Digicel

The Bigger, Better Network.

Digicel's response to the National Telecommunications Regulatory Commission's Consultation on ECTEL's Draft Retail Tariff Regulations

September 2010

For ease of reference, Digicel has followed the numbering scheme which is included in the Consultation Document when providing its comments. The succeeding comments are not exhaustive and Digicel's decision not to respond to any particular issue raised in the Consultation Document or any party does not necessarily represent agreement, in whole or in part with ECTEL and the Commission on these issues; nor does any position taken by Digicel in this document mean a waiver of any sort of Digicel's rights in any way. Digicel expressly reserves all its rights.

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Overall Comments

The Commission and ECTEL are proposing to take extraordinary and perhaps unprecedented steps in modern regulation in terms of the levels of their duties to control and intervene in the retail pricing of non-dominant telecommunications providers.

Even if the Regulations applied solely to dominant providers they would be very interventionist. Applied as they are in many areas to non dominant providers, the proposals seem to have echoes of command and control government – an approach which has proven to be a huge economic failure.

There is a vast amount of literature, experience and evidence on the promotion of competition and the crafting of the divide between dominant providers versus others. Only providers which are dominant in particular markets can distort competition, and pricing controls are only relevant in those circumstances. Those are the only instances in which there should be the potential to regulate the pricing of providers, and even then only if absolutely necessary. Competition is the regulator in markets where dominance does not exist. Competition is recognised in modern regulation as the best regulator in the absence of dominance.

The proposed controls on non-dominant providers are competition killers. As one example the strict requirements on what kind of tariffs a new entrant may implement will severely undermine its chances of establishing a foothold in the market. Further, the requirement to prove its pricing is above long run average incremental cost (LRAIC) would be exorbitantly expensive and time consuming and either put some providers, especially small entrepreneurs, out of business or stop them entering the market in the first place. Moreover there is no single right answer to what LRAIC is for any provider. There are many potential answers. This is an area subject to a huge amount of argument and debate. Different regulators, consultancies and operators will arrive at different LRAIC prices depending on the approaches they take and the assumptions they make when populating cost models. Arguments about the LRAIC of a new service could drag on for long periods.

In addition, it seems to us that these regulations have been drafted on the basis that most of the burden of implementing this excessive volume of regulation is placed virtually on the shoulders of the providers. Providers are confined to a very narrow path in terms of how they can price and, moreover, they themselves have to prove the pricing meets all the criteria stipulated. The effect of all these controls, especially on non-dominant providers may be akin,

metaphorically speaking, to burying the market in treacle. Competition will be stifled or choked, consumers will suffer and potential new investors may scatter. In contrast large established providers will benefit from a more secure market position in the presence of the reversion to an old style regulatory environment more conducive to regulating and maintaining a slow moving single incumbent operator.

In our very strong view retail pricing controls need to be focused solely on instances where dominance is found, and even then prices should only be regulated when absolutely necessary. Competition will regulate the market in the absence of dominance.

Paragraph 6 and Regulation 23: Negotiations with Individual Providers About Price Cap Schemes

ECTEL states that it may negotiate with providers about the type of price cap scheme. We are not clear why a negotiation is necessary. This is not a commercial arrangement between two operators where there may be give and take between two parties on different matters depending on perceived importance of each matter to each of the two parties. Any price cap scheme is meant to reflect what is in the best interests of the sector overall, not what one provider may or may not be prepared to agree to.

The only circumstance in which we imagine that a negotiation might be appropriate, and then only on a transitional basis, was where there was some kind of market distortion caused by legacy regulation or a lack of regulation in the past, which needed to be weaned out of the system on some kind of glide path basis.

In the absence of such an exception, which should be made public and explicit if it exists, we believe that ECTEL should collect what information it deems appropriate, carry out its analysis, and consult publicly with all parties at the same time. No negotiation would be necessary or desirable. Any purported negotiation would afford an individual provider an unfair advantage in terms of its ability to influence the outcome. ECTEL might be particularly loathe to make an adjustment to a price cap plan if it has already spent a lot of time "negotiating" it with a particular provider. This would make it almost inevitable, despite the best intentions, that views of other providers and members of the public would be given less consideration and have less

influence on the outcome. The regulator's discretion would effectively be fettered.

Paragraph 8 and Regulation 5: Price Regulation of Non-Dominant Providers

We do not agree that the Commission should have the power, with or without the recommendation of ECTEL, to regulate the prices of non-dominant providers. This includes the power to substitute and amend tariffs and to order compensation to be paid by a provider to customers or other providers. There are no proper guidelines to indicate when such a step might be taken. Moreover no examples are offered in terms of when this could be justified. What protects the public in terms of the price regulation of smaller operators is arguable – most regulators would argue we believe that the best protection in this case would be no regulation. There exists the potential for abuse of this kind of ill defined regulatory measure. The likely result of such regulation would seem likely to be:

> 1/ stymieing of the market;
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> 2/ significantly increased risk for potential investors that will shrink investment in The ECTEL region;
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> 3/ excessive and unnecessary demands being placed on the regulator which will distract it from more important work in terms of its impact on the public.

In contrast the dominant and non-dominant divide is well defined in law and in terms of the regulatory steps needed to define when the threshold is crossed and the remedies that are appropriate. There should be no power to price regulate non-dominant providers. If the Commission wishes to take the very unusual and perhaps unprecedented step in modern regulation of controlling the prices of non dominant operators then a separate consultation on detailed proposals about when and how this could be justified would be a necessary first step.

Paragraph 10: Requirement for Commission and ECTEL to Approve Tariffs

We understand that the proposal is that no new tariff may be approved amended or disapproved by the Commission without the recommendation of ECTEL. This applies to both dominant and non dominant providers.

It is hugely excessive and antithetical to competition to require that all new or amended tariffs for a non-dominant provider be approved by even one regulator (the Commission) let alone two if ECTEL has to approve it first. This might be considered in an environment where there was no competition or where service provision was unchanging in its nature. But the opposite is true. Telecommunications is generally very competitive and fast moving. The proposed regulation seems likely to push us backwards in time to a more static and less competitive environment rather than forwards to an increasingly dynamic and competitive one. It would result (rather similarly in some respect to one of the measures referred to above) in:

1/ the stymieing of the market;

2/ a limitation on the ability to compete and therefore making it more difficult for an operator to attempt to win market share. As a consequence discouraging potential investors and shrinking investment in The ECTEL region;

3/ excessive and unnecessary demands being placed on the Commission and ECTEL which will distract them from more important work in terms of its impact on the public;

4/ more static and higher prices for consumers;

5/ inefficient allocation of resources as providers will be less able to tailor packages to consumer demands due to the amount of time it will take to get changes improved.

Regulation 7: Intervention in the Tariffs of Non-Dominant Operators

The same arguments are applicable to all control of the retail prices of non-dominant operators as stipulated in clause 7. All focus in terms of determining what prices are “fair and reasonable” as referred to in 7(a) must be restricted to the pricing of operators which are dominant in particular markets. Other operators must be free to price as they see fit. What the

Commission and ECTEL appears to be leaning towards in terms of an ability and an obligation to control the pricing of all operators, is akin to old style command and control economics which have proven to be failed policies. The level of intervention proposed flies directly in the face of the principle that competition should be the prime manner in which the market should be developed.

We were also very taken aback by the suggestion that non dominant operators are required to price above long run average incremental cost – 7(d). Again this flies in the face of all best practice.

Non dominant operators should be allowed to price as they see fit since they do not have the market power necessary to distort the market. The only chance a new entrant might have to establish itself in a market may be to provide below cost services at least for a short period (it would be unable to sustain this due to the lack of market power) otherwise it might never gain enough market share to become viable. This option must not be denied to them as otherwise competition will be undermined. Moreover it is hugely expensive to develop a LRAIC cost model to attempt to comply with this kind of requirement – it will cost at least hundreds of thousands of US dollars. Some, or many, operators simply will not enter the market if this requirement is enforced.

The same point is true of a requirement for accounting separation in 7(e). The reason that accounting separation exists as a regulatory tool is to prevent an operator which is dominant in one market from leveraging that dominance in to another market by means of a cross subsidy. It is not relevant to and must not be applied to non-dominant operators. They must be free to flow monies through their business as they wish free of such constraints. Again forcing accounting separation, which is a very costly and resource intensive exercise, on non-dominant operators will heavily discourage investment. It will also drive up costs which will then be passed on to consumers.

Regulation 8: "Unreasonable" Tariffs

Again, this regulation should not be applied, and all best practice requires that it should not be applied, to non-dominant operators. All the harm that these kinds of measures are aimed at stopping is limited to operators with market power. For example if an operator with market power attempted to implement a price rise that was "unconscionable" it would go out of business. The point is that in competitive markets competition is the regulator – that is why best

practice policy is to focus on maximising sustainable competition, and only taking the draconian step of intervening in pricing where market power exists and even then only if absolutely necessary.

Clause 9: Anti-Competitive Conduct

This clause should not be included in a section applicable to all providers. This kind of regulation should only be implemented as required. Most of the section is aimed at dealing with behaviour that becomes a problem only when pursued by dominant providers. The only exception in this respect should be with respect to price fixing between operators as detailed in 9(e).

Bundling, as referred to in 9(a) for example only becomes a problem when an operator leverages dominance between markets. It is not a regulatory problem if an operator which is not dominant in any market bundles two services together. Nor is the pricing that is offered an issue in the absence of dominance.

All modern best practice regulation indicates that the market should "regulate" where there is no dominance. In a competitive market, intervention through formal regulation will in contrast be very much second best, and lead to market distortions. No matter how good it is, a regulator cannot keep up with the dynamics of, or therefore match, the outcomes from a free flowing competitive market.

Regulation 10: Contract Minimum Terms

10(2)(b) needs to be amended to allow for price increases without the ability of the customer to cancel if the price increase is a knock on effect of regulation of the provider in question.

Regulation 11: Billing

It is true throughout international commerce that companies are generally not liable for consequential losses. It is the balance that society generally accepts bearing in mind that companies are the engines of the economy and should not be driven in to the ground by excessive litigation. We cannot agree therefore that consumers should be able to claim for "any inconvenience" caused. This

phrase is not definable in a clear fashion, not circumscribed, and opens up huge scope for litigation and liability to the detriment of the providers and as a result, the majority of their customers. Suppose for example that a highly paid executive claims he spent a week on his phone bill – is the suggestion that the provider pays his salary for a week? How can the executive's actual inconvenience be proved? What if he says he lost a business contract since his phone was cut off over a billing error – is the full value of the contract recoverable?

We are very surprised that this clause has been included by ECTEL. It seems entirely inappropriate. Providers should only be liable for the services they provide. If the service is not provided the provider should reimburse the customer for any such period.

Clause 13(3): Disconnection

It is very important for operators to manage their risks and potential losses. If they do not do this they threaten their own viability and inevitably end up with higher costs which have to be passed on to customers. It seems to be common sense therefore that a customer who has been failing to pay their bills for one service should be vetted by the provider before it considers whether to provide any other service. The provider must have the right to refuse to provide services or to disconnect services if the circumstances justify it. The provider cannot be forced to provide services at a loss. Indeed, if a provider sought recovery of a debt from a customer in the courts we would expect the judge to require the provider to have done what it could to avoid a loss. The judge would take in to account the "voluntary" provision of another service by the provider to a person where the provider already knew that the person in question was one who did not pay his debts.

The rights to observe and implement reasonable loss mitigation measures should therefore not be denied to operators. Requiring operators to obtain the written consent of the Commission on a customer by customer basis by the Commission is wholly impractical. The Commission cannot be consulted in every instance in respect of matters that must be dealt with on the spot by the customer care teams of the operators. The Commission does not have the resources to deal with this. The end result would be a huge backlog of cases referred to the Commission by the operators that the Commission will not have the resources to handle.

If the Commission wishes to take powers here then it could perhaps take a right to agree the policies to be followed by the operators when deciding to refuse to supply, disconnect, or refuse to reconnect somebody. But the Commission should not attempt to become involved in every decision.

Clause 14: Tariffs to Be Regulated

Similar to points made above, the threshold for determining whether the Commission should intervene in pricing should be the presence of dominance. A new entrant that has just launched a service cannot be said to be dominant: the legislation should not hold out even the possibility that prices could be regulated in the absence of dominance.

Consequently, using a threshold of whether there is "only one telecommunications provider operating a public telecommunications network or providing a public telecommunications service" in 14(1)(a) is not appropriate.

Furthermore, the catch all 14(f) enabling price regulation "in the public interest" is also unnecessary in our view as this is not defined and could mean many things, and will mean different things to different people. The experience from around the world is that regulating dominant providers if necessary, will deal with public interest concerns.

Clause 16: Procedure for a Declaration of Dominance

16(2)(d) as drafted allows the Commission to draw an adverse inference from non supply of information to it, no matter whether the information is relevant or not. The clause must only apply to an information request that is both reasonable in its extent and relevant to the matter being investigated. The wording needs to be adjusted accordingly.

Clause 17 and 28: Sole Provider to be Deemed Dominant

Please see our answer to section 14. It is dominance, not whether or not there is only one provider, which is the appropriate threshold. Being the only provider does not mean that the provider is dominant.

Clause 18: Presumed Dominance

On either side of the Atlantic the thresholds for a presumption of dominance differ and the approach has differed historically. We understand that the United States Department of Justice's view is that dominance should not be presumed unless the firm has 60 to 70% market share. The European Court of Justice uses a 50% threshold. This reflects the less interventionist approaches in the United States versus the more interventionist policies in Europe.

In any event, the greater the burden that the Commission proposes to impose on firms which are found to be dominant, the higher the threshold should be, as the impact of making an incorrect finding of dominance on the affected firm would be that much greater. We suggest that a presumption of dominance should require at least 60% market share.

Clause 30: Commission Power to Regulate Where it Appears Just and Reasonable

Consistent with our comments above, price regulation should be limited to particular markets in which particular providers are found dominant. It is only when the provider is found dominant that it becomes just and reasonable, perhaps, to regulate tariffs. By reserving itself powers to regulate beyond this the Commission threatens the future of the industry it regulates, and the Commission's ability to regulate in priority areas given the strain on its resources given what, in the absence of any proper basis that we are aware of for this, would amount to the arbitrary regulation of the pricing of non-dominant providers. The "regulator of the pricing of non-dominant providers is competition.

Clause 31: Tariff Applications

We see no case for requiring a provider to file a tariff application for approval for a new service (31(2)). We do not see what the Commission can hope to gain by this regulation and think that pricing in this instance should be left to the provider. If the issue is for example aimed at the bundling of new services with services in which a provider has market power, provision is already made elsewhere in the draft Regulations to deal with such circumstances.

Consistent with previous comments, neither do we see any case for requiring (32(d)) a sole provider to apply to change the tariff for a service. The sole provider could be a new entrant providing an innovative service and have very few customers. The test should be whether the provider is dominant in a relevant market.

Clause 32: Procedures for approval of tariff application

Clause 32(3) is inappropriately worded since it does apply to sole providers without dominance. The Commission/ECTEL should not suggest that even a non-dominant and possibly very small firm should have to determine the long run average incremental costs of its services for reasons explained previously. The cost could be astronomical relative to a small firm's revenue, and would be extremely high by any person's measure. Non-dominant providers must be allowed to price at any level they see fit, and even provide services for nothing for a period if they think that is how they can compete. Non dominant firms cannot, by definition, harm the market with their pricing strategies. They will only invigorate it.

Clause 32(6) – in a similar vein to previous comments made, adverse inferences should only be possible if the information request was both reasonable and relevant to the matter being investigated. The legislation should not provide a loophole to allow for fishing expeditions, which is the case given the current manner in which it has been drafted. The wording should be changed accordingly

Clause 35: Market Trials

Non dominant providers should be free to carry out as many market trials as they wish on whatever basis they wish within the parameters of cross industry general consumer protection legislation. These providers cannot cause harm to the market through trialing services.

The proposed restrictions that have been proposed – eg limiting market trials or promotions to two per year - are arbitrary and antithetical to competition.

If the Commission wishes to take any powers in respect of dictating the terms of market trials they must be confined to dominant providers; to do otherwise will result in a chilling effect on the market place.

Clause 36: Special Rules for Bundles

Bundling is another area where problems spring from dominance and not in the absence of dominance. Non-dominant providers should be permitted to bundle as they see fit. In the absence of dominance, bundling is a competitive response, it is only when the threshold of dominance is passed by a provider in one or more of the services within a bundle that bundling may become an issue and only then if dominance is abused.

Once again we reiterate how inappropriate and antithetical it is to competition to require non-dominant providers to prove that a service or services are provided above long run average incremental cost.

Clause 38: Tariff Reviews

As stated above non dominant providers should not be subject to sections 7 to 10 (which is required under 32(1)(a)-(b)).

Burden of Proof

For many of the reasons expressed above non-dominant operators should not be subject to the requirement of the Regulations indicated and should not therefore have a burden of proof placed on them. This is another imposition which will undermine competition.

Fixed Price Regulation Regime Saved

We think that it is inappropriate that any provider "agree" to a price control regime with ECTEL. The reasons for this are outlined above. ECTEL should collect information, and consult with all parties simultaneously on a price control regime. There should not be a bilateral negotiation between a regulator and an individual provider. This will, in our view, inevitably lead to inappropriate regulatory approaches being followed.

Practically speaking, existing price regimes will probably have to remain in place but this should not be because they were agreed.