



Digicel Response to the Consultation by the Turks and Caicos Islands Telecommunications Commission on the Review of Flow's Fixed Regulated Services

16 April 2019

We thank you for inviting Digicel to provide its comments on the Review of Flow's Fixed Regulated Services. Digicel is of course available, and would be happy, to discuss its submission further.

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. Digicel expressly reserves all its rights in this matter generally.

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



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Preliminary comments

Digicel notes that the process being consulted on is one whereby the Commission proposes to forebear from imposing obligations on foot of a dominance designation, this forbearance being conditional on certain limited market protections as opposed to a process whereby the Commission actively intervenes to address actual or potential market failures, which might arise from an operator holding a dominant position. This is an important distinction as an approach based on active market intervention would in general lead to higher levels of regulatory burden on the designated entity and often includes obligations geared at facilitating market entry at the retail level.

The lower burden arising from the Commission's chosen approach informs any assessment of the proportionality of the proposed market protections. It also means that the Commission should pay special attention to areas where this lighter touch regulation might introduce or facilitate the leveraging of dominance.

Digicel's response to the Commission's questions contained in the Consultation Document follows.

QUESTION 1: Relevant Markets: Do you agree with the Commission's proposed set of defined fixed service relevant markets for forbearance review purposes? If not, explain why not and provide any suggested modifications you consider appropriate with supporting rationale.

Digicel broadly agrees with the proposed set of defined fixed service relevant markets for forbearance review purposes.

We note the Commission's position that Digicel's request for mandated access to dark fibre and/or infrastructure falls within the definition of the markets, which are the subject of this review.

However, we also note that the functional characteristics of the local access portion within Turks and Caicos of both, Relevant Market #5 - Domestic Private Leased Lines and Relevant Market #6 - International Private Leased Lines, are identical, that is, connectivity from an end point in the premises of a customer buying the service to a network node of the operator providing the service, and therefore the difference between them is the upstream off-island connectivity. Therefore, we believe that Relevant Market #6 should be more correctly defined as – Off-Island International Capacity. This is an important distinction as this upstream service is used not only as in input to leased lines, but to provide off-island connectivity by licensees other than Flow for other services such as access to internet content for fixed and mobile broadband services, fixed and mobile international voice both inbound and outbound and also access to non-satellite TV content for distribution. Limiting Relevant Market #6 in the manner proposed runs the risk that the Commission's analysis of the forbearance criteria will cover too narrow a range of matters and so arrive at incorrect conclusions.

QUESTION 2: Preliminary Market Assessment Results: Do you agree with the Commission's preliminary market assessment results for each of the six relevant markets listed above and as supported by market assessment evidence provided in the Annex? Please provide your responses separately for each relevant market, as may be applicable, and, in each case, provide supporting rationale for your position, including any additional market data and/or information that you believe the Commission should take into account when assessing the extent of competition in the defined relevant markets in question.

Digicel's comments in respect of preliminary market assessments for each of the relevant markets follows.

Relevant Market #1 - Residential Access at a Fixed Location:

Digicel agrees with the Commission's preliminary assessment. However, we believe that the Commission may have overstated the impact of OTTs on this market, as OTT's require a broadband connection, and in general fixed voice access connections are bundled with fixed broadband connections at limited incremental cost to the end user. However, the cost of standalone voice access delivered over HFC or FTTx platforms means that they cannot competitively substitute for access based on traditional twisted pair. Therefore, it is highly likely that Flow will have a de facto monopoly on the market for Residential Access at a Fixed Location for the foreseeable future.

Relevant Market #2 - Business Access at a Fixed Location:

Digicel agrees with the Commission's preliminary assessment. However, we believe that the Commission may have overstated the impact of OTTs and other competitive constraints as these are not reflected in the fact that the decline in volumes has not been significant, and further, that Flow has a persistently higher market share.

Relevant Market #3 - Domestic Calling from a Fixed Location:

Digicel agrees with the Commission's preliminary assessment. However, we disagree that Mobile provides an "indirect competitive alternative" to fixed calling. As the Commission itself points out, mobile call charges are in general higher than fixed call charges. We believe that any substitution effects that do exist are as a result of the complementary nature of fixed and mobile services. To the extent that there might be any indirect downward pricing pressure from mobile, this has been insufficient to force Flow to reduce its pricing below the price cap level. This indicates that absent the price cap, Flow could increase prices without effective constraint by market.

Relevant Market #4 - International Calling from a Fixed Location:

Digicel agrees with the Commission's preliminary assessment.

Relevant Market #5 - Domestic Private Leased Lines:

Digicel agrees with the Commission's preliminary assessment.

Relevant Market #6 - International Private Leased Lines:

Digicel does not agree with the Commission's preliminary assessment. Even though Digicel had signalled its intent to provide sub-sea connectivity to Turks and Caicos, such capacity is unlikely to exercise any competitive impact on the market in the short term. In addition, international capacity contracts tend to be multiyear and in the case of IRUs up to 15 years. This means that even when such capacity does come on the market, the current market position of Flow is likely to be reflected in capacity pricing for some time after that. In this context we believe that it is premature for the Commission to entirely forbear from intervention as Flow will be in a position both to exercise and benefit from its monopoly position for a number of years.

As Digicel has pointed out earlier in its submission, off-island capacity is used as an upstream input to the full range of telecommunications services provided to end users in Turks and Caicos. The potential harm from the Commission's forbearance is high and does not promote the interests of consumers or encourage licensees to operate efficiently.

QUESTION 3: Forbearance Condition Options for Relevant Markets #1 to #3: The Commission asks interested parties to provide comments on the suggested forbearance condition options for Flow’s residential and business standalone (basic) access services and domestic FTF and FTM call rates which collectively fall in Relevant Markets #1 to #3. All comments and, as may applicable, alternative forbearance condition suggestions should include supporting rationale and evidence.

Digicel agrees that some forbearance conditions are necessary to protect the market and consumers in the absence of the types of ex-ante obligations, which would usually be expected in the alternative situation where the Commission intervened on the basis of a dominance designation. For these markets, Digicel believes that a retail price control represents a proportionate balance between market protection and market intervention.

As regards the form of the price control Digicel believes that Flow should be able to reflect general price increases in the Turks and Caicos economy in its retail prices. This is particularly true where such increase may be driven by external factors such as global energy prices, global foreign exchange movements or other geo-political considerations. Digicel therefore believes that “Option (b)” for each of the three markets is the preferred condition.

QUESTION 4: Preliminary Forbearance Determinations for Relevant Markets #5 and #6: Do you agree with the Commission's preliminary forbearance determination with respect to Relevant Market #5 and #6. If not, please explain why not. In addition, please provide any modifications and/or additions you consider warranted along with the supporting rationale and evidence.

Digicel agrees with the preliminary forbearance determination with respect to Relevant Market #5.

Digicel does not agree with the preliminary forbearance determination with respect to Relevant Market #6. As set out in response to Questions 1 and 2 Digicel believes that the proposal to forebear from Market #6 is not appropriate. The scope for Flow to leverage its current monopoly on international capacity into the downstream markets is high. The multiyear nature of international capacity agreements means that any such leveraging will persist for a number of years after there is active competition in this market. Given the adverse impacts across the full range of telecommunications services Digicel believes that some conditions are both desirable and necessary.

In this regard Digicel proposes that Flow be subject to a non-discrimination obligation whereby the pricing for any international capacity provided to other licensees should be no higher than the equivalent cost attribution it uses for the off-island capacity input for its downstream products. Digicel further proposes that this condition be automatically lifted once alternative supply for international capacity becomes active on the market.

This proposed condition is proportionate as it does not set absolute pricing levels. However it does ensure that the upstream monopoly does not result in downstream competition issues. It protects the market in the event of delays in the introduction of alternative sources of international capacity and does not disadvantage Flow in the event that such alternative supply becomes available in the short term.

QUESTION 5: Preliminary Forbearance Determination for Relevant Market #4: Do you agree with the Commission's preliminary forbearance determination with respect to Relevant Market #4, International Calling from a Fixed Location. If not, please explain why not. In addition, please provide any modifications and/or additions you consider warranted along with the supporting rationale and evidence.

Digicel agrees with the Commission's proposal in respect of Relevant Market #4.

QUESTION 6: Other Matters: Do you agree with the Commission's reporting requirement and forbearance review timing proposals? If not, please explain why not. In addition, please provide your comments on any other issues you consider relevant to the Commission's decision in this consultation.

Digicel agrees with The Commission's proposed reporting requirements. As the filing of returns is already part of the license obligation and the other amounts to no more than a self-declaration and self-certification of compliance the regulatory burden is low and these represent an appropriate and proportionate regulatory intervention.

In terms of the review period Digicel believes that a maximum cycle time of 5 years represents a practical approach however we believe that this is balanced by the ability of parties to request a review at any time.