Digicel

Digicel's Response to Consultation C13/03: Integrated Communications Operating Licences and Associated Spectrum Licences

4th March 2013

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in the consultation 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 with the Authority or any party on those issues; 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.

We thank you for inviting Digicel to provide its comments on this consultation and of course are available for any questions you may have.

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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Introduction

Digicel is pleased to provide what comments it can on this consultation within the timeframes proposed. We would need more time to respond properly and as helpfully as we could have done. In this regard we note that this consultation forms one of several running over a six week period which amount in aggregate to over 500 pages. There is no reasonable prospect of responding properly to that volume, and that level of complexity, of documentation in such a timeframe. We feel that the Authority is being compelled to rush through a huge volume of issues unreasonably to it, operators and the public. There is, consequently, a risk of causing substantial harm as a result of the manner in which the legislation attempts to compress the timeframe for dealing with all the matters in this group of consultations. We must therefore reserve all our rights to comment further at a later stage. We are committed to working as productively as possible with the Authority despite these difficulties.

Main Response

10. Interested parties are invited to comment on proposed Condition 10.

With respect to the following:

> *"**10.2** The Licensee shall, at the Direction of the Governor, Minister or the Authority, give Telecommunications of the relevant Government ministries responsible for national security and emergency services priority over all other Telecommunications."*

In our previous response of 14th November we informed the Authority that Digicel had no means of complying with such a requirement.

In its latest document the Authority elaborates that:

> ***"**The intent of this provision, found in licences issued under the TA86, is to require ICOL holders to accord the Government ministries responsible for national security and emergency services with priority in the restoration of services and connectivity when the capacity of the networks of ICOL holders may be limited.**"***

In the light of this and for the Authority's information, Digicel does not generally have the capability to prioritise capacity of its mobile network in the manner described. The mobile

switch is either working or it is not. The only manner in which we can envisage that it is possible to give priority in terms of restoration of services would be for example if transceivers had been displaced during a hurricane in which case those transceivers in the vicinity of designated buildings key to national security could be re-pointed before others on the island.

Therefore we would suggest adding to the end of section 10.2

> *"to the extent technically feasible."*

11. Interested parties are invited to comment on proposed Condition 11.

11.1 states:

> *"If the Authority determines that the Licensee possesses Significant Market Power in a relevant market, the Licensee shall promptly comply with each Ex Ante Remedy…."*

It is in the nature of ex ante remedies that they are not things that require just one task to be undertaken at one moment in time. Typically in order to comply with such a remedy will involve a process of negotiation and implementation and there could potentially also be disputes about the terms on which such remedies are implemented between operators. We do not think it could be the intent of the legislation to bar market entry until implementation has been completed finished or until a court has finally determined a matter one way or another as that could take many years. We think therefore that the wording of the licences must reflect that reality. We therefore suggest using the words in the transitional provisions in the Act instead of the words "promptly comply". The words in section 73(5)(a) of the Act govern the approach for the transition. We suggest alternate wording as follows in accordance with that section: "satisfactorily comply in respect of transitional provisions and promptly comply thereafter". We hope that these words will provide a mechanism for managing determinations of compliance sensibly by allowing the Authority to determine that compliance, in terms of what has been practical to achieve with respect to the various elements of implementing an ex ante remedy, up to a given point in time, has been satisfactory.

It is of course Digicel's position that it would be better not to risk barring market entry pending compliance assessments by only considering imposing ex ante remedies post removal of the current licensing constraints on market entry.

13. Interested parties are invited to comment on proposed Condition 13.

Section 13.4 reads as follows:

> *"The Licensee shall permit an End-User or Subscriber to inspect its records regarding Electronic Communications provided to that End-User or Subscriber and shall respond promptly to requests to correct or remove information that is shown to be incorrect."*

We suggest inserting the following words after "requests": ", within reason as may determined by the Authority from time to time" to prevent this being an opened ended commitment inter alia to amend or remove large amounts of data from data archives.

15. Interested parties are invited to comment on proposed Condition 15.

Currently condition 15.3 states:

> *"The Licensee shall permit the Authority or Persons designated by the Authority to enter upon the Licensee's premises to conduct an inspection, examination, investigation or audit of the Licensee."*

We do not think that the intent is to provide unfettered access without notice to licences which is even greater than the powers of the police. The drafting needs to reflect section 92 of the Regulatory Authority Act. We suggest the following addition to the end of the paragraph:

> *"….provided that reasonable notice is given and in any event no less than forty eight (48) working hours and solely for the purpose of ensuring compliance with the Regulatory Authority Act 2011 and the Electronic Communications Act 2011 and other sectoral legislation. Entry may only take place during normal business hours. Entry without notice and/or outside regular business hours may be obtained in the event that a search warrant has been obtained."*

24. Interested parties are invited to comment on proposed Transitional Condition A1.

Digicel made some of the following comments in response to the pre-consultation. However we make them again here as a result of doubts surrounding the status of the pre-consultation and the need to ensure our comments are recorded by the Authority.

As indicated previously, in our view what the Authority needs to do at this stage is to licence market entry. Placing onerous ex ante requirements on operators which could result in blocking them from competing across the market place, and especially without giving them sufficient time to comments properly, is not in the overall best interests of Bermuda. It will for the most part form a shelter for certain operators from competition. The Authority has the power to decide that it is generally inappropriate to impose ex ante remedies at this time as markets will shift due to new entry. The Authority can decide to take decisions about ex ante remedies at a more appropriate time and give operators a reasonable chance to comment at that juncture. We further understand that the ECA stipulates in section 23(6), that the Authority shall conclude a further review of each relevant market within a period of not more than 4 years from the date of completion of the previous review. This section would be designed to allow the Authority to make a new review within e.g. 12 – 24 months after the introduction of ICOLs which would have the benefit of: 1/ allowing the markets to develop commercially without any onerous regulatory restrictions which would support the criteria of only regulate where necessary – it is a well-known fact that "over-regulation" is expensive for operators and consumers; and, 2/ it would also allow the stakeholders ample time to properly review and engage in the consultation process which would better address the natural justice and procedural fairness points which, as previously expressed, have not been addressed properly in our view.

In addition to this there is always section 85(5) of the RAA which prohibits price squeezes and predation which can be applied should such a situation occur during an initial term without ex ante remedies.

We recognise that the Authority is constrained by the manner in which the legislation has been drafted in terms of reviewing markets and determining SMP. For the record, as we think that most electronic communications/telecommunications regulators would agree, best practise regulation requires that the market be given the chance to develop naturally initially first wherever possible before market interventions are considered. Further, best practise regulation would require for the most part that market reviews would not be undertaken just as a market is being opened to competition as significant shifts in the market place might take place. We are not in a situation here where there is only one incumbent operator in the entirety of Bermuda such as BT in the UK prior to 1984. There are already multiple competitors.

We also have concerns around the meaning of the term compliance in relation to ex ante remedies. Firstly, there will have been no time over which the compliance can be measured. Secondly, it may ultimately be up to the courts to determine whether a licensee has committed

a breach or not. The fact that the Authority states on a particular day that a licensee has complied does not determine that as fact or prevent the courts stating otherwise later on. The only way it appears that this could be made certain would be for all other licensees to state that they waive all rights to challenge the legality of the behaviour of the licensee in question prior to the Authority's statement of compliance. It seems unlikely that the Authority can waive the rights of licensees to make a challenge in future with respect to past breach of a licence condition discovered post a declaration of compliance by the Authority. All that the Authority can by itself state is that it is not currently aware of any "breaches of ex ante remedies" that have been put in place.

While, as stated, Digicel is generally opposed to the imposition of ex ante remedies at this time, if any are imposed they will have to be very carefully crafted to maximise the chance that they do not entangle the market place. Some of the proposed remedies are complex from a technical and commercial perspective and the mere drafting and negotiation could take months. It is noteworthy that many jurisdictions e.g. allow 3-6 months for negotiation and establishment of interconnection between 2 parties – MVNO and bitstream access are other services that will require time to implement. Any remedies would have to be worded in a way that enables the Authority to say that up to a particular moment in time there has been compliance, rather than requiring the Authority to wait until there has been compliance with every aspect of the remedy imposed before allowing an ICOL to enter into another market. That could severely delay competition in other markets to the detriment of people and businesses in Bermuda. We remain uncertain however whether this is legally feasible and think that the better option is at this stage not to impose any ex ante remedies but to initiate a review process within the next 12-14 months which should be conducted in line with regulatory best practise. Alternatively the Government could revisit the Act in terms of the requirement imposed on the Authority all at once and in a very short time frame to review all possible markets, make findings of SMP, consider ex ante remedies and determine compliance with those remedies, as well as the bar on market entry. This cannot be done properly or correctly for the most part at this time or in the timeframes proposed in our view.

24. Interested parties are invited to comment on proposed Transitional Condition A1.

Consistent with comments made above in respect of the concept of compliance the word "satisfactorily" should be inserted where appropriate.

Section A1.1(a) should read:

> *"the Licensee has Significant Market Power in one or more relevant markets and until such time as the Authority determines that the Licensee has* ***satisfactorily*** *complied with any Ex Ante Remedies imposed on the Licensee by the Authority; or*
> *"

Section A1.1(b):

> *"*
> *if the Authority determines that the Licensee possesses Significant Market Power in one or more relevant markets, until such time as the Authority determines that the Licensee has **satisfactorily** complied with any Ex Ante Remedies imposed on the Licensee by the Authority.*
> *"*

25. Interested parties are invited to comment on proposed Transitional Condition A2.

Consistent with comments made above in respect of the concept of compliance the word *"satisfactorily"* should be inserted where appropriate.

Section A2.1 should be amended to be consistent with the Act and read at the start:

> ***"**The Licensee shall **satisfactorily** comply…."*

Section 2.1 (b) should read:

> *"if the Authority determines that the Licensee possesses Significant Market Power, the Authority determines that the Licensee has **satisfactorily** complied with any Ex Ante Remedies imposed on the Licensee by the Authority."*

Section A2.2 (b) should read:

> *"if the Authority determines that the Licensee possesses Significant Market Power, the Authority determines that the Licensee has **satisfactorily** complied with any Ex Ante Remedies imposed on the Licensee by the Authority."*

27A. Whether the requirement of Transitional Condition A4.1 that ICOL holders permit subscribers to opt out of directories and directory enquiry services is 104 adequate? Whether any other obligations should be imposed on ICOL holders offering such services?

The expectation and indeed the regulatory practice worldwide is we believe to recognize that subscribers see their mobile phone numbers as private and therefore the default position is that unless mobile subscribers choose to make their mobile numbers public they should remain private. Therefore we suggest changing A4.2 as follows:

> ***"**Subject to the requirements of Condition 13 of this Licence, the Licensee shall, at its own expense, maintain a complete and accurate database of its **fixed** Subscribers' Numbers and make that data (including and clearly identifying Numbers that Subscribers have*

asked be excluded from Directories and Directory Enquiry Services) available to licensees, designated by the Authority, that wish to provide Directories and Directory Enquiry Services on reasonable terms and conditions, in a format agreed between the Licensee and the other licensee requesting the data. ***The numbers of mobile subscribers shall only be made available if they choose to opt in to a public database****."*

28 Interested parties are invited to comment on the proposed spectrum licences. Where interested parties wish to propose specific changes to the language of the spectrum licences, the Regulatory Authority requests that the proposed edits clearly indicate proposed additions and deletions.

Draft Spectrum Licences

Section 7.5 reads:

> *"The Licensee shall permit the Authority or Persons designated by the Authority to enter upon the Licensee's premises or premises used by the Licensee to inspect, examine, investigate or audit the Licensee's use of Radio Apparatus and Radio Spectrum."*

The drafting needs to reflect section 92 of the Regulatory Authority Act. We suggest the following addition:

> *"Reasonable notice shall be given for this purpose and in any event no less than forty eight (48) working hours and solely for the purpose of ensuring compliance with the Regulatory Authority Act 2011 and the Electronic Communications Act 2011 and other sectoral legislation. Entry may only take place during normal business hours. Entry without notice and/or outside regular business hours may be obtained in the event that a search warrant has been obtained."*

29A. The proposed timetable and process for reaching decisions regarding the efficient use of the assigned frequencies.

Digicel's primary concern is that based on the current timetable CellOne will continue to benefit from an significant and unfair market advantage for an indefinite period of time but as a minimum it appears based on the Authority's plans at least another 18 months to 2 years. As Digicel has stated in other responses and as is well known CellOne has 850MHz spectrum while Digicel does not. At any given cost this enables better coverage and better indoor coverage. An operator without 850MHz spectrum has to build more cell sites and micro sites to match that coverage. This significant disadvantage is compounded further by the great difficult encountered in building new cell sites and micro sites in Bermuda.

Digicel has already shown the Authority that not all the existing 850MHz spectrum is being used and there is no need to wait two years or more to reallocate that spectrum to Digicel. This can be done within a few months. Therefore we disagree with the suggestion that everything must wait until the entirety of spectrum resources have been reviewed.

29B. The factors and criteria that should be considered by the Regulatory Authority in assessing efficient use.

Operators normally look at this in terms of traffic volume per MHz. Digicel would run a series of engineering equations to estimate this in advance, which theoretical outputs can be informed by empirical data obtained through actual outcomes during network operation.

Benchmarking traffic volume per MHz would probably help the Authority. Digicel may be able to provide that kind of information on a confidential basis for its regional operations. Alternatively there may be publicly available data.