it may be appropriate to undertake a cost modelling exercise as a last resort.
73. Digicel welcomes the opportunity to comment on the submissions of other parties and looks forward to continuing to discuss these issues with NICTA as the Public Inquiry progresses.