



**Public Consultation on Proposed Amendments  
to the *Service-Specific Pricing Principles*  
(*Submarine Cable Services*) Determination 2019**

**RESPONSE TO COMMENTS REPORT**

December 2020

## 1. Purpose of this Report

This Response Report sets out NICTA's responses to the main comments that interested parties have included in their submissions on the Discussion Paper and on the submissions of others.

NICTA has considered carefully all submissions and comments received before determining whether the proposed amendments to the *Service-Specific Pricing Principles (Submarine Cable Services) Determination 2019* (the Determination) should be adopted in the form proposed in the Discussion Paper or in some other form.

Submissions received from interested parties have been posted on NICTA's website, redacted at the request of the authors to protect from disclosure information claimed to be confidential.

The Annex to this Report only considers main comments in submissions. However, all comments have been considered carefully by NICTA.

## 2. Consultation Process

A discussion paper containing draft amendments to the Determination was prepared by NICTA and published on 24 July 2020 with an invitation for comments by interested parties to be received by NICTA by 24 August 2020. At the request of the industry NICTA extended the deadline for comments on two occasions, the second to 16 October 2020.

Opportunity for a second round of comments (chiefly for the purpose of enabling interested parties to comment on each other's submissions) was permitted, with a deadline for submissions on 13 November 2020.

Submissions in the first round were received from:

- PNG DataCo Limited ("DataCo")
- Digicel (PNG) Limited ("Digicel")
- Kumul Telekom Holdings Limited ("Telikom")

Submissions in the second round were received from:

- DataCo
- Digicel

The comments and responses set out in this Report combine all submissions from each party for convenience.

NICTA thanks all of the organisations who made submissions. Their contribution to the process and to improving ICT regulation in PNG is appreciated.

## Annex: Summary of Key Comments received in Submissions

Item	Issue / subject reference		Summary of comment	Summary of NICTA response
<b>A: DataCo</b>				
1	Single Price	Aug 2020, Section A, pp. 2-3	“DataCo agrees that the PNG submarine cables provide mutual redundancy and should be considered as a single system.... It does not matter to the end user seeking, say, international connectivity to Sydney which path is used.... To the extent that any fibre cable system is used to carry international traffic, an appropriate share of its costs will be counted as part of the single system providing international connectivity.”	It was for these reasons that NICTA decided to propose a change in the amended Determination and adopt a single price for each period. This change has now been confirmed.
2	Maximum average price	Aug 2020, Section B, pp. 3-4	DataCo welcomes this approach because it enables large capacity purchases to have a lower unit rate than smaller purchases. DataCo also discusses how average revenue can be monitored for compliance with a regulated maximum average price.	This was the main reason for proposing a maximum average price.
3	Indicative prices	Aug 2020, Section C, p 4	DataCo notes that the calculation of maximum average prices achieved will depend on demand in future years. “It is not possible to commit to future prices because of uncertainty of demand. But, now that the major cable investments have been made and with growing data volumes, it can reasonably be expected that unit costs and prices will fall continuously over time.”	The point is understood and agreed. The average prices that are actually achieved in any period will reflect the overall demand and the structure of that demand in terms of size of capacity purchases. It was because demand forecasts need to be regularly updated in the light of emerging experience that the maximum average prices for periods after the first period have been shown in the Schedule to the amended Determination as “indicative”. They are based on current forecasts and

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				will be updated annually, reflecting on future years' maximum average price.
4	Compliance	Aug 2020, Section D, pp 4-6	<p>DataCo sets out its views about how compliance will be measured, especially considering that submarine cable capacity will be a constituent part of various wholesale services offered by DataCo as well as being available on a standalone basis.</p> <p>“NICTA is silent on what should happen if the maximum average price is exceeded in a regulatory period.” DataCo proposes a carry forward arrangement for any surplus or deficit of revenue.</p>	<p>NICTA has taken the considerations in DataCo’s submission into account in setting out the methodology for assessing compliance that is now in the amended Determination.</p> <p>After considering the matter NICTA decided that it was not necessary to be definitive in the Determination itself about the way in which a surplus or deficit of revenue might be treated. This will depend on the extent of the difference involved. Clearly carry forward arrangements are available in terms of impact on future years’ maxima – but also credits and refunds. The duration of the initial regulatory period will also be a factor.</p>
5	Review	Aug 2020, Section E, p 6	DataCo agrees with the review processes contemplated in the proposed amended Determination and the Discussion Paper.	These arrangements have been adopted in the amended Determination.
6	Commencement Data	Aug 2020, Section F, p 6	DataCo argues that “it would be inappropriate to backdate the Determination to, say, 1 <sup>st</sup> January 2020” because unit cost is sensitive to the level of demand, and demand has more than doubled in the meantime. DataCo notes but does not disagree with a commencement date for the amendments of 1 <sup>st</sup> September 2020 suggested in the Discussion Paper.	NICTA agrees that backdating to period of significantly different demand would be inappropriate (in the absence of adjustments to the regulated price to reflect that changed demand). The date of 1 <sup>st</sup> September 2020 was prospective when the Discussion Paper was published in July 2020 but is now past. After further consideration and taking account of the matters raised in the consultation process and the passage of time, NICTA now proposes a Commencement Date of 1 <sup>st</sup> January 2021, notwithstanding that this creates a very short initial regulatory period.

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7	Service Definitions	Aug 2020, Section G, p 7	DataCo notes that no wholesale customer currently purchases some of the declared services, per se, but that all of these declared services are to be found in wholesale internet service (WIS) and IPLC service. DataCo suggests that NICTA might wish to make the commercial services look more like the regulated services, or vice versa.	NICTA has considered this approach – which would require additional declarations by the Minister. However, the services that have been declared are services that involve access to wholesale transmission on international submarine cables or on national fibre-based systems. It is not NICTA’s intention to constrain DataCo or any other operator in the manner in which they combine transmission and other service elements to form commercial services, not is it NICTA’s intention to follow commercial initiatives with a series of declarations. The cost models that DataCo has commissioned and which NICTA has overseen and studied are adequate to allocate the costs of constituent elements of service – elements that include but are not limited to declared services – and thereby enable compliance assessment.
8	Cost Mark Up	Aug 2020, Section H, pp 7-8	DataCo notes that the top-down model that it commissioned is based on fully allocated costs only, and that a mark-up needs to be added.	The maximum average cost in Schedule 1 to the amended Determination includes a mark-up based on Weighted Average Cost of Capital. The final amendment will note the average purchase capacity on which it is based. Should that average capacity be different after the completion of the regulatory period, then the difference will be taken into account in determining whether there has been compliance or not.
9	Second Round Submission	3 November 2020	DataCo has sought to comprehensively address the comments in the Digicel and Telikom submissions.	The relevant comments in the Digicel and Telikom submissions are better addressed directly, taking into account, where necessary, the DataCo second round comments.

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<b>B: Digicel</b>				
10	Cost information	31 Aug 2020, covering letter	<p>Digicel had not had access to DataCo’s underlying costs of service at the date of its first submission.</p> <p>“We have therefore been forced to rely on international benchmarking information to support our submission.”</p> <p>Digicel suggested that “NICTA establishes a confidentiality regime that allows DataCo’s confidential information to be made available to specified independent experts of interested parties who have entered into appropriate confidentiality agreements”.</p>	<p>NICTA encouraged DataCo to use its retained experts to provide a presentation of the models used to calculate service costs. DataCo hosted a workshop for the industry on 6 October 2020, which included presentation of and discussions of the models used.</p> <p>NICTA appreciates the use of benchmarking, but only, as Digicel suggests, as a supplementary approach, and one that might be used if information on actual costs, local demand and local contextual factors is not available.</p> <p>NICTA encouraged DataCo and Digicel to negotiate a confidentiality agreement along the lines suggested by Digicel. It was considered inappropriate for NICTA to impose its own non-disclosure agreement on the parties or to impose views on what might be appropriate terms for protecting commercial confidentiality.</p>
11	Single price	31 Aug 2020, Section B, para 11	<p>Digicel agrees that it is appropriate for NICTA to establish a single price for the capacity on all cable systems, but does not agree with NICTA’s stated reasons for doing so, which is to do with diversity and “mutual support”. Digicel notes that the services it receives are unprotected, with protection at additional cost.</p>	<p>These comments hinge on the meaning that Digicel attributed to the words in the Discussion Paper. NICTA intended to refer to the situation, as clarified in DataCo’s second round submission, that users are concerned to receive a service in PNG and are not concerned above the cable systems over which the service is provided. DataCo therefore uses the capacity available and can switch between cable systems. This supplier flexibility is to be distinguished from the provision of a protected service at the request of the user, which has a more specific and technical meaning, and relates to specific</p>

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			<p>Digicel also notes that “access seekers should not be required to pay a premium on the basis of DataCo’s continued operation and use of the APNG-2 cable”.</p>	<p>redundancy and other provisions in the contract for service.</p> <p>In relation to APNG-2, NICTA agrees. The costs of that obsolescent cable are high. In any case, those costs were excluded from the DataCo models and the concern mentioned by Digicel does not arise.</p>
12	Maximum average price	31 Aug 2020, Para 12	<p>Digicel “strongly disagrees” with this approach, based on reasons including (i) the difficulty of meaningful monitoring, (ii) unnecessary complexity, (iii) commercial uncertainty, (iv) incentives for DataCo to game the system, and (v) remedies occurring only after any damage to access seekers having occurred.</p> <p>“Instead, Digicel proposes that NICTA should adopt a ‘rate card’ approach, with maximum prices specified for various capacity volumes.</p>	<p>After taking account of all comments on this, NICTA has decided to continue with a maximum average price approach as proposed in the draft amendment. The amended Determination sets out the assessment methodology, and monitoring will follow that. Both NICTA and DataCo are able to separately monitor during the course of a regulatory period. NICTA is not pretending that this will be without complexities. The issues of commercial uncertainty and the possible use of a rate card need not be pursued, given DataCo’s commitment to proposing a RIO, the draft of which has been based on the same network cost models that underpin the rates in the Schedule to the proposed amended Determination. In relation to point (v), all remedies would necessarily be after the event of non-compliance, but the rate card approach in the proposed RIO will, if that RIO or another is accepted, mean that any non-compliance and consequences for access seekers will be apparent at an early stage.</p>
13	Proposed rate card	31 Aug 2020, Para 12 (l) and (m)	<p>Digicel has set out a rate card based on a combination of DataCo’s current rate card and benchmarks derived from Tonga cable capacity prices.</p>	<p>Given the combination of PNG costs and demand information in the DataCo cost models and the commitment by DataCo to proposing a consistent RIO, there is no need to pursue alternative rate cards. However, one important difference in the case of Tonga</p>

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				is the significant minimum commitments by the national operators to take cable capacity from TCL. There are no current equivalent arrangements in PNG.
14	Indicative prices and regulatory periods	31 Aug 2020, para 13	<p>Digicel agrees with the proposal in the Discussion Paper, which involves firm regulation of prices for the first period and then progressive review of prices for subsequent periods. “However, Digicel is concerned that the proposed first period for the proposed amendments is too short to be of practical commercial value” and that it might impose “an unnecessary cost burden on the industry”. Digicel therefore proposes that the initial period should run to 31 March 2021.</p> <p>Digicel is concerned about the review arrangements proposed “as soon as possible during Q1 of the period to which it relates” because of commercial uncertainty during the time taken for the review, the complexity of adjustments, and the need for a four-week consultation under Section 135(4) of the Act.</p>	<p>The shortness of the initial period has been exacerbated by the time that has passed since the initial Discussion Paper was published. NICTA prefers to retain calendar year regulatory period because they best align with other periodicities, as far as it is possible to do this. However, the passage of time for the review in 2020 has meant that NICTA now agrees that the initial period should run from the Commencement Date to 31 March 2021.</p> <p>NICTA agrees with Digicel about compliance with Section 135(4) timescales. However, as noted above, the impacts that Digicel has mentioned will, assuming they occur at all, be reduced by the prospect of a RIO being in operation at the same time.</p>
15	Compliance	31 Aug 2020, para 14	<p>Digicel notes that compliance monitoring and assessment will result in “unnecessary complexity” with strong incentives for DataCo to “game” the system.</p>	<p>NICTA is not aware that the proposed arrangements will add to any incentive that any commercial entity has to seek to operate to its own advantage. Undoubtedly if there is any “gaming” in practice, it will be the subject of complaint and review, based on evidence. The RIO arrangements, already discussed above, will, as Digicel recognises, potentially resolve many of the issues of concern to Digicel.</p> <p>NICTA has not specified exactly how an adjustments system will work because, as already noted in this Response Report, the approach will depend on the</p>



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			Digicel also notes that the complexity of the adjustments system for non-compliance could be problematic.	circumstances that need to be taken into account at the time.
16	Review	31 Aug 2020, para 15	Digicel's submission sets out a process for review, and argues that "any such review process should be conducted in a transparent way that includes the independent expert scrutiny of DataCo's claimed costs and demand information".	The modelling tools that have been used to set the initial prices will be redeployed with updated input data for the review process. The review will be conducted with maximum transparency consistent with commercial confidentiality, as was the process in September-October 2020.
17	Commencement Date	31 Aug 2020, para 16	Digicel supports a commencement date of 1 October 2020.	Since receipt of Digicel's submission, the suggested date has passed, and NICTA is now planning on a Commencement date of 1 January 2021.
18	Form of Amendment Determination	31 Aug 2020, para 17	Digicel believes that a new determination, as amended, is inappropriate, and that there should be a specific Amendment Determination.	NICTA agrees, and has taken further advice on the matter since Digicel's comments.
19	Non-Price terms	31 Aug 2020, para 17 (e) and following	Digicel is concerned "that DataCo is seeking to impose (or has imposed) on access seekers such as Digicel payment related terms and conditions that DataCo does not apply to its related entities", such as disconnection for late or short payments, which terms have not been applied to Telikom or Bmobile.	This is a serious matter. DataCo is subject to non-discrimination obligations under the Act in relation to declared services, and will be subject to non-discrimination in applying a RIO, if the proposed RIO or another is accepted. NICTA will not tolerate non-discriminatory treatment and, based on the evidence, will take these matters further, and may involve the ICCC. Additional non-price terms do not have to be included in the Determination for action to be taken.

**C: Telikom**

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21	Single price	31 Aug 2020, p 2	Telikom disagrees with one single price for all international cable systems because all submarine cable systems have different cost elements.	NICTA disagrees with this approach. The requirement is that wholesale access prices for declared services should be cost based plus a reasonable return, not that prices should vary to reflect the different costs of each service element or, in this case, each cable system. This is particularly inappropriate where the choice of cable system is a matter for DataCo and not the access seeker. It is important to note however that in the cost model the actual costs for each of the cable systems included in the mix have been entered from the accounts.
22	Maximum average price	31 Aug 2020, p 2	Telikom disagrees and prefers retention of a maximum price “for ease and effectiveness of ex-ante regulation”.	The need for prices to reflect the capacity commitment of each purchase is the reason for the change, as discussed earlier in this Response Report. Some of Telikom’s concerns should be alleviated by the introduction of a RIO with a price schedule that will allow ready consultation by all parties when orders are being placed.
23	Indicative prices	31 Aug 2020, p 2	Telikom accepts this arrangement whilst pointing out that the challenge will be to undertake the review in a timely manner.	NICTA agrees that will be a challenge.
24	Cable duct access	31 Aug 2020, p 3	Telikom comments that “the meaning of submarine cable service should exclude ‘cable duct access’ because there is a business risk for interference, causing disruption to live service when another future service provider or vendor is permitted by this determination to use the same ducting”.	The Determination does not have the effect that Telikom claims. Telikom appears to be referring to the Submarine Cable Duct Access Service which was also declared by the Minister on 19 February 2019, but which is not the subject of the Service-Specific Pricing Principles now under review. The focus of the current review is the cable capacity service.

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				<p>In any case, the “free for all” access arrangements which Telikom is concerned about are not intended to accompany any declaration that NICTA would recommend.</p>
25	Wholesale and retail	31 Aug 2020, p 4	<p>Telikom is concerned that the Declarations do not distinguish adequately between wholesale and retail services, and seeks clarification.</p>	<p>This matter affects the Declarations rather than the instrument now being amended. The Act defines Wholesale Service very clearly in terms of the customer to whom a service is sold and the purpose to which that customer then puts the service. In addition, Declarations under Section 130 of the Act apply only to wholesale services. Therefore, there is no need to clarify within a Declaration or Pricing Principles that they refer only to wholesale services, because they can only refer to wholesale services.</p> <p>There are other issues associated with the wholesale / retail distinction that are of concern to Telikom, and NICTA is taking these up separately.</p>