

Friday, 15 May 2020

Mr. Kenva Williams
Director General
Turks & Caicos Islands Telecommunications Commission
P.O Box 203, Business Solutions Complex
Leeward Highway, Providenciales
Turks & Caicos Islands

Dear Mr. Williams,

**RE: Digicel Response to the Public Consultation by the Turks and Caicos Islands
Telecommunications Commission on the Third Review of Interconnection Rates**

We thank you for the opportunity to provide our comments on the consultation document “the Third Review of Interconnection Rates” dated 24 February 2020 (the “Consultation”).

Digicel (TCI) Ltd (trading as Digicel), respectfully submits its comments and responses to the Consultation.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in the draft Regulations or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement, in whole or in part nor does any position taken by Digicel in this document represent a waiver or concession of any sort of Digicel's rights in any way.

Please do not hesitate to refer any questions or remarks that may arise as a result of these comments by Digicel to: -

Addison Stoddard
Chief Executive Officer
Digicel (TCI) Limited
Email: addison.stoddard@digicelgroup.com

1. Introduction.

Digicel notes the Commission's proposal to use a benchmark of prices in other countries to establish the cost-oriented price of termination in the Turks and Caicos Islands. This approach is fundamentally wrong. Any price derived from a benchmark cannot be said to be based on the actual costs of operators in the Turks and Caicos Islands. Such an approach appears to be a breach of the requirements of the relevant legislation. Any attempt to impose prices based on this methodology would be unlawful.

The use of benchmarks by the Regulator to establish a cost oriented termination rate was litigated in Ireland by way of a statutory appeal.¹ The issues canvassed in this matter align closely to the issues that arise in connection with the Commission's proposed approach to the setting of rates in the Turks and Caicos Islands.

In particular these include whether a benchmark is a valid methodology to be selected by a regulator to set cost oriented rates.

This matter was ruled upon by the High Court in Ireland which stated:

"It follows in the judgment of the Court that a fortiori, the facility allowed to the Regulator in this regard cannot extend to calculating the cost of efficient provision of the operator services by taking an average of results obtained by a number of other NRAs [National Regulatory Authorities] in other geographic markets. However widely one construes the latitude afforded to the regulator to rely on its own independent accounting method, it must be applied to costs incurred or liable to be incurred by an efficient operator in the market in which it is providing the service and in which the regulatory obligation is to be imposed. The reality of the benchmark solution is that all of the costs that have given rise to the results notified to the Commission by other NRAs and used to calculate the benchmark by ComReg are costs calculated in respect of other operators in other markets."

and that

"it must be highly questionable whether the use of an arithmetical short cut of adopting the average of the rates that happened to be available from other NRAs who have fixed rates by reference to the recommended LRIC methodology at the time when the decision comes to be made by the NRA is a "methodology"."

Digicel more fully sets out its position in response to the individual questions.

Question 1: Respondents are invited to provide any comments they may have on matters related to legal and regulatory provisions relating to the establishment of interconnection

¹ Vodafone Ireland Limited -v- Commissioner for Communications Regulation, Case Number 2012 No. 465 MCA, Neutral Citation [2013] IEHC 382

rate maxima in TCI. Any alternative proposals or suggestions offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

As the Commission summarized in the consultation document Section 25(4) of the Telecommunications Ordinance states as follows:

*25. (4) For calling, party pays calls between networks, the terminating network shall receive a cost-oriented usage based rate **based upon costs of the licensee providing interconnection services.** [emphasis added]*

Whatever method the Commission specifies under Regulation 15(1) of the Interconnection Regulations it must conform to Section 25(4) of the Ordinance and therefore the method must be applied to costs incurred or liable to be incurred the licensee providing the service. The essence of a benchmark solution is that all of the costs that are used to calculate the benchmark by the Commission are costs calculated in respect of other operators in other markets.

The proposed benchmarking method does not yield a cost oriented rate which is based on the costs of the licensee as required by Section 25(4) of the Ordinance and therefore the imposition of a rate based on this methodology is ultra vires.

The estimation of the upper and lower bounds of cost oriented price using the Commission's proposed benchmarking method is akin to trying to determine the heights of the tallest and shortest men in the Turks and Caicos Islands by taking the average of the heights of the tallest and shortest men in a range of other countries but not taking any measurements in the Turks and Caicos Islands.

Question 2: Respondents are invited to comment on the Commission's proposed Benchmarking Sample selection criteria, the jurisdictions included in the proposed Benchmarking Sample, related measures used to establish an historical benchmarking sample time period as well as any other issues considered relevant to the establishment of a benchmarking sample. Any alternative proposals or suggestions offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

The Commission has used 7 criteria to select benchmark comparators. These are:

1. Regional Geography – only jurisdictions in the Caribbean Region included;
2. Physical Geography – only island nations or jurisdictions included;
3. Calling Party Pays ("CPP") versus Receiving Party Pays ("RPP") Regimes – only full CPP regime jurisdictions included;

4. Number of Operators – only multi mobile operator jurisdictions included;
5. Availability of MTR information – only jurisdictions where the MTR is publicly available and verifiable by the Commission included;
6. Non-Confidentiality of MTR – only jurisdictions where the MTR are not claimed to be confidential by all operators; and
7. Vintage of Regulatory Decision – only jurisdictions where the regulatory authorities has revised interconnection rates since January 2010 included.

A number of these are objectively justified such as CPP regimes.

However a number are arbitrary, for example limiting the sample to those in the Caribbean region, why are comparators in other geographic regions not acceptable.

In addition some result inclusion of comparators, for example both Jamaica and the Dominican Republic have populations, topological and demographic distributions which are materially different to the circumstances which pertain in the Turks and Caicos Islands.

While some attempt has been made to compensate for the short comings in the comparator sample it is not clear that such mechanisms are adequate.

It should be noted that in the litigation referenced previously a sample size of 7 was considered too small yield accurate outcomes. The Commission's sample size of 9 for cost based regimes is similarly unlikely to be adequate for the purpose for which it is proposed.

Question 3: Respondents are invited to comment on the Commission's analysis of historical trends in MTRs, FTR and TRs, including the Commission's preliminary conclusion that the allowed maxima for all three of these interconnection rates should be reduced in TCI. Any alternative perspectives offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

The vintage of the regulatory decision criterion contains elements of pre-judgement. Comparators which were perfectly acceptable to the Commission in the previous reviews have been excluded because they have not changed their rates. This implies that the Commission is seeking only to include those comparators which bolster its position that the rates in the Turks and Caicos Islands should be reduced.

The fact that a number of comparators used in the previous review have not reduced their rates is an indicator that the downward trend in rates is neither as deep or as fast as the Commission asserts.

Question 4: Respondents are invited to comment on the Commission's proposed forward-looking benchmarking methodology for setting MTR, FTR and TR maxima. Any alternative

methodological proposals or suggestions offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

Regulation 15(2)(d) of the Interconnection Regulations state that

“15(2) The Commission shall apply the following principles in establishing the methodology to which subsection (1) refers

...

*(d) rates shall permit the recovery of a reasonable rate of return for **that carrier or service provider** on the capital employed, all attributable operating expenditures, depreciation and a proportionate contribution toward **such carrier’s or service provider’s** fixed and common costs;”*

This is a further requirement on the Commission to take into account the specific costs of the licensee to which any proposed methodology is applied. While the Commission proposes some form of “aiming up” in the rates to allow for a recovery of fixed and common cost the Commission has no certainty that the adjustment is adequate to account for the specific differences in the Turks and Caicos markets compared to the chosen benchmarks.

It is not clear if the adjustment is sufficient to take account of the material differences in population (and hence customer base) which mean that the fixed and common costs must be recovered over a base which is multiples smaller in the Turks and Caicos Islands than the selected comparators.

For example, the Commission is aware that Digicel has commenced a project to change its Home Network Indicator (HNI). The cost of this is substantial and given the small size of the market in Turks and Caicos Islands is proportionately a material cost, which is not part of the cost base of the chosen comparator markets.

Digicel notes that the cost base for telecommunications operators in the Turks and Caicos Islands is significantly higher than for a number of the chosen comparator countries. For example Digicel estimates that the Commission’s expenditure (and hence cost to operators) per head of population is approximately US\$48. By comparison the combined expenditure of the NTRC in St Vincent and a proportionate expenditure of ECTEL is approximately US\$9. The cost of regulation in the Turks and Caicos Islands per capita is therefore multiples of the cost in the chosen comparators.

Similarly the cost of electricity to commercial users in the Turks and Caicos islands is some 30% higher per kWh than the price in St Lucia.

Digicel notes that the population of Turks and Caicos is smaller by a factor of 4 as against some of the comparator markets. This means that even if the total fixed costs are broadly

similar in absolute terms the impact on unit costs in Turks and Caicos are likely to be multiples of those in the comparator markets.

The Commission is proposing a “normalisation adjustment” of 1.2% for the Cost-Based Average and an average of 6.2% for the All Sample Average. The examples outlined above indicate that this is a very significant underestimate of the upward adjustments needed to make the benchmark rates correspond even remotely to the actual costs that might exist in the Turks and Caicos Islands.

Individually each of these issues make the Commission’s approach unreliable. When taken together they render the analysis and the conclusions that are drawn from it fatally flawed.

Question 5: Respondents are invited to comment on the Commission’s MTR, FTR and TR Proposals. Any alternative proposals or suggestions offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

As set out previously Digicel believes that the proposed benchmarked rates are a significant underestimate of the actual costs of providing these services in the Turks and Caicos islands. The potential scale of this underestimate means that contrary to its assertions the Commission can have no certainty that the price proposed is above the statutory minimum.

The Commission asserts that the approach *“takes into account the statutory requirement to include a proportionate contribution to fixed and common costs and the upwards normalization adjustment...”* However as set out previously the statutory requirement is that the methodology is *“based upon costs of the licensee providing interconnection services”*

An approach which simply takes the midpoint of the averages of two benchmarks from other jurisdictions is manifestly is not based on the costs of the licensee providing the service.

In general Digicel believes that step changes in regulated prices are overly disruptive to the normal operation of the market. In this regard Digicel supports the proposal to adopt a “glidepath” approach to any changes in the rate.

However the proposed profile of the glidepath is does not protect the market from the shocks resulting from the proposed aggregate 75% reduction in MTRs. In absolute terms the initial reduction is approximately half of the overall proposed reduction. This large reduction is propose to occur less than 2 months after the rates are finalised. From a budgeting and cashflow point of view this timeline and the scale of the short term reductions will cause difficulties. Therefore Digicel believes that that any glidepath must be tilted to smooth the phasing of any changes.

Given the delays to the process resulting from the Covid-19 pandemic the proposed timings set out in the Consultation document must be revised and extended.

Question 6: Respondents are invited to comment on the Commission’s proposed Recommendation to Government and Directive to operators. Any alternative proposals or suggestions offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

While the draft recommendation to Government reflects the proposed rates set out in consultation document Digicel believes that the assertion that *“that each of those rates should be reduced in keeping with the objectives of the Telecommunications Ordinance and the Interconnection and Access to Telecommunications Facilities Regulations (the “Interconnection Regulations”)*” is factually incorrect given that the benchmarking methodology used by the Commission does not conform to the requirements of Section 25(4) of the Telecommunications Ordinance.

Because of potential delays to the overall process of amending the relevant regulations Digicel suggests that the dates of reductions should be referenced to being a defined time after the actual Direction to amend rates.

Question 7: Respondents are invited to comment on the Commission’s proposed flow-through obligation and timing of the next interconnection rate review as well as any other issues relevant to this review. Any alternative proposals or suggestions offered by Respondents should include, as necessary, supporting rationale and evidence.

Digicel Response

The proposed flow through reflects the process adopted following previous reviews and Digicel has no objection to this process being followed in respect of the current review.

Yours sincerely,



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Addison Stoddard

Chief Executive Officer
Digicel (TCI) Limited