Digicel

Digicel Response to the Consultation on the Electronic Communications Bill

30th November 2015

We thank you for inviting Digicel to provide its comments on the draft Electronic Communications Bill. Digicel is of course available, and would be happy, to discuss our 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 Electronic Communications Bill 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: -

David Geary
General Counsel Caribbean
Tel: +1 758 713 8793
Email: david.geary@digicelgroup.com

1. General Approach

The general approach taken by the draft Bill introduces an outdated regulatory system devised for a bygone era.

The draft Bill as currently worded provides for an increase in the regulatory obligations on licenses at a time when the legal and regulatory framework for electronic communications markets across the globe are being revised to reflect the new reality of a converging market.

The provision of electronic communications services is no longer the preserve of licensed telecommunications operators. Licensees face competition from Internet giants such as Facebook and Google for communications services. As both Internet giants and former 'telecommunications operators' enter the space for converged services it is not reasonable or fair to expect the latter to compete with the former while subject to regulatory obligations that do not apply to these competitors.

Increasingly around the world regulatory frameworks are being revised to ensure that all service providers are subject to the "same rules for the same services". The draft Bill has fundamentally failed to grasp this concept. It introduces outdated regulation for licensees that do not apply to competitors. For example why should a licensee be required to seek type approval for handsets it sells (section 50) when shops or internet retailers that sell the exact same handset are not subject to this regulatory burden? Why should complaints about licensees be referred to costly tribunals (Part 9) when OTT Voice Operators are subject to no regulatory obligations whatsoever?

The result of the one sided and outdated approach will be to place operators that have invested in the ECTEL member states at a competitive disadvantage and this will damage licensees and the industry in the ECTEL member states.

There is a fundamental lack of balance in the draft Bill which gives ECTEL and the NTRCs sweeping powers and sets out criminal sanctions for a large number of activities in sections aimed primarily at licensed service providers. There are few protections of the rights of service providers and on reading the draft Bill one would be forgiven for thinking that the public urgently needs protection from service providers and that they are not business that have invested and continue to invest in local economies, provide services to local consumer and employ large number s of local people. The fundamental principle that innovation, better services and optimum prices emerges from competition rather than through over-regulation seems to have been lost.

Further the draft Bill appears to abrogate the role of the courts, national parliaments and many of the fundamental protections afforded by national constitutions.

Digicel submits that ECTEL should now prepare a regulatory framework fit for purpose for the newly emerging converged environment. It will be possible, in Digicel's submission, to address current market failures by extending the current regime while a regulatory framework fit for a converged world is adopted. Overburdening service providers with red tape at a time when they are expected to compete against companies such as Google or Facebook and at the same time invest in networks in the ECTEL member states is the wrong approach.

As regards the regime proposed by the draft Bill, best in class regulatory regimes are principle and evidence based economic regulation. Underpinning these are market analysis, market interventions based on a *de minimis* approach, remedy design based on specific and identified market problems, all of which occur within a framework of public consultation and explicit delineation of the powers of regulators to make such interventions and the public policy goals which such regulation is attempting to facilitate.

Essentially such regimes recognize that the best regulatory outcomes and interventions are those which foster competition.

These regimes allow market demand (and ultimately consumers) to decide what are the appropriate products and services to be in the market and the appropriate relative price levels of these various products.

In addition such regulatory regimes provide incentives to networks operators to innovate and invest as they will be confident that they can choose to invest in network and service developments that will be in demand and to construct the appropriate commercial terms to allow them to make a return on this investment. The operation of competition provides the fulcrum to balance consumer interests ensuring that consumers can choose those operators who offer them the best mix of value services and quality appropriate to their needs

In general Digicel supports these concepts as they result in more transparent and predictable regulatory regimes which are more likely to result in outcomes which balance the needs of consumers with the commercial necessities of investment hungry network based services.

While the draft Bill being consulted on ostensibly displays a number of these elements Digicel believes that as currently formulated it falls short of a template for a best in class regulatory regime.

Specifically Digicel is of the view that the proposals within the Draft Bill are overly prescriptive. It enshrines in primary legislation specific and detailed market control mechanisms. This means that these measures have been designed without an assessment of the market on which they are imposed and without an assessment of their likely outcome.

In many cases they appear to be an attempt to directly impose outcomes which may or may not be produced by competitive markets rather than set market conditions which enable competition, which in turn produces the optimum outcomes for consumers.

These types of direct market interventions will either be imposes conditions on operators which are more onerous than those produced by competition, restricting incentives to invest thereby reducing the range and quality of services available to consumers. If on the other hand they impose too light a market constraint then absent competition they will fail to maximize consumer value.

Absent a detailed market assessment the likelihood that these detailed interventions and measure precisely mimic the outcomes form a competitive market are vanishingly small.

Coupled with the adverse market impacts of the direct intervention approach there is also the issue of the definition of the role and powers of the regulator.

As outlined previously best in class regulatory frameworks involve market assessment and remedy design and that such remedies are the minimum necessary to address specific competition issues using remedies which foster the operation of competition as the mechanism for addressing such issues in a systemic and sustainable manner.

In order to ensure that regulators continue to focus on structural competition enhancing interventions rather than treatment of the symptoms of market issues it is necessary that the framework explicitly sets out the criteria that regulators must take into account before making a market intervention and that such interventions should be the minimum necessary to promote consumer welfare by way of increased competition.

Apart from being good procedural practice, as an input to deciding whether market interventions are necessary in the first place and when designing any measures to give them effect regulators should seek the widest possible range of views. This allows Regulators to reach considered and balanced decisions which are more likely to result in outcomes that meet policy goals. Because of this best in class regulatory frameworks have explicit requirements that Regulators consult on proposed measures. Digicel is strongly of the view that such provisions should form part of any revised Electronic Communications Act.

Digicel notes that the draft Bill seeks to significantly increase the regulatory burden on licensed providers, increase the workload of ECTEL and the NTRC's and increase the cost of regulation. These increased costs must ultimately be borne by consumers. Given that the countries to be covered by the proposals are small in an economic sense, there is a real risk that the increased cost of regulation will be disproportionately high compared to the overall benefit that is delivered. In advancing these proposals there has been no assessment of the cost/benefit analysis of the proposals. Digicel believes that much of the detailed market control provisions should be removed and that instead enabling provisions inserted which allow the

Regulator make the cost benefit assessment, and if it is positive to design appropriate and focused regulation.

Regulatory certainty and transparency both in what operators' obligations are and the conditions and mechanism under which they might change are key risk factors in the types of long term investment decisions associated with network industries such as telecommunications. While the intent of this draft Act in moving towards a best in class regulatory framework is laudable the practical detail of its wording undermines both the efficacy of this approach and damages the very regulatory certainty and transparency which are necessary to ensure that the ECTEL region attracts the levels of telecommunications investments needed to make sure that its citizens can fully take part in the globalized Digital society and economy.

2. Definitions

Section 2 of the Draft Bill proposes the following definition for retail customer

"retail customer" *means a consumer, other than a licensee, who is obliged to pay periodically or on demand for an electronic communications service;*

Digicel notes that this definition excludes commercial models where the service to the end user is not funded through fees collected from the end user but from other sources such as advertising. We propose the following alternative definition:
"*…means a consumer, other than another licensee, with whom the licencee has entered an agreement for the provision of an electronic communications service"*

3. Objectives of the Act – Net Neutrality

Section 3 of the Draft Bill proposes the insertion of the following:

"(d) ensure the compliance by licensees to the protection of personal data, secrecy of correspondence and to the principle of neutrality that internet service providers should enable

access to all content and applications regardless of the source, and without favouring or blocking particular contents or websites."

While Digicel firmly believes in a free and open Internet, Digicel fundamentally objects to the proposed inclusion of the 'principle of net neutrality' as an object of the Act and indeed the manner by which ECTEL is seeking to establish that this is enshrined in law.

The concept of "net neutrality' remains an uncertain concept and there is no one universally accepted definition. Different jurisdictions have adopted different approaches and the majority of the countries in the world have to date not sought to enshrine such a principle in their laws.

We are aware that ECTEL has advocated the adoption of US style restrictive Net Neutrality rules in recent statements and in other recent publications. There is considerable debate in the US as the merit of these rules. Indeed the Federal Communications Commission itself was divided 3 to 2 on this issue with one of the Commissioners, Mr. Ajit Pai, quoted as saying that Net Neutrality is "a solution that won't work to a problem that simply doesn't exist". The EU is following a different approach and other developed jurisdictions, for example Australia, have decided against implementing any such rules for now and have decided to "wait and see" whether or not such rules are beneficial.

A key concern is that restrictive Net Neutrality rules will unnecessarily restrict the commercial freedom of service providers and deter investment in broadband networks. This is of particular relevance in the Caribbean as the Internet content companies that are in favour of "Net Neutrality" rules are typically based in the United States and lobbied in favour of these rules there in order to enshrine a commercial model in law whereby they did not have to engage network providers commercially. In contrast access to broadband is a challenge in many Caribbean nations and the Caribbean needs investment in the networks of the future and this investment will come from the licensed service providers in the ECTEL member states that, unlike the Global Internet giants, do invest in the ECTEL economies.

Developing any strategy in respect of Net Neutrality can only be done when policymakers and regulators have a clear policy framework and policy goals to test whether any proposed approach is actually fit for purpose and deliver the maximum overall benefits to the various stakeholders based on the actual conditions in their local market.

Some of the policy questions that Digicel believes need to be clarified before a Net Neutrality approach can be developed and decided on include:

- Do we want to maximise broadband connectivity?
- Do we want to maximise Internet usage?
- The extent to which inclusiveness is a goal
- Do we want to encourage network investment?
- Do we believe that the commercial benefits of the converged Internet should be concentrated or distributed?
- The extent to which different services and service providers (both traditional and converged) need or should be protected.

Entirely separately there is a structural question of whether any Net Neutrality intervention lives alongside, and is in addition to, existing regulation or whether it forms but one aspect of an integrated regulatory framework which takes a holistic approach to the new converged environment.

Getting the policy objectives and regulatory framework wrong means that the digital divide between the economies and societies of the Caribbean and their more powerful and more developed trading partners will grow.

For the ECTEL countries any disincentives to operator investment would have serious consequences. A recent article in Forbes magazine noted that "If Net Neutrality is bad policy in a developed economy, it is nothing less than outrageous in a developing one, which has yet incipient networks and a lot of rural areas to be covered. Net Neutrality rules obliterate the incentives to innovate and expand networks."[1]

In Digicel's submission it is wholly inappropriate that ECTEL is now seeking to include a reference to Net Neutrality in the objects of the Act and effectively to establish this principle by stealth. Questions such as whether net neutrality regulation is necessary, useful or indeed whether it would be highly damaging to the economies of the ECTEL member states are very important and require detailed consideration and consultation before an informed decision can be reached. Indeed, ECTEL has recently committed to do just this in meetings with Digicel.

[1] http://www.forbes.com/sites/realspin/2015/06/15/net-neutrality-bad-policy-in-a-developed-economy-even-worse-for-a-developing-one/

Digicel questions whether it would be constitutional to limit the commercial freedom of operators in this manner and notes that the wording proposed above is unclear and would even require operators to enable access to illegal content such as child pornography. ECTEL appears to have adopted a very extreme position on this issue.

Any intervention introducing the concept of Net Neutrality" into the laws of ECTEL member states will have long term effects. The extra time taken now to craft the best possible approach will be repaid many times over compared to a sooner but less appropriate (and perhaps even damaging) decision.

It is imperative that there is a detailed and proper consultation on the concept of "Net Neutrality" before any decision is taken. Digicel requests that the above section is removed from the draft Bill and that this issue is dealt with separately with the seriousness it requires before any decision is taken.

4. Powers and Duties of the Minister

Section 7 of the Draft Bill proposes the following:

(1) The Minister shall, in the exercise of his or her powers, under this Act —
(a) adopt the form, document, process of licences or frequency authorisation as recommended by the Commission;
(b) adopt the form and document of draft subsidiary legislation as recommended by the Commission; and
(c) implement policy and recommendations proposed by the Commission.
This formulation appears to remove any discretion from the Minister as the representative of the elected Government with the requirement that he or she "*shall… implement policy proposed by the Commission*". This would appear to place the formulation of public policy in the hands of unelected officials. Further the mandatory requirement that the Minister adopts recommendations of the Commission in effect converts these Recommendations into instructions. In the case of the 7(1)(b) this in practice devolves the ability to enact subsidiary legislation to the Commission

3. Functions of the Commission

In Section 11, Digicel notes that absent from the draft bill are any parameters or boundaries which the Commission must respect in the discharge of its functions. This leads to a situation where there is a lack of regulatory certainty. We note that the Bill has proposals which impose standards of reasonableness on the Minister (for example section 41(8) of this Bill) however the Commission's activities appear to be unfettered. As a minimum Digicel believes that there should be an obligation on the Commission to publicly consult should it propose to exercise its powers to introduce a measure or impose new obligations which will affect the market or licencees. Further Digicel believes that the legislation should set out that any actions that the Commission takes should be proportionate, reasonable and justified. Having provided the Commission with wide powers it is right and proper that there is a balancing of these with this requirement.

4. Budget and Work plan

Section 28 of the Draft Bill states *The Commission shall, not later than October 31st in each year, cause to be prepared and shall adopt and [submit to ECA for the approval of ECA] —*

This provision appears to be incomplete and still in draft form. We welcome the introduction of a requirements for NTRCs to establish budgets and workplans and submit that ECTEL should be required to do the same. We note the intention for the ECA to circumscribe the Commission and determine the activities undertaken by the Commission as it gives the ECA an effective veto on both the workplan and budget of the Commission.

5. Requirement for Frequency Authorisation

Section 38 of the draft Bill states that:

"(1) notwithstanding section 6, a person shall not use a spectrum for an electronic communications service without a valid frequency authorization.
(2) A person who contravenes subsection (1) commits an offence and is liable on conviction on indictment to a fine not exceeding $1,000,000 or to imprisonment for a term not exceeding 10 years or to both."

The scale of this penalty is disproportionate to the nature of the transgression. Digicel is not aware of any difficulties caused to the public order, licensees or consumers by unauthorized uses of spectrum that warrant criminal penalties of this magnitude. This lack of proportionality can only serve to undermine confidence in the regulatory framework.

6. Assignment and Change of Control of the Licensee or Frequency Authorization Holder

Section 41 of the draft Bill sets out a process for the assignment or transfer of licenses. We note that an application must be made to the Minister at least 90 days before the proposed date of assignment etc. However there appears to be no maximum tome for the consideration of the application and Digicel submits that this section should clarify that if no decision is issues within the 90 days period the application is deemed to have been approved.

Section 42(5)(c) of the draft Bill provides that when evaluating a change of control application the ECA or the Commission shall take into account " whether the change of control would have an effect, or would be likely to have an effect contrary to the public interest including the need for the availability throughout [Name of ECA Contracting State] of a wide range of content services, which, taken as a whole are high quality and calculated to appeal to a wide variety of tastes and interests and which give due consideration to the free expression of opinion in the media;"

Given that broadcasting services are explicitly excluded from the definition of Electronic Communications Services it is inappropriate that matters relating to media diversity from any part of the evaluation of applications relating to licences for Electronic Communication Services. Digicel notes that the matters provided for in this subsection for evaluation of a request for change of ownership are not park of the criteria sued in the initial grant of the licence. If they are not germane for the original grant of a licence then it does not seem to be appropriate that they form part of the evaluation for change of control.

Digicel submits that subsections 42(5)(d) and (e) are repetition of the SLC test set out in section 42(5)(b) and are not required and should be deleted.

Section 43 of the draft Bill requires licencees to notify the Commission of share transactions that result in a person acquiring a "significant interest" in a licensee. It is unclear why such a provision is required given that section 42 provides for a change of control process. Digicel submits that this is an unwarranted intrusion into the commercial freedom of licensees and serves no purpose. If a transaction does not result in a change of control that results in a substantial lessening of competition then no regulatory intervention or notification should be required.

7. Renewal of Licence and Frequency Authorisation

Section 45 (1) of the draft Bill requires that licencees apply for licence renewals in the same form as their original application. Digicel submits that a form of renewal should be prescribed as the same process as section n37. Digicel also questions why an application should be made 12 months prior to the expiry of a current licence as this seems to be a very long period.

Section 45 (2)(d) of the draft Bill proposes that the Minister, on the recommendation of ECA, has determined that it is not in the public interest to renew the licence.

Digicel notes that this formulation gives the ECA, which is a supranational body the power to determine what is or is not in the public interest within a particular State. Digicel believes that the discretion for what constitutes the public interest within a particular state should reside with the elected representatives within that state.

8. Surrender of Licence or frequency authorization on revocation

Section 47 of the draft Bill proposes that where the Minister, on the recommendation of the Commission, refuses to grant an application, the Minister shall give reasons for his or her refusal.

Digicel notes that in practical terms there seems to be little benefit in refusing an application to surrender a licence. A licencee which wishes to surrender a licence clearly does not wish to continue to offer services associated with that licence. There does not appear to be any practical way that a company which does not wish to continue commercial activities can be obliged to do so. Refusal of such an application is likely to result in the licencee not competing actively on the market and in practice running down its operations. It would be better that especially in the case of spectrum licences that the resource associated with the licence is returned to the regulator

which in turn would allow for its potential assignment to an operator who does wish to actively compete on the market. Digicel therefore suggest removing this provision

9. Type Approvals

Section 50 of the draft Bill provides for the introduction of a type approval process. It is unclear to Digicel why such a process is required and Digicel submits that such a process is unnecessary and is making extra work for the NTRCs a licence holders.

Digicel notes that section 50(2) refers to equipment that require type approval as including equipment that may be bought online or may be sold by non licence holders (for example cellular telephones and GSM telephones (we are unclear on the difference), fax machines, modems, CPE equipment etc.). Digicel submits that imposing this process on licencees but exempting other retailers such as online retailers, supermarkets, electronic stores etc. places licensees at a competitive disadvantage. Indeed Digicel submits that this requirement demonstrates how the draft Bill as a whole is designed for a bygone period and an outdated approach.

In the modern converged marketplace it is not appropriate to impose regulatory obligations on licencees and not on their competitors which may be Internet giants such as Facebook, Google, Amazon and the like.

Section 50 (13) of the draft Bill proposes that the Commission may, upon the recommendation of ECA, determine the technical regulations that should be recognized in Saint Lucia and other approved States for the purposes of giving effect to the recognition of, or exemption from, type approval procedures.

This appears to be a typographical error and should refer generically to the EC contracting State.

10. Access and Interconnection

Section 56 of the draft Bill provides for “equal and direct access”. Digicel submits that this wording is unclear.

Section 60 of the Draft Bill proposes that a licensee who operates a public electronic communications network shall grant or assist another licensee in making an interconnection with his or her electronic communications network.

Digicel believes that it is fundamentally wrong to require the requested party to assist the requesting party to implement interconnection. The working assumption must be that all Licensees are competent network with sufficient resource and expertise to run their networks including the implementation of interconnection. It is manifestly unfair to have provision that seems to require that competent licensees must provide consultancy services to potential competitors simply because they are not expert enough to operate the services and networks to which their licence relates.

11. Cost of Interconnection

Section 62(1) of the Draft Bill appears to be an incomplete sentence but indicates the possibility that the cost of establishing interconnection to the network of another service provider should be borne by both parties to the interconnection agreement.

The objective of regulating interconnection is to ensure that the interconnection process does not constitute a barrier to entry to a specific market. The current Telecommunications Act of the ECTEL member states provides that the cost of establishing interconnection to the telecommunications network of another telecommunications provider shall be borne by the party requesting interconnection. This is the principle which has guided interconnection between the current providers of telecommunications services in ECTEL States to date. New entrants continue to compete effectively in the local market notwithstanding the requirement to bear start-up costs. There is no apparent justifiable basis on which any proposal for the apportionment of start-up interconnection costs may be sustained.

The apportionment of costs among operators can only be considered on the assumption that such costs will generally be passed on through user rates[2]. Costs may be apportioned based on the projected use of telecommunications services (including interconnection services). In the event that actual use of services differs from projected use, a formula must be established to

[2] Telecommunications Regulation Handbook, Module 3 "Interconnection", p. 36

adjust compensation between operators. Therefore, if start-up interconnection costs must be borne by both parties to an interconnection agreement, the Act must make express provision for the recovery of such costs from users. In addition, Regulations must set out the attendant procedures in detail.

Therefore, Digicel considers that unless and until:

i. a policy position is established which provides the justification for the departure from the current position where start-up costs are borne by the party requesting interconnection; and
ii. the Act makes explicit provision for the recovery of apportioned start-up costs through user rates; and
iii. regulations specify the exact process by which such costs are to be recovered

the cost of establishing interconnection should continue to be borne by the party requesting interconnection.

12. Numbering

Section 67 of the draft Bill proposes

A licensee shall —

(a) pay the annual fee on November 1 of each year for each number or block of numbers allocated to the licensee;

This wording may not be consistent with the requirement to support number portability as the benefit of ported out numbers accrues to the post porting host network and not the original licensee to whom the number was allocated. It is also unclear what rights attach to the payment of these fees. For example OTT VoIP Operators use numbers provided to licensees and paid for by licensees to provide competing services to licensees. In circumstances where licencees do not enjoy exclusive use of numbers assigned to them it is unclear why they should be subject to this regulatory burden if the OTT VoIP Operators may use the same numbers and are not required to pay any fees.

13. Customer Contracts

Section 67 of the draft Bill imposes obligations on licensees as regards contracts with customers. Digicel has very detailed customer contracts. However some of the proposed obligations are not workable. Specifically sections 69(2) entitles the Commission to determine whether a proposed contract change may be of "material detriment" to customers. This appears to introduce an approval process in relation to licensees contracts. It is unclear to Digicel why this is required. Further, competitors of licensees do not appear to be bound by this regulatory burden.

14. Privacy and Confidentiality

Digicel believes that Section 70 of the draft Bill causes competitive distortion in the market. The providers of so called App based services on smartphones regularly collect location information relating to the terminal and use it in an unfettered way. In general these providers are unlicensed. In there is in addition the use of cookies, IP addresses and other information by advertisers and providers of web based services In an environment of converged services this section places significant constraints on Licensed service providers should they wish to compete with App or internet based competitors. The sort of services that might be affected include those relating to the internet of things, rights control for content services such as IPTV etc.

This competitive imbalance acts a disincentive to investment and ultimately may impact of the commercial viability of licensed services. Digicel urges that these provisions be removed from the final form of the Act and that any obligations are imposed in a more technology neutral manner through general rather than license specific legislation.

15. Competition- General Competition Practices

Digicel notes that Part 5 Section 73 of the Draft Bill proposes to introduce provisions regarding "General Competition Practices". Digicel is very troubled by the wording proposed as this appears to abrogate the role of the courts, national parliaments and many of the fundamental protections afforded by national constitutions. In addition the proposed provisions introduce restrictions that are unnecessary to maintain competition, and indeed may have the opposite

effect. A number of concepts also appear confused. Digicel submits that this section requires a substantial revision so that it is aligned with international best practice and reflects both the legal and constitutional framework of the ECTEL member states and what provisions are required to maintain competition in the sector. Digicel recommends that ECTEL refers to similar legislation in other countries and adopts a similar format of wording.

Digicel is very concerned with the proposed wording of this Part of the draft Bill as, with the greatest of respect, it does not reflect international best practice in the field of competition law and policy. Digicel submits that it must be questioned whether it is appropriate to expect the NTRCs and ECTEL to have the capacity to discharge all of the functions assigned to them by the wording of this part of the bill as it currently stands.

Digicel is concerned that the market review procedures and the competition law enforcement duties set out by Part 5 of the draft Bill require staffing levels and competencies that neither the NTRCs nor ECTEL currently have. Further, jurisdictions that have similar regimes typically have regulatory bodies with a multiple of the staff numbers in the NTRCs and ECTEL. For example the remedies outlined in section 76 are of a similar nature to the remedies set out by the EU regulatory framework where regulatory bodies may have hundreds of staff and are also supported by the European Commission.

In the circumstances, Digicel submits that rather than replace the existing regulatory regime at this point perhaps the better approach would be to build on the current Price Cap Plan approach by adding to the range of regulatory remedies that may be imposed by the process while further thought is given as to how a market review/remedy regime might operate in practice.

In addition, straightforward competition law provisions, for example similar to those set out by Articles 101 and 102 of the Treaty on the Functioning of the European Union, could be inserted into the draft Bill instead of the current wording on competition. Any such provisions should be enforceable before the courts by the NTRC's or through private enforcement actions.

Digicel's comments on the specific sections of Part 5 are as follows:

Subsection 73(1) provides that the Commissions "shall have exclusive competence to determine, pronounce upon, administer, monitor and enforce compliance of all persons with competition

laws whether of a general or a specific nature, as it relates to ….[the] electronic communications market."

Digicel questions whether such a provision could be constitutional as it appears to exclude the courts. It is also unspecific as to what constitutes a "competition law" and this creates legal uncertainty. Further the concept of "electronic communications market" is not defined and this adds further uncertainty.

Subsection (2) provides that "a licensee shall not engage in any conduct which has the purpose or effect of substantially lessening competition…". Digicel submits that it is discriminatory to apply a legal provision to one set of persons (licensees) and not to others.

Subsection (3) provides that "the Commission, on the recommendation of ECA, may from time to time publish guidelines which clarify the meanings of substantial lessening of competition in [Name of ECA Contracting State] electronic communications market and such guidelines may include reference to the following —
(a) agreements between licensees, decisions by associations of licensees and concerted practices by licensees which have as their object or effect the prevention, restriction or distortion of competition within [Name of ECA Contracting State];
(b) actions by which a licensee abuses its significant market power within [Name of ECA Contracting State]; or
(c) any other like conduct by licensees whose object or effect is to frustrate the benefits expected from the establishment of the CARICOM Single Market and Economy or the OECS Economic Union and of ECA.

This appears to give the Commissions and the ECA the ability to write the law of ECTEL member states without any reference to national parliaments. Digicel submits that it cannot be constitutional for the Commissions and the ECA to usurp the role of the legislature in this way.

Subsection (4) provides that "The clauses, agreements and commitments generally having the object or effect of restricting, limiting or affecting competition are void." The meaning of this provision is unclear to Digicel, for example agreements may have affect competition one way or the other. Digicel recommends that wording regarding the prohibition of anti-competitive agreements similar to that used in other jurisdictions is used instead. We note also that subsection (6) seeks to identify circumstances where agreements may be beneficial to

competition and that this closely mirrors the wording in the EU TFEU. Digicel recommends that the wording regarding anti-competitive agreements is more closely aligned to the TFEU wording.

Subsection (5) provides that "Any exclusive right for the provision of electronic communications networks or electronic communication services is prohibited." It is unclear to Digicel why this provision is felt necessary. While "exclusive rights" is not defined and is therefore unclear Digicel notes that as in certain circumstances exclusive arrangements can promote competition.

This would appear to preclude customers, and in particular corporate and public sector entities exercising their purchasing power by offering to enter into exclusive agreements. Digicel believes that provided such agreements and of fixed duration then they from part of a normal competitive market.

Subsection (7) provides that

"A licensee shall not –

(a) refuse to make available in a timely manner to other licensees, technical information about essential facilities and commercially relevant information necessary for the exercise of their activity;"

It is unclear what such an "essential facility" may be. Digicel notes that this concept and similar concepts have evolved in the case laws of the US and the EU in recent decades and in recent times the application of this concept has been restricted significantly by the courts in those jurisdictions. Digicel submits that it is unnecessary and problematic to seek to establish a broad concept as "essential facility" in legislation and that access of obligations of licence holders should be clearly identified. Further "technical information" and "commercially relevant information necessary.." are unclear and are in themselves open to abuse, in particular where the Act excludes the role of the Courts and establishes the Commissions with exclusive competence in this field.

Subsection (8) introduces a definition of "anti-competitive business conduct". This definition is both insufficient to address what Digicel presumes to be the intent - i.e. to prohibit anti-competitive agreements between competitors, and overly restrictive in that it seeks to prohibit activities that promote competition.

Digicel submits that it must be made clear that the prohibition of anti-competitive agreements refers to agreements between competitors. For example, it cannot be anti-competitive for a business to set its own prices as the current wording proposes. We note that section 79 of the draft Bill also addresses this concept and Digicel questions whether it is necessary to include subsection (8).

In addition it is clear from international best practice and the laws established in many jurisdictions across the globe that the matters addressed in sections (f) to (j) of the definition may only be problematic if undertaken by entities that are dominant on certain relevant markets.

Digicel is deeply troubled by section (f) with refers to "unauthorized denial of access.." which appears to imply that the Commissions have some role in authorizing the commercial conduct of commercial entities.

As regards sections (h) and (i) Digicel notes that price discrimination and loyalty discounts are not in themselves anti- competitive practices. In fact they are part and parcel of normal commercial activity. For example airlines practice price discrimination on almost every flight with different prices being charged to different customers for the same service. Similarly airlines offer loyalty schemes though which one can obtain discounts on flights.

As formulated these provisions would impede normal commercial practice and may in fact reduce consumer welfare benefit but preventing for example term and volume discounts being offered in the market.

It is unclear to Digicel what an "exclusionary vertical restriction" referred to in section (j) means. Digicel notes however that it is established internationally that exclusive vertical arrangements may promote competition in certain circumstances.

We note that subsection 8 also includes a definition of an "anti-competitive merger" and that this definition does not appear to be referred to anywhere else in the draft Bill.

Section 74 of the draft Bill refers to the abuse of significant market power. We also note that section 78 introduces the concept of an assessment of dominance (although with no other provisions regarding dominance seem to appear in the draft Bill). Digicel questions whether it is necessary to include both concepts.

As regards subsection 74(1) Digicel notes that he wording as regards "preventing, restricting or distorting competition in the market" is generally seen in clauses that address anti-competitive agreements between competitors.

As regards clause 73(2) we believe the wording is most unclear and unspecific as regards what exactly the Commission may take into account.

Digicel notes that section 75 of the draft Bill proposes that:

Pursuant to section 73(5), a licensee shall not discriminate between persons who acquire or make use of an electronic communication service in the market in which the licensee operates in relation to –
(a) any fee or charge for the electronic communications service provided;

(b) the performance characteristics of the electronic communications service provided; or

(c) any other condition on which the electronic communications service is provided.

This would appear to be overly prescriptive and prevent differentiated retail offerings. Differentiated offerings are the norm in the telecommunications industry across the world. Digicel submits that this clause will hamper competition and requests that it is deleted.

Section 76 of the draft Bill addresses the obligations on licensees having significant market power

Digicel notes that the remedies set out in this section are similar in nature to the remedies provided for by the EU electronic communications regulatory framework. As has been noted above, Digicel believes that a general 'SMP and remedies' regime is not the correct approach for the ECTEL region as this will overburden the NTRCs and will not be possible to operate in practice. Digicel submits that this section needs to be rethought so that a realistic framework can be established.

We note that subsections (3) and (6) provide that the "Commission may apply for injunction relief pursuant to section 98". This would appear to be an error as the correct reference appears to be

section 99. Nevertheless it is not clear how this fits with the exclusive competence of the Commission set out in section 73(1).

Section 77 of the draft Bill provides the procedure for conducting a market analysis.

Digicel submits that any assessment should necessarily be of whether or not a relevant market is "effectively competitive". This is the approach taken in many other jurisdictions including the European Union. It is unclear to Digicel what is meant by a "not competitive situation".

Notwithstanding this, Digicel considers that it will not be possible for the NTRCs to conduct market analyses of all relevant markets every three years. The result of attempting to introduce such a system will, Digicel believes, be one where the NTRC's will become bogged down in endless market reviews that become increasingly out of date.

Quite simply Digicel believes that this is the wrong approach for the ECTEL region both because of the resources required to conduct market reviews and impose remedies and also as markets in electronic communications are converging as such a rigid approach where it will only be possible to lift remedies following lengthy market reviews will hamper local operators at a time when they are competing increasingly with unregulated Internet companies. Digicel notes that the evidence to date suggests that ECTEL is not prepared to enforce regulatory obligations on service providers located outside of the jurisdiction of the ECTEL member states even when they provide equivalent services to operators in those markets – for example ECTEL has failed to take any action whatsoever in relation to OTT Voice operators even though the wording of the Telecommunications Acts clearly requires that these service providers require a licence.

Section 78 of the draft Bill provides for an assessment of dominance by the Commission. Digicel submits that this should be replaced with a straightforward prohibition of the abuse of a dominant position similar to Article 102 of the TFEU. As noted above, Digicel believes this should be sufficient and that the process for assessing SMP and the concept of SMP should be removed from the draft Bill.

Section 78 of the draft Bill provides for a prohibition on anti-competitive agreements. Digicel broadly agrees with this section but notes that there appear to be errors in the text. For example it would seem that the words "including an agreement, arrangement or understanding for an acquisition" should appear in subsection (1) while subsection (a) should begin with the words "which has the purpose or has…."

Section 78 of the draft Bill introduces a concept of "reasonable allowance". Digicel is not familiar with this concept. However it appears that this is seeking to address the excesses of section 75 and Digicel submits that the better approach would be to delete sections 75 and 80.

16. Local Loop Unbundling

The mandatory unbundling of local loops is increasingly being used by regulators around the world as a means of promoting competition in local access markets. One reason for this is the impetus to spur the growth of high speed access markets and to increase the availability of and access to services such as e-commerce and video services – services that are considered necessary to increase the competitiveness of national economies. Therefore, regulators in a range of different economies have mandated access to local loops. These comprise, on the one hand, more developed nations such as US, Canada, Australia and the EU Member States and on the other hand, lesser developed nations such as Albania, Guatemala and Pakistan.

Full unbundling of the local loop allows an interconnecting operator access to the raw copper local loops (copper terminating at the local switch) and sub-loops (copper terminating at the remote concentrator or equivalent facility) of the access provider. This allows the interconnecting operator to assume control of the local loop. Upon the full unbundling of a local loop technical solutions can be employed which allow a customer to receive services from both the access provider and the interconnecting operator e.g. the customer can receive basic PSTN services from the access provider and internet services from the interconnecting operator.

The advantages of local loop unbundling are as follows:

i. Accelerates the onset of local access competition;
ii. Accelerates competition, service innovation and increased access to high speed services including video services and e-commerce;
iii. Avoids duplication of access networks and therefore increases network operating efficiencies;
iv. Provides new revenue streams to the incumbent;

v. Reduces the disruption of existing physical infrastructure due to the construction of new networks.

In its First Report on Order in the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act, 1996, the FCC noted that "*preventing access to unbundled local loops would either discourage a potential competitor from entering the market in that area, thereby denying those customers the benefits of competition or cause the competitor to construct unnecessarily duplicative facilities, thereby misallocating societal resources".*

In August 2012, LIME denied Digicel's request for fully unbundled local loops on the basis that the Telecommunications Act of St. Lucia does not mandate the provision of fully unbundled local loops. LIME also disagreed that Regulation 9(2) of the Interconnection Regulations applied to access to facilities for the purpose of an interim order or direction from the Commission.

The Telecommunications Act defines the term "infrastructure" to include the term "facilities" and that facility means "any facility, apparatus or other thing that is used or is capable of being used for telecommunications or for any operation directly connected with telecommunications and includes a transmission facility". It was and it is still Digicel's position that the term "infrastructure" incorporates the copper loops running between LIME's exchanges to customer premises and on this basis Digicel made two requests to LIME in 2012 in respect of fully unbundled local loops.

Regardless of the wording in the legislation however the policy position of ECTEL and the NTRCs with respect to LLU remains uncertain and this casts doubt on what the outcome would be should the matter be referred to dispute. Digicel has no wish to become involved in a protracted and expensive regulatory dispute when a simple amendment to the Draft Bill could make the position absolutely clear. Digicel therefore requests that an explicit requirement to provide LLU is inserted in to the Draft Bill.

In the Explanatory Note the Draft Bill is described as one which seeks to operate in a converged environment and is broader in scope to encompass electronic communications. The objective is to facilitate a liberalized and non-discriminatory entry into the electronic communications sector and to enable a robust and competitive environment. The growth and development of electronic communications services in ECTEL States relies on access to networks by third parties to boost the offering of value-added services on the island. Therefore, Digicel considers that local loop

unbundling must be mandated. In this regard, Digicel recommends in addition that the definition of "facility" be amended to read:

> *means any, apparatus or other thing that is used or capable of being used for electronic communications or for any operation directly connected with electronic communications and any associated software, including Private Branch Exchanges (PBX's) and other terminal boxes or points used for the purpose of the operation of an electronic communications network, not including customer equipment but including wires, lines, poles, ducts, towers, internal building wiring leading up to PBX's from an information and communications network.*

17. Powers of Commission Under This Part

Section 81(1) of the Draft Bill proposes that *" Notwithstanding the Commission's powers under section 13, where the Commission finds after investigation under section 96 that a licensee is in breach of this Part, the Commission may do any of the following –*

(a) issue an enforcement order against the licensee having significant market power;
(b) order the cessation of abusive conduct or specify changes in its conduct to limit the abusive aspects;
(c) recommend the suspension or revocation of the licence of the licensee having significant market power;
(d) order compensation to be paid to subscribers or competitors injured by the abusive conduct;
(e) order the restructuring of the licensee; or
(f) facilitate and approve settlement with the aggrieved licensee."

Digicel submits that subsections (c) to (f) should not be included. Subsection (c) refers to the concept of SMP which Digicel does not believe should be included in the draft Bill. Digicel does not believe that the NTRC's should be empowered to make the orders referred to in (d) and (e) and submits that orders such as these are a matter for the courts. Digicel does not understand subsection (f).

Section 81(2) of the Draft Bill provides that

(2) Without prejudice to its powers in controlling tariff of interconnection and access offers, the Commission may –

(a) carry out tests of non-discrimination on the tariffs of the offers on-net and off-net of the licensees on the retail market to ensure that the price differential on-net or off-net, including promotional offers, do not unduly strengthen its market share at the expense of its competitors;

(b) carry out tests to ensure that the structure and level of prices of a licensee having significant market power operator, vertically integrated, on the retail market, including promotional offers, do not prevent its competitors from providing a competitive offer in reasonable profitability conditions;

(c) regulate the maximum difference between the prices of offers on-net and off-net licensees on the retail market;

Digicel notes that the essence of effective competition is an attempt by one market player to strengthen its market share vis a vis its competitors. If such an attempt does not run foul of the anti-competitive behaviour provisions of the Act then it does not seem rational to prohibit behaviour which is not anti-competitive but is in fact evidence of competition. This provision appears to provide for intervention in the market absent any market failure and should be deleted.

Subsection (d) empowers the Commission to "regulate the abuse of promotional offers in terms of duration and frequency and require the submission of appropriate information to the Commission;"

Provided promotional offers do not constitute a breach of the completion provisions of the Act this provision too Digicel notes that the essence of effective competition is an attempt by one market player to strengthen its market share vis a vis its competitors. This appears to be regulation for the sake of regulation and should be deleted.

Section 82 of the draft Bill provides for consultation with competition bodies in other jurisdictions.

While Digicel has no objection to such consultation in the region Digicel has major concerns about subsections (2) and (3).

As regards subsection (2), Digicel submits that the Commission's must have regard to the confidentiality and proprietary nature of information in their possession. Therefore it is not open to them to transmit such information to administrative bodies in other jurisdictions without the consent of the party to whom the information belongs. This would be a gross breach of that person's right to privacy.

Subsection (3) provides that:

"A decision of the Competition body under this section is binding on the Commission and is enforceable in accordance with Rules made by the Supreme Court under the Supreme Court Judicature Act, as though it were a judgement of the High Court."

This provision offends numerous legal principals and the notion that a competition body (that has not yet been established) can have the status of a high court judgment and bind the courts of ECTEL member states regardless of any requirements as regards due process must surely be unconstitutional.

18. Part 6 Universal Service

In earlier comments to the Draft Bill, Digicel made substantial submissions on the proposed implementation of a universal service regime in ECTEL member states and gave reasons as to why the imposition of a universal service levy should not be automatic. Rather Digicel recommended that measures be taken to spur the degree of competitiveness in the market and for competition to be the driving force for the attainment of access targets. Digicel again advocates that this opportunity of the enactment of the Draft Bill is used to reconsider the approach to universal service in ECTEL States. The regime implemented under the Telecommunications Act is not one which would serve to encourage operators and service providers to commit to the high levels of investment required to attain the degree of competitiveness which the Commission would expect in a converged landscape.

Any universality regime which contemplates the establishment and maintenance of a dedicated fund is one which involves yet another levy on the revenue of licensees. For this reason, it is critical that the approach to universal service must be one which endeavors to increase both the availability of and access to telecommunications services in ECTEL States whilst ensuring that obligations imposed on licensees are not unduly onerous and unjustifiable and involve only so much burden on the licensee as to ensure that appropriate standards of availability and access are met.

In our view, the most effective way to ensure that access targets are met is to first incentivize operators to compete to do so. The regional operators group CANTO has also made representations to Ministers in the region about incentives for Broadband rollout and is in discussions with CARICOM in that regard. This approach allows operators to devise and create cost-effective means of rolling out services to meet targets. A Universal Service Fund Study Report prepared on behalf of the GSM Association and published in April 2013 noted that alternative approaches to achieving universal service targets often prove to be more effective than a regime which relies heavily on mere establishment of a dedicated universal service fund. Such alternatives include the imposition of licence conditions on operators or private/public partnerships such as those as applied in countries such as Bangladesh, Brazil and Finland.

A universality policy must endorse a technology neutral approach to the attainment of access targets. The policy must promote technology neutral licensing practices that enable licensees to use the most cost-effective technology to meet access targets whilst still ensuring that quality of service requirements are met. It was noted in the 2013 GSM Association Report that the universal service regimes in many jurisdictions were highly ineffective because their underlying frameworks were not well conceived from the outset. For instance, they were not technology-neutral or service-flexible and made provision for excessive bureaucracy but without appropriate oversight.

For universal service to be achieved most effectively, inter alia:

- there should be a transparent and non-discriminatory interconnection framework in which interconnection rates are driven by costs;
- the total regulatory and investment burden on licensees must be reduced to lower the cost of providing services to end-users;

- competition must be promoted in the provision of the full range of not only core telecommunications services but also in relation to ICT services to increase access, affordability, availability and use of ICT services.

19. Financial Reporting of the Commission

Since fees paid by operators and service providers should be a function of the costs incurred to regulate the sector and to manage spectrum, in the interest of transparency it is only appropriate that operators and service providers have the opportunity to view the annual budgets of the Commission and of ECTEL. The Draft Bill should be amended to make specific provision for this. There is precedent for this in Trinidad and Tobago where the TATT is required publish its annual budgets. This will enable the public to debate the focus of ECTEL and the NTRCs based on the clearest measure – the issues on which the Regulators spend their budgets.

20. Other Offences

We note that the draft Bill displays an appetite for the imposition of higher criminal penalties. Digicel submits that it is not necessary to increase the penalties in sections 87 and 88 of the draft Bill and that the penalties under the Telecommunications Act are sufficient.

Digicel submits that section 89 of the Draft Bill raises profound legal questions. The right to remain silent and the right to avoid self-incrimination are fundamental to the legal systems of the ECTEL Member States. Compelling persons, on pain of criminal sanction including imprisonment, to appear before the Commission and to give sworn evidence represents a gross intrusion on these rights and goes against the very notion of fair procedure. The status of any information provided under such coercion must be clarified.

Digicel questions whether section 90 of the Draft Bill is required and whether it is compatible with section 42. Further, Digicel questions whether the imposition of criminal penalties is warranted.

Digicel is also extremely concerned about the provision at section 129 of the Draft Bill. In Digicel's submission a move away from legislation that protects user information to one whereby the Commission is expected to monitor communications will be totally unacceptable to consumers and to service providers, including Digicel. It is unclear also how the Commission could in practice "stop or cut off" transmissions, the basis upon which the Commission could decide that a communication endangers national security or is "contrary to the laws on public order or decency".

Digicel also notes that section 87(1)(b) of the Draft Bill requires the release of personal information relating to a subscriber when requested by customs, Inland Revenue or the police. In Digicel's submission any encroachment on the right to privacy must be limited and must be further to a Court Order or a search warrant lawfully issued by a judicial authority.

Section 91 is grossly unfair to licencees as it is more likely that non licensees will cause "harmful interference" – for example visiting cruise ships. Why should licensees be the only ones subject to this provision?

Section 93 provides that a licensee may be subject to a fine of 3% of annual net revenues if it breaches a code of practice issued by the Commission. This section is not acceptable – first as it is unclear what may be contained in a code of practice, second as this would enable the Commission's to in effect enact rules that attract criminal sanctions and this would usurp the role of the legislature and third as a 3% of revenues fine could be larger than other penalties provided for in the draft Bill and disproportionate to any breach.

Digicel requests that ECTEL clarifies the basis upon which it proposes the various penalties set out in the draft Bill.

Section 94 of the draft Bill identifies directors, managers, supervisors, partners, or other officers as bearing criminal liability for bodies corporate. The draft Bill is now replete with sections imposing criminal sanctions for a wide range of actions and it is unacceptable that large numbers of staff would be expected to work under circumstances where they could be subject to criminal sanctions personally. As has been noted above many of the offences apply to licensees only and not to competing service providers that have been exempted by the draft Bill from the requirement to hold a licence. This is an unbalanced and discriminatory approach.

21. Part 8

Section 95 of the draft Bill establishes the Commission's right of investigation. This section should also clarify that the Commission may seek information from persons located outside of the jurisdiction, in particular from persons located outside of the jurisdiction who are offering services to consumers within the jurisdiction.

Sections 96 and 97 should apply to "any person" and should not be limited to licensees or frequency authorisation holders. Further the comments above regarding the proposed penalty of 3% of revenues or 5 years imprisonment (or both) are repeated in relation to this section.

22. Part 9 Complaints and Tribunal

Sections 111 to 126 of the draft Bill provide for a Tribunal to hear complaints referred to it by the Commission. It is unclear whether a tribunal of this nature is required to determine complaints. A Tribunal of this nature would be a very costly and time consuming exercise. It is not appropriate for the resolution of complaints. Further to Digicel's knowledge and in our experience there have not been unresolved complaints that require a tribunal of this nature. The existing system of resolving consumer complaints appears to be working adequately. Further in a competitive market service providers are motivated to offer optimum services to consumers as if they fail to do so consumers will switch to a competitor.

The inclusion of a detailed section on complaints and a Tribunal are further evidence of the heavy handed and outdated approach followed by the draft Bill.

Digicel submits that there is no need for such a Tribunal and that sections 111 to 126, and indeed all of Part 9, should be deleted.

23. Conclusion

Digicel submits that a more balanced Bill is required. The Bill proposes to give the Commission, ECTEL and the Minister (to a much lesser extent) quite wide and sweeping powers with little or no guidance on the limits of how they might be exercised. Digicel is particularly concerned that many clauses such as those on Roaming and Net Neutrality have seemed to make their way into the Draft Bill without a proper consultation process. Any intervention by a regulatory body must be proportionate, reasonable and justified and in the case of ex ante remedies these must be based on the nature of the problem identified.

Appendix 1

PROPOSED NEW LICENSING REGIME

1. *Who are you? (Please identify yourself. Are you regulator, a Stakeholder, interested party or other operator?)*
   Digicel Group – Affiliates in all the Contracting States Licensed to provide various telecommunications services.

Questions Relating to the Revised Draft EC Bill

See Digicel comments to the Draft Bill in the mark-up attached.

Questions Related to the New Licensing Regime

2. *Would you agree that a licensing regime, which requires a provider to apply only once to provide a number of services, is desirable?*
   Although it is desirable that the proposed licensing regime be one which requires a provider to apply only once to provide a number of services, we note the following in relation to ECTEL's proposals as set out in the Consultation documents:

   i. The new licensing regime is not clearly set out in the Bill. The Bill merely identifies the classes of licence.

   ii. It is not clear whether the scope of the licence would be so wide as to encompass any kind of service that the licensee can offer on its network, whether or not this service is

envisioned at the time of application. This would be our recommendation. As new technologies evolve and new and different services may be offered on the same platform, the holder of a network/service licence should not be required to apply for the authorization to provide such additional services that might become possible as a result of the evolution of network technologies. The licensee should merely be required to notify the NTRC that it intends to launch an additional service. If the NTRC considers that special conditions should apply to this new service, then the terms of the licence may be amended accordingly either by adding an Annex containing such terms and conditions or by a deeming provision i.e. that the terms and conditions published by the NTRC in relation to that specific service shall be deemed to apply to the licensee

iii. It is not clear whether a single licence document would be issued, which would contain all the terms and conditions applicable to the operation of the licensed network and the provision of the licensed services. We recommend that a single short form document should be issued, which sets out the basic terms and conditions that would apply to any type of licence. The Annexes would vary depending on the type of network to be operated or the types of services to be offered.

iv. It is not clear whether the intention is to extend the scope of regulation to persons who do not have a physical presence in the Contracting States but who provide services in the Contracting States using the networks of licensed network operators in the Contracting States. The Consultation document proposes that all persons who wish to provide electronic communications services must first be granted a service licence. It is Digicel's position that there should be no distinction between persons who have a physical presence in the Contracting State and those who do not, if the service is provided to consumers in the Contracting State. To this extent, explicit provision should be made in the Bill that:

    a. these provisions should have extra-territorial effect;
    b. the person wishing to provide services to the public in the Contracting State need not be incorporated in the Contracting State. However, once a licence has been granted, the service provider must register as an external company and must provide an address for service in the Contracting State.

In addition, there must be a requirement that all applications for service licences must include a letter of intent by the holder of an appropriate network licence in the

Contracting State, that facilities would be provided to the applicant subject to the grant of the service licence and to the terms of an agreement between the parties.

v. We note that an attempt is made to make the distinction between Network Facility Providers, Network Service Providers and Network Based Operator Licences. However, it is difficult to have an opinion about these distinctions if there is no indication as to how each category would be treated from a regulatory point of view. We note the different Annexes set out in the Model Licence document. Which of these would apply to each type of licence?

   In the Consultation document, as it relates to a Network Based Operator Licence, ECTEL states that "the danger with this type of authorisation where a Service Provider's infrastructure and services are bundled in the same authorisation is an incentive to monopolize". However, ECTEL has not gone further to expound on this premise. We submit that the incentive to monopolize can exist whether or not all a service provider's authorisations are contained on the same document.

3. *Would it assist ECTEL if only one application for a licence needed to be made to enable a provider to operate in any Member State?*
   The advantages to this approach are:
   - Barriers to entry in the regional space would be reduced; and
   - This would reduce the administrative burden on the NTRC's

4. *Would it be beneficial to be able to complete an electronic communications application online?*
   Yes.

5. *Are you familiar with the various licensing regimes, which have been presented here?*
   We are familiar with the options that ECTEL have presented and references with the systems that apply in other countries. However, there is some ambiguity as to the specific regime that ECTEL intends to implement

6. *What are your views as it relates to the submission of all licence applications to the Minister of each relevant ECTEL Contracting Member State as the Minister is the one issuing the licence?*
   This approach would make sense if the NTRC simultaneously receives a copy of the application.

Views on a Multi-Service Network-Licensing Regime

7. *What are your views on the adoption of a Multi-Service Network-Licencing Regime for implementation in the ECTEL Member States?*
   Digicel favours this Multi-Service Network Licensing Regime because it makes for a more seamless regulatory experience. It allows for easier self-monitoring.

   That being said, we note that the procedures proposed in the Consultation document in relation to the application, renewal, transfer and surrender of licences do not appear to simplify the process by which these requests are handled. We consider it to be overly onerous for full licence applications to be made for matters as simple as a licence amendment and for fees to be paid on each such occasion. The application must be submitted to the Minister, the Minister will then pass it to the NTRC, the NTRC will then forward it to ECTEL, ECTEL will make a recommendation to the NTRC who will in turn make a recommendation to the Minister. We believe that these procedures are counterproductive and should be revisited.

8. *Do you favour the use of only one licence, which gives you permission to carry out more than one service?*
   Yes. For reasons set out above.

9. *Should this regime be extended to include service licences as well? Give reasons for your answer.*

10. *What alternative suggestions if any do you have?*

11. *Why are you of the view that your suggested regime would be better suited for implementation in the ECTEL States?*

12. *Have you observed any specific areas of the current Licences, which are problematic? If yes what areas are they?*

13. *Do you think they can be addressed and in light of the current changes being made?*

14. *Do you have any suggestions, which may assist with revising the current licences to meet the needs of a multi-service network-licencing regime?*

15. *What problems do you foresee in adopting the changes suggested in this consultation document?*
    These are set out below. Our comments do not address drafting issues or finer details such as technical definitions and standards. We assume that we will be granted a further opportunity to review these in detail. At this time, our comments limited to general premises and proposals.

Model Licence Template

- **Clause 5 – Duration and Renewal**
    - **5.3** – The requirement for the Licensee to apply to the Minister to renew the licence three (3) years prior to the expiry date of the Licence or at a later date if the Minister so determines is inconsistent with the current section 45(1) of the Bill (which refers to a 12 month period).

      The 12 month period set out in the Bill would also be problematic in relation to the renewal of frequency authorisations granted for relatively short terms. We recommend that the Bill should not make reference to a specific period of time and that this would be more appropriately set out in the licence or frequency authorization.

    - **5.6** – The Bill makes no provision for a "Renewal Fee". Rather, provision for made for an application fee to be paid – "application" meaning any request for a licence, including a renewal.

      This reference to a "Renewal Fee" is also made in the existing framework and causes confusion as to whether a fee other than the application fee must be paid upon the renewal of the licence.

      We recommend that the reference to "Renewal Fee" be removed and replaced with "application fee".

- **Clause 7 – Modification of Licence**
    - Section 40(2) of the Bill provides that a licensee who seeks a modification of his licence shall apply in the same manner as he or she did for the initial licence. This requirement is quite an onerous one and likely unjustified if the modification or amendment proposed is a minor one.

      We recommend that the term "modification" should be defined so that the process set out in Section 40 of the Bill applies only in the case of a material amendment or modification to the licence.

- **Part II**

- **Clause 4 – Registration of Customer Information**
  This whole clause is unauthorized by the Bill. There is no legislative justification for this in either in the Bill or in existing regulations. To insert such a provision in the licence would be to act *ultra vires* the legislation.

  We recommend that this clause be removed.

- **Clause 5 - Confidentiality of Customer Information**
  5.2.2 provides that a licensee may disclose customer information where disclosure of customer information is deemed necessary by the Commission or such other relevant law enforcement or security agencies in order to carry out their respective functions or duties.

  We consider this provision does not afford adequate protection – both to customer information and to the licensees who have an obligation to observe the confidentiality of same. In its current form, this provision is so broad in its terms that any law enforcement official or security agency personnel can make a request for the disclosure of customer information.

  We consider that there should be checks and balances in place before customer information can be disclosed. Therefore, we recommend that such information should only be disclosed by warrant, order of the court, or by an order of the Commissioner of Police.

- **Clause 7 – Licensee's Obligations to Customers**
  The Licensee shall, no later than three (3) months after the Effective Date, establish an efficient procedure for the resolution of disputes with Customers in accordance with the Act. However, the Bill requires that licensees establish a process for the resolution of complaints with customers. There is a significant distinction between the resolution of complaints and the resolution of disputes. If a complaint is addressed satisfactorily, then there is no opportunity for the issue to develop into a dispute.

  We recommend that the word "disputes" be replaced with "complaints"

- **Annex B – Licensed Services (Public Mobile)**

Licensee authorized to provide mobile voice telephony services, mobile data services, mobile information services. However, Item 3 provides that nothing in this Licence grants a person the rights to own or operate any electronic communications facilities used for the provision of a Fixed Service or Internet Access service. "Internet Access" refers to the provision of access to the Internet with "Internet" being defined as *a global information system, consisting of high speed circuits connecting routers that transmit data in the form of Internet Protocol packets, that is logically linked together by a globally unique address, based on Internet Protocol; is able to support communications using the Transmission Control Protocol/Internet Protocol; and provides, uses or makes accessible, either publicly or privately, high level services on an Electronic communications Network.*

According to this definition of "Internet", mobile data services constitute a form of "Internet Access". Therefore, there is an inconsistency here that must be corrected – perhaps by an amendment of the definition of Internet Access to only refer to the provision of access to the Internet by fixed technologies.

In addition, on the face of it, we believe that there might be issues with the technical standards. We would like a further opportunity to review these.

- **Annex E – Universal Service Obligations**

The Universal Service obligations proposed in Annex E are also cause for serious concern as these seek to impose significant obligations on operators which do not exist at present. ECTEL would recall that the subject of Universal Service was subject to much consultation before Regulations were enacted and Universal Service Funds established in the Contracting States. It comes as a surprise now that there is an attempt by ECTEL to introduce through the back door additional obligations, which, without consultation, ECTEL has described as universal service obligations, in addition to the requirement to contribute to the Fund. We submit that this is not the process by which ECTEL should seek to do this. This should be done by a separate consultation process to give effect to appropriate amendments to existing Universal Service obligations.

We note that there are specific obligations which ECTEL has not justified as being appropriate universal services for the Markets and which we object to. We will set our position on these in detail in a full and proper consultation on the subject.

16. Is there any category of licence, which you envisage will not fit into the current changes?

17. Should special licences continue to be a special category under the revised EC Bill?

18. *Is there any other way of dealing with special licences? Can you make any suggestions?*

Concerns about the consequences of adopting Multi-Service Licensing Regime

19. *Do you have any concerns about this new regime recreating the monopolies of the past?*
    The creation of monopolies would not be a concern if the ex-ante provisions for anti-competitive conduct are adequate.

20. *If yes, how do you envisage monopolies being recreated based on this new regime?*

21. *Having reviewed the draft EC Bill, will the new competition provisions address your concerns?*
    See Comments in the mark-up attached.

22. *Is there a need for a licence to provide a network without a service?*

23. *Do you have any additional suggestions? If any, do you wish to put them forward for consideration?*

Spectrum and Numbering

24. *Should Spectrum and Numbering be treated as separate issues? Why?*

Redundant Provisions in Current Licences

25. *Are there any provisions in the existing licensing regime, which you consider to be redundant or irrelevant and should not be included in the New Multi-service Network Licences? Please provide examples and possible resolutions or suggestions.*

26. *Should adherence to net neutrality and technology neutrality be included in the licence?*
    No. There should be no provisions on net neutrality in the licence.

    Net neutrality provisions can only be added to the licence when ECTEL has developed a clear policy framework and policy goals to test whether the proposed approach to net neutrality can deliver the maximum overall benefits to the various stakeholders based on the actual conditions in the markets of Contracting States.

    Some of the policy questions that Digicel believes need to be clarified before a Net Neutrality approach can be developed and decided on include:

    - Do we want to maximise broadband connectivity?

- Do we want to maximise Internet usage?
- The extent to which inclusiveness is a goal
- Do we want to encourage network investment?
- Do we believe that the commercial benefits of the converged Internet should be concentrated or distributed?
- The extent to which different services and service providers (both traditional and converged) need or should be protected.

Since the Internet is rendering traditional regulation no longer fit for purpose, we submit that the concept of net neutrality is most relevant in a truly converged regulatory environment. It is not clear that the framework which ECTEL now proposes properly facilitates that degree of convergence. For example, as broadband becomes more available the sort of issues that telecoms operators faced with so called "OTT voice" will be faced by broadcasters from "OTT video". But policy makers will be also faced with a challenge as OTT video providers will not have the same "must carry" obligations in respect of local content and channels. These existing rules on broadcasting will simply be no longer able to deliver the policy objectives that they were designed to. The blanket approach to Net Neutrality actually reinforces this regulatory obsolescence and may sidestep any policy objectives of Governments in the region.

We understand technology neutrality to be a different issue where operators are authorized to provide any service regardless of technology used. This should be objective of this new licensing regime.

Suggested clauses to be included in new licences

27. *Are there any clauses, which in your opinion should be included in the licence? If yes, please outline the clause and give your reasons.*

Implementation

28. *Should ECTEL cease the issuing of any new licences until a decision has been arrived at in relation to the new licencing regime?*

We do not see a reason why ECTEL must discontinue the issuance of licences. Business must be allowed to go on as usual.

29. *Should old licences simply be extended for a period of 12 or 24 months to allow effective migration to the new regime?*

This would depend on the extent of the changes that licensees would be required to make to ensure compliance. However, we strongly recommend that existing licensees must not be prejudiced or be reduced to any worse position upon the promulgation of the Act.

30. *Should stakeholders holding licences migrate onto the new regime automatically?*
    If the intention is that existing licensees should migrate to the new regime before expiration of their current licence terms, then the following should apply:
    a. Holders of what is now referred to as Individual Licences should be granted Network/Service licences with authorisations to provide an unlimited number of services on the network that they were authorized to operate;
    b. There should be no requirement to complete new application forms or to pay application fees
    c. All existing licensees must be migrated to the new regime simultaneously

31. *What do you consider to be a reasonable period for migration once the new system is in place?*
    This would depend on the process involved and the extent of changes that licensees would be required to make

32. *Should current licensed Stakeholders be required to provide all documentation previously provided on first application upon migration?*
    No application should be required – current licence holders should automatically migrate to the new regime. The NTRCs and ECTEL already have information on existing licensees and their networks/ services.

33. *Would license operators and stakeholders appreciate a forum or series of forums with ECTEL to explain the new regime and how they may be impacted by it?*
    Yes. There are some areas of ambiguity which must be addressed in detail.

Questions related to the network-service application form

34. *What are your views on the proposed revised application form?*
    i. For electronic submission, we recommend that there should be a centrally managed portal on which the application may be completed, attachments uploaded and submitted (as opposed to hard copies reduced to pdf's and e-mailed).

ii. Certainly an applicant who is applying for an amendment, a renewal or a surrender of a licence should not be required to provide as much information or to satisfy the same requirements as a new applicant. Therefore, the Form should clearly identify which parts of the Application Form would not apply in these cases.

35. *Does it adequately provide for the application of multiple licences in one form?*

36. What changes, if any, would you suggest?

Questions for Stakeholders and Licence Operators?

37. Are there any questions or issues, which have not been addressed? Please give examples.

38. Would you appreciate a person be designated to assist them with any concerns about the revised draft EC Bill, the proposed new network-service license, and the proposed new network-service licence application form once a final decision has been made as to regime to be adopted?

- **END OF DOCUMENT** -