



**Public Consultation: Guidelines on Sharing of
Telecommunications Towers and Service
Specific Pricing Principles for UAS Funded
Towers**

RESPONSE TO COMMENTS REPORT

Issued on 19 December 2019

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1 SUMMARY

On 8 April, 2019, NICTA published a discussion paper as part of its review of the need for a guideline on the sharing of towers and related facilities. In this matter NICTA is acting within the terms of Section 218 of the National Information and Communications Technology Act 2009 (“the Act”), which empowers NICTA to make rules and guidelines that are consistent with the Act. In addition NICTA proposed to make service-specific pricing principles in relation to access to towers and other facilities constructed using Universal Access and Service (“UAS”) funding.

The consultation period was extended to the first week of June 2019, and written submissions were received from:

- Digicel (PNG) Limited (“Digicel”);
- The Independent Consumer and Competition Commission (“ICCC”); and
- Telekom PNG Limited (“Telikom”).

1.1 The 2018 review of wholesale services for possible declaration

During 2018 NICTA conducted a public inquiry into the potential declaration of a number of wholesale services pursuant to the procedure set out in Part VI of the Act. One of the services discussed for possible declaration in that inquiry was tower sharing – that is, the requirement for a licensed operator owning or controlling telecommunications towers to share, under certain conditions, its tower capacity and related amenities with other licensed operators who might request access.

The public inquiry concluded that, on balance, there was insufficient evidence that the criteria for declaration in the Act would be met by a declaration of tower sharing at that time, and that, instead, NICTA should monitor the market for tower sharing and facilitate the making and registration of applications to facilities owners to provide access to and share towers and related facilities. That is the purpose of the present public consultation.

It is not the intention of the present public consultation to re-run the discussion or to revisit, at this stage, the conclusions of the wholesale service declaration public inquiry into tower sharing. Some of the respondents who made submissions treated the consultation as if it were for that purpose.

1.2 Specific purposes of the public consultation

The specific purposes of the present review are to consider the following draft instruments:

1. Tower Sharing Guideline, including an Annex containing a model application for tower and site sharing and related ancillary services; and

2. Service-Specific Pricing Principles (Access to Universal Access and Service Fund funded Telecommunications Towers, Sites and Related Facilities) Determination 2019.

1.3 The Discussion Paper of 8 April 2019

The Discussion Paper provided information on the 2018 Wholesale Services Declaration public inquiry and its outcome in relation to tower sharing in order to provide context. In particular, the Discussion Paper noted that there had been conflicting assertions in the submissions of different operators about the level of demand for tower sharing and whether attempts to apply for sharing had been made and were properly dealt with. As a result one of the purposes of the proposed guideline was to establish a process by which applications could be made by operators (using a model application form if that proved to be helpful) and the overall level of demand monitored by NICTA. The proposal was that NICTA would review whether tower sharing should be declared after a year, taking into account the level of demand and the likelihood that commercial negotiations might prove to be adequate without further regulation.

During the course of the 2018 public inquiry it became clear to NICTA that it would be appropriate to assist access to and sharing of towers and associated facilities that have been funded from the UAS Fund. These facilities are deemed to have been declared services at Section 131(5) of the Act. Being declared it is appropriate to determine service-specific pricing principles, pursuant to Section 135 of the Act.

1.4 Response to the Discussion Paper

The main elements in the responses to the Discussion Paper are presented in Section 2 of this report, along with analysis and the action now proposed by NICTA as a result of considering the submissions.

After consideration of the submissions NICTA has made some changes to the proposed Guideline and to the proposed Determination that were set out in the Discussion Paper. These changes are for clarity and to bring the instruments into greater alignment and consistency with the Act. However there has been no change in the overall thrust of the instruments.

On this basis NICTA has re-drafted the proposed instruments and the revised now appear at Attachments A (Guideline) and B (Specific Service Pricing Principles Determination) to this report.

NICTA thanks the organisations that have made comments for doing so. The overall regulatory process and outcome has been improved as a result.

2 SUMMARY OF COMMENTS RECEIVED

2.1 Tower and Related Facilities Sharing Guideline

Note that the proposed title of the Guideline has been changed to better reflect its content

Ref.	Issue / subject and reference	Submission	Summary of comment	Summary of NICTA staff's response
GENERAL COMMENTS				
1	Declaration of tower sharing services	ICCC (Page 1)	The ICCC reiterates the position that it expressed in its submission on the 2018 wholesale services review, namely that tower sharing should be declared, and sets out benefits that would result.	The present exercise is not a re-run of the 2018 wholesale services review. NICTA does not doubt that there are benefits in infrastructure sharing, but that can be achieved in many ways, of which declaration and regulated mandatory access is only one. NICTA has to consider the criteria for declaration in the Act and did so in the 2018 review.
2	Declaration of tower sharing services	Telikom (Page 1)	Telikom states that it agrees with NICTA on the need for “careful handling” and “commercial grounds” in relation to tower sharing. Telikom agrees that there “is no regulatory change regarding mandatory sharing”.	Noted. This is a significant comment because the Kumul group of companies might be expected to be access seekers more than access providers.
GENERAL GUIDELINE				
3	Overall emphasis of Draft Guidelines (Section 4.3)	ICCC (Page 2)	The ICCC notes: “The draft guideline seems to place emphasis on non-discriminatory and non-exclusive conduct which the ICCC notes and is satisfied with. The ICCC then suggests a change in the heading to section 4.3 to “General Terms and Conditions for Sharing UAS Funded Towers and Sites”.	NICTA will change the heading to “Sharing of Towers, Sites and Other Facilities funded from the UAS Fund”. General Pricing Principles are set out in section 134 of the Act, and it is not intended to have references that might appear to be inconsistent with the Act.
4	Extent of the Guideline	Telikom (Pages 1, 2 and 3)	Telikom reiterates its view, expressed at the time of the wholesale services review, that not only UAS-funded towers, but other towers that are publicly funded should	The current consultation is not a re-run of the issues that were discussed and ruled on in the recent wholesale services review. The Act only deems

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			<p>be subject to mandatory sharing. In addition Telikom recommends that enough capacity should be included in all “publicly built sites for sharing”.</p> <p>“Going forward, all UAS funded towers built must have physical load-bearing capacities as most if not all privately built don’t.”</p>	<p>wholesale facilities services that are constructed in accordance with a Project Agreement under the UAS scheme to be declared. That deeming does not extend to other publicly funded towers.</p> <p>NICTA will consider this proposal when it next reviews the terms of Project Agreements under the UAS scheme that relate to the construction of towers. In the meantime, once-off costs associated with strengthening of UAS-funded towers to improve load bearing for sharing will be borne by the access seeker.</p>
5	Ambit of the Act (Introduction, 3)	Digicel (Page 20)	Digicel states its “concern that, with respect to NICTA’s treatment of roaming and backhaul transmission services, what has been proposed is outside of the ambit of the Act.”	NICTA disagrees. The matter is dealt with more completely in comment Ref. 7 below.
6	Coverage of the Guideline (Section 7.2, b.)	Digicel (Page 2)	Digicel states that it “understands that the Draft Guideline is not intended to apply to any sites or towers that have not been constructed pursuant to the terms of [a] Project Agreement as that term is defined in the Act.”	This comment is incorrect in relation to the intention of the Guideline. The approach in the Guideline is recommended for all sites and towers to which access is sought, and the procedure for registering applications for site and tower sharing apply to all such situations.
7	Definition of “facilities access services” under the Act (Section 8.3)	Digicel (Pages 2 and 3)	<p>Digicel notes that only services that are facilities access services and which are supplied by means of any facility constructed under a Project Agreement are deemed to be declared for the purposes of Section 131(5) of the Act, and, further, that neither roaming services nor backhaul services are facilities access services as the term is defined under the Act.</p> <p>Digicel also states in para (e) that “whether or not a backhaul transmission service or ‘a roaming service to the nearest feasible network node in the access seeker’s mobile network’ is provided under a Project Agreement</p>	<p>NICTA disagrees. The only practicable means of effectively accessing the facility in question may be via the use of backhaul capability that is in place for that purpose. The Act deems the access service to be declared where the facility accessed has been supplied under a Project Agreement.</p> <p>Whether an otherwise successful bidder chooses to enter into a Project Agreement is a commercial judgment for that party, but the requirement for other licensed operators to be able to have access via</p>

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			is a purely commercial matter”.	roaming and backhaul to the facility and site being developed will be incorporated by NICTA as standard terms in Project Agreements.
8	Standardising facilities access charges (Section 9.2, a)	Digicel (Page 3)	Digicel agrees that NICTA “should refrain from seeking to impose facilities access charges under the ‘standard clauses in UAS Project Agreements’. That is because any such charges will be highly dependent on the nature of the specific services or services that may be sought by an access seeker and which, in most cases, will be unknown at the time of the Project Agreement is concluded.”	Digicel’s conclusion and reasoning is noted. However, the reason that NICTA has taken the view set out in the Draft Guideline is that the matter is adequately governed by more general principles which can be adequately applied to the circumstances of individual facilities if there is a dispute between the access seeker and access provider.
9	Project Agreement RIO (Section 9.2, b)	Digicel (Page 3)	Digicel ‘suggests it would be appropriate for NICTA to expressly contemplate the possibility that a party to a project Agreement may wish, in parallel with entering into that Agreement, also make a Reference Interconnection Offer under Section 141 of the Act in respect of any facilities access services that may be provided by means of the facilities constructed under the project Agreement.”	This is a good suggestion, and one with which NICTA generally agrees. As a separate matter NICTA will review the Project Agreement template to include a requirement for a RIO. However the RIO will include the services to provide access already discussed in this Response Report, not just the facilities constructed under the Project Agreement.
10	Backhaul transmission and roaming access (Section 9.3, a – and also in Section 11 (Annex A) a.)	Digicel (Pages 3 and 4)	Digicel reiterates its view that neither backhaul transmission nor roaming services are deemed to be declared under section 131(5) of the Act.	See Refs. 6 and 7 above. The arrangements proposed do not involve the declaration or deemed declaration of these services in the general sense implied by Digicel. The arrangements proposed involve full and proper consideration of the access arrangements necessary to enable practical and meaningful access to the relevant facilities.
11	Record keeping (registration of applications for the sharing of towers and related facilities)	Telikom (Pages 1 and 6)	Telikom “commends and agrees with NICTA for record keeping in [sic] a way forward to ascertaining demand”.	Noted. This is the only comment received specifically on that point. It should be noted that the registration of applications

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				for tower and site sharing with NICTA is not only for ascertaining demand, but also to enable NICTA to investigate the adequacy of the response to the applications and whether the overall situation might be improved through regulatory action in the future.
DRAFT SERVICE-SPECIFIC PRICING PRINCIPLES FOR UAS-FUNDED TOWERS (Annex B)				
12	Reference to facilities and towers (Section 4, a and b)	Digicel (Page 4)	Digicel suggests that “the reference to ‘facility’ should be amended to be a reference to a ‘tower’ as that is the specific type of facility that is the subject of the” proposed determination.	NICTA notes that the heading and reference have now been amended to make it clear the facilities that are intended to be covered. They extend beyond towers, and align with the diversity contemplated in the Act and in Project Agreements.
13	“Facilities” (Section 4, c, d and e)	Digicel (Page 4)	Digicel states that “section 131(5) [sic] of the Act provides that ‘ <i>all facilities access services that may be supplied by means of any facility constructed under a Project Agreement for the life of that facility</i> ’ (emphasis added) are deemed to be declared. This creates a relationship between the facilities access services and the specific facility that is specified pursuant to a Project Agreement. Seeking to broaden the scope of that facility in the way NICTA is proposing would essential [sic] mean that any service provided by any party (including those provided by access seekers) would be deemed to be declared simply by virtue of having some connection with the facility that is constructed under a project Agreement.”	NICTA disagrees that the scope of the deeming provision would be extended to any service having some connection with the relevant facility. Such an argument misconstrues the arrangements that NICTA intends. NICTA does not intend that ‘any services’ ‘having some connection’ should or would be included in the deemed declaration. However, NICTA does intend that the Project Agreement shall make provision for access to the facility to be meaningful if such access is sought by other licensed operators.
14	Cost-based pricing and General Pricing Principles (Section 5)	Digicel (Pages 5 and 6)	Digicel cites considerable detail from the General Pricing Principles in Section 134 of the Act, and makes the point that the draft Pricing Principles Determination should not attempt to replace or rewrite the General Pricing Principles.	NICTA agrees that the draft Service-Specific Pricing Principles should not attempt to rewrite or replace the General Pricing Principles. Section 134(3) makes it clear that the General Pricing Principles will prevail if there is an inconsistency with service-specific pricing

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			<p>Digicel gives an example of where it considers that NICTA, in the draft service-specific pricing principles, has rewritten or been inconsistent with the Act. Digicel states that the definition of “efficient costs” includes “direct and indirectly attributable capital, operating and maintenance costs” and “a reasonable contribution to any common costs” and that these costs cannot be excluded, as Section 5(4) of the Draft Determination seeks to do.</p>	<p>principles or other nominated instruments.</p> <p>The second sentence of Section 5(4) was intended to require approval to the quantum of indirect costs and overheads attributed to any tower or other facility to ensure that the amount represents a reasonable contribution, not to exclude such costs altogether. In the light of the comment from Digicel, NICTA will amend the draft determination by deleting the second sentence in section 5(4) and leaving the matter to the General Pricing Principles.</p>
15	Pricing principles	ICCC (Page 2)	<p>The ICCC states that NICTA should ensure that access prices are cost based, non-discriminatory, not lessen competition in dependent markets, and not be predatory.</p>	<p>NICTA considers that these more general requirements are covered by legislation and are not required to be reiterated in service-specific pricing principles.</p>
16	Cost of capital adjustments (Section 5(2))	ICCC (page 2)	<p>The ICCC seeks clarification in relation where the cost of capital employed is adjusted to zero reflect UAS Fund funding. The ICCC notes that “the cost of capital is the opportunity cost of the debt and equity funds to finance the operations of a firm. Determining the cost of capital is an important part of determining an access price.”</p>	<p>NICTA agrees with the general observations of the ICCC on the cost of capital. However the guideline in Section 5(2) relates to the source of funds employed. To the extent that the funds are provided from the UAS Fund the cost of capital to the Tower/Site/Facility owner is zero. The Section will be amended to make it clear that cost of capital is always a relevant consideration and that the adjustment should only apply to the quantum of capital funding from the UAS Fund. It is conceivable that additional funds may be required in relation to some facilities from the operator's own capital resources.</p>
17	Formula for the calculation of annual access charges applicable to access to towers	Digicel (Page 6)	<p>Digicel states that the definition of “efficient costs” in the Act means that the Draft Determination cannot exclude “indirectly” attributable costs by only</p>	<p>In the light of this comment, NICTA proposes to amend the Determination to read “incurred by the access seeker and reasonably attributable to the operation...”, removing the word “directly”, to align</p>

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	and use of sites (Section 6(2))		permitting the inclusion of directly attributable costs.	with Section 134(2) of the Act.
18	Onsite Shelter and Accommodation, and Access Roads (Sections 7 and 8)	Digicel (Page 6)	Digicel notes that it appears that NICTA has sought to exclude the capital costs of onsite shelters and access roads from the calculation of annual access charges, and that this would be inconsistent with the General Pricing Principles.	NICTA will amend these sections to include annualised capital costs in the formulae for calculating the annual access charges concerned.
19	Access to power (Section 9)	Digicel (Pages 6 and 7)	Digicel notes that in most cases the operator [by which NICTA believes the access provider is intended] will have been required to establish its own power supply and that the same principles for access should apply as in the General Pricing Principles.	NICTA does not disagree with these comments and will amend the section. However the comments do not affect Section 9(b) and (c) which will be retained.
20	Access to Backhaul Transmission (Section 10)	Digicel (Page 7)	Digicel raises again the issue of whether access to backhaul is a deemed service.	This issue has already been discussed above. NICTA is not seeking to declare backhaul services as such, but to specify that access to backhaul associated with a facility is part of the overall access required to the facility where the facility is funded under the UAS scheme as the subject of a Project Agreement.
21	Discounts for community based services, NGOs and non-commercial operators	Telikom (Page 1, 7)	Telikom "in principle, agrees with the pricing principles attached in Annex B and further suggests an exception for community based services, NGOs and non-commercial operators to be given special rates or discounts".	Special support in the form of discounts to these types of user of towers and other facilities is not part of the scheme in the Act. Consequently NICTA has no authority or power to require that special rates for tower and site sharing be given to organisations in the categories mentioned. The scheme of Part VI of the Act is the access arrangements to wholesale services. Wholesale services are only provided to licensed operators, and the organisations mentioned in Telikom's proposal are not licensed operators. Any access to them would not be a wholesale service in any case.

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22	Tower and site co-location fee scheme	Telikom (Page 6)	<p>Telikom considers two situations, namely (1) where a site is 100% built by UAS funds; and (2) where the operator and the UAS Fund jointly fund a tower or site. In case (1) Telikom proposes that “a fee shall be charged to the telecommunications provider (a % rate of the end user revenue). If operators are to share the tower then this UAS fee must be shared as well.”</p> <p>In case (2) one approach would be that the access seeker should share the UAS charged fee and also pay a co-location fee to the “host operator” (access provider), with the co-location fee “representing the proportion of investment in the tower by the host operator”.</p> <p>Telikom also states that “where the promoting of universal access of telecommunication services is concerned, should any operator [has] benefited from such UAS funding, that operator should declare the towers funded under such arrangement and also reflect the benefit in pricing to the end consumers”.</p>	<p>NICTA does not favour the imposition of a fee. The aim of the UAS scheme is to facilitate the provision of services in areas which are unserved or underserved, and provision of service is not commercially sustainable without a capital grant from the Fund. If other service providers wish to access the facility and share in revenue from the retail market they need to contribute at wholesale rates to the access provider. The actual costs borne by the access provider are the basis of wholesale facility access charges under the Act, and they will take account of the cost of capital from UAS Fund sources, (see Ref. 16 above).</p> <p>There is no need for an operator to declare that towers, or other facilities, are funded from UAS Fund sources, since the matter will be a matter of public record, and any doubts can be cleared up by contacting NICTA and the UAS Secretariat.</p>