Telecommunications (Bermuda & West Indies) Ltd. ("Digicel") Response to Consultation Paper on

Draft Regulatory Authority Act 2010

And

Draft Electronic Communications Act 2010

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1/ Comments

a/ Declaration of Interest

Digicel provides nationwide mobile telecommunications services to approximately 52% of the population.

b/ Executive Summary

Level of Fees To Be Imposed on the Operators

The existing regime already requires that telecommunications operators pay 3% of their revenues and $5 per subscriber per month to the Bermuda Government. In the fiscal year ending March 30th 2010, 3% of our Gross Revenue equaled, $ 1,349,038 and $5 per pre-paid and post paid subscriber $1,920,785 for at total of $3,269,823.

This is a very significant financial contribution. The, as yet, undetermined overall level of fees that will be payable under the new regulatory regime is resulting in budgetary planning difficulties for operators now, as well as representing an indeterminable amount of business risk.

In order to enable budget planning and to reduce risk levels we believe that, as a transitional measure the overall level of fees levied on an individual operator (including regulatory and authorization fees), when compared with the total burden on each operator currently, should remain unchanged for the initial twelve months under the new regime. The only exception would be where an operator decides, and is permitted, to provide additional services in communications markets where it currently does not have permission to operate.

It must be noted that International Businesses, for obvious reasons, do not any pay such amounts to the Bermuda Government. It appears that the further increased fees will serve as a double tax on the Telecoms Sector.

Innovation

Innovation and entreprenuership has been recognized by the OECD in a May 2010 report to be the key way to raising productivity and living standards. There are also many references to innovation in the draft RAA and ECA. However there is, surprisingly to us, no explicit reference to innovation in the Principal Objects of the Authority. We believe that innovation must be explicitly mentioned here to give it sufficient weight in the regulatory decision making process.

Risk of Gaming of the Transitional Process

There exists the potential for gaming of the transitional process in order to delay market entry by a operator in to a new area of communications activity. This would be achieved by another operator through either challenging a finding of non-dominance for another operator, or challenging the remedies deemed appropriate to deal with a finding of dominance. We have suggested measures to reduce this risk.

Consultation and Transparency

We have suggested a strengthening of administrative procedures to ensure that in the vast majority of cases there will be some form of consultative or public procedure supporting decision making processes. This would provide transparency. Further, for the exceptional cases where no such procedure may be appropriate, we have proposed including a requirement that reasons for a lack of transparency in any particular case must be given.

Universal Service

There are many ways to achieve universal service objectives. Competition is the first of these. If other methods are to be employed then the Authority should seek a method of implementing them which minimises market distortions and which ensures that they can be removed as soon as reasonably possible. The Authority must also be creative if it does resort to other methods in order to find the least market distorting and most effective approach. There are a range of possible options including coverage targets, special tariffs, ascending and descending auctions, in addition to universal service funds. We have suggested wording for the Electronic Communications Act which is consistent with this approach.

Dispute Resolution

A major drag on the communications sector, especially given its generally disputatious nature, can be the large number of disputes which take place. Every reasonable approach should of course be employed to avoid disputes initially. However, in the event that disputes do arise, Bermuda should not allow itself to suffer the fate of many other jurisdictions which have multiple disputes dragging on for years at the cost of the development of the sector as well as customers and the economy. We have therefore suggested strict dispute timetables, for which there is precedent, and which must be adhered to other than in exceptional circumstances.

c/ Draft Regulatory Authority Act – Detailed Comments

RAA Section 5 (Authority of the Responsible Minister)

In order to avoid actual or perceived inappropriate political interference in regulatory decisions, the ability of the Minister to waive any legal provision in the Act or related legislation should be limited to circumstances where the Authority has requested this. We propose the following revised text for clause 5(6) therefore:

> *A Responsible Minister, ~~on his own initiative~~ at the request of the Authority, may make a regulation waiving, or authorising the Authority to waive, the application of any provision of this Act, relevant sectoral legislation or any regulation to a sectoral participant or a class of sectoral participants.*

In the name of transparency we also feel that there should be a general obligation to consult about the creation of regulations, and that where the Minister chooses not to do so, he should provide reasons. Therefore we suggest that clause 5(9) should be re-worded as follows:

> *Prior to making any regulation pursuant to this Act, or pursuant to sectoral legislation, the Responsible Minister shall confer with the Authority and~~, where appropriate, shall seek public comments~~ consult publicly. In the event that the Minister does not wish to consult he must provide his reasons for not doing so.*

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RAA Section 12 (Establishment And Organisation of the Authority – Principal objects)

The major additional benefits worldwide to consumers and the economy from the electronic communications sector have stemmed from innovation. Mobile and other wireless services and the internet being the best examples. Thus we feel that the promotion of innovation must be one of the very key determinants when establishing the role of the regulator with respect to the highly innovative communications sector. The high level of innovation means that the sector is fast changing, diverse and higher risk, and these characteristics have to be borne in mind when regulating it.

We also note that in support of the OECD's new report on innovation released in May this year the OECD Secretary-General Angel Gurría said on 27th May 2010 that *"Knowledge is the main driver of today's global economy"*, and that *"Countries need to harness innovation and entrepreneurship to boost growth and employment. This is the key to a sustainable rise in living standards."* We propose the following additional clause therefore. This would become clause 12(d):

> *to promote innovation;*

RAA Section 44 (Regulatory Authority Fees)

In order to reduce business risk and enable operators to budget effectively we suggest that the authorization fees in combination with the regulatory fees paid by any particular operator do not exceed the current level of authorization specific and non authorization specific fees for the first twelve months under the RAA and the ECA. Moreover we believe that it will always be important that the Authority takes in to account the overall financial burden on the industry when recommending the level of authorization and regulatory fees. Consequently we suggest re-wording clause 44(6) as follows:

> *In developing the proposed Regulatory Authority fees, the Authority shall give **the greatest consideration** to the revenue received from any Government authorisation fees established pursuant to section 52, as well as the overall fee burden on the industry. **During the first twelve** (12) months after the implementation of the relevant section of this Act and **the Electronic Communications Act, the** Authority shall not recommend and the Responsible **Minister shall not impose, a combined level** of regulatory and authorisation fees for an operator **licensed within any particular market that** exceeds the overall level of fees levied on that operator **previously.***

RAA section 49 (Grant, assignment and transfer of control [of licences])

We have two perspectives that we wish to share here. Firstly, we are concerned to minimise the risk of, or the perception of, political interference. The second is to ensure that the method chosen for awarding a spectrum licence is consistent with providing them at least cost to those best able to make use of them. This is because it is extremely difficult to value spectrum and this can lead to very wide possible ranges of costs which drives up business risk substantially. While auctions may be considered in theory to be an efficient way of awarding spectrum licences for example, it is possible that due to unanticipated external factors the prices arrived at may not be sensible, or that they may be forced upwards by the manner in which the auction process is devised.

Consequently we suggest that section 49(3) is re-worded as follows:

> *When authorized by sectoral legislation, a Responsible Minister may on the recommendation of the Authority direct that an auction or comparative selection process is used. Whenever a spectrum licence is to be issued whichever process is chosen to select the appropriate licensee shall be designed to ensure that the best candidate obtains the licence at the minimum price possible.*

RAA Section 52 (Government Authorisation Fees)

In order to ensure that a holistic view is taken of the overall burden of regulatory and authorization fees and the industrywe believe that the Authority must be required to submit a recommendation on authorisation fees to the Responsible Minister. Thus clause 52(2) would be revised to read as follows:

> *The Authority~~, at the request of the Responsible Minister,~~ shall submit a recommendation to the Responsible Ministers regarding the Government authorisation fees to be adopted*

Further, and consistent with our proposed changes to section 44, in order to reduce business risk and enable operators to budget effectively we also suggest that the overall level of ees paid by any particular operator should remain unchanged during the first twelve (12) months of operation of the relevant sections of the RAA and ECA unless the operator is permitted to enter in to a new area of licensed activity by the Minister. We suggest therefore that the following clause is inserted as a new 52(7):

> *During the first twelve (12) months after the implementation of the relevant sections of this Act and the Electronic Communications Act, the Authority shall not recommend and the Responsible Ministers shall not impose, a combined level of regulatory and authorisation fees on an operator licensed within any particular market that exceeds the overall level of fees levied on that operator previously.*

RAA Section 57 (Dispute Resolution)

A frequent drag on the effectiveness of the electronic communications sector which is highly dependent on speed and innovation, is the lengthy time that disputes are sometimes permitted to take. Dispute processes can and should be designed to take a minimum amount of time. This should be no more than four (4) months from start to finish and should not be permitted to take longer than this except in exceptional circumstances. Consequently we suggest that section 57(d) is amended and that the following wording is inserted as a new section 57(f):

> 57(d) – the word "*sixty*" is replaced by "*thirty*".
>
> 57(f) – *Any arbitration or adjudication must be completed within one hundred and twenty (120) days at most based on the information that has been provided within that period except in exceptional circumstances in which eventuality the Authority shall make an interim determination.*

RAA Section 59 (Resolution of disputes involving sectoral providers with significant market power)

As a result of the commercial incentives which may affect the behavior of SMP operators we do not agree that a operator should be forced to attempt to resolve a matter with an SMP operator through negotiations unless the compulsory period of attempted negotiation is specifically limited. The reference to sixty days would also have to be changed to be made consistent with our proposed changes to section 57 above with respect to dispute resolution.

Consequently we would amend section 59(3) (a) as follows:

> *3) The general determination provided for in subsection (2) shall provide that—*
>
> *(a) a sectoral provider who claims that another sectoral provider that has significant market power in a relevant market has failed to discharge a duty to which it is subject by virtue of this Act, sectoral legislation, or any regulation or administrative determination made by the Authority must first seek to resolve the dispute through negotiations;*
>
> *b) irrespective of progress made or otherwise in negotiations the sectoral provider may file a complaint with the Authority within thirty (30) days of asking the SMP operator to negotiate, which shall contain all relevant information;*
>
> *(c) if the Authority is unable to facilitate an informal resolution of the dispute within thirty (30) days after receiving the complaint, the Authority shall—*

RAA Section 61 (Selection of administrative procedures; use of evidence)

In harmony with earlier comments, and in the name of transparency, we believe that there should be a general obligation to consult where appropriate and that reasons should be given where no consultation or other public procedure is implemented. Consequently we suggest revising clause 61(1) to read as follows;

> *61 (1) Except where this Act or sectoral legislation expressly requires the use of a specific administrative procedure, the Authority must choose as a part of any decision making process whether to—*
>
> *(a) conduct a public consultation; or*
>
> *(b) conduct an adjudication; and*
>
> *(c) in the event that neither (a) nor (b) is appropriate then reasons must be given.*
>
> *61(2) where the Authority conducts an adjudication it shall be required to publish details of any dissenting opinions expressed by those responsible for the decision reached.*

RAA Section 92 (Inspectors)

The Section does not appear wide enough to capture all necessary information that an inspector might require. General references elsewhere to the Authority's ability to collect information do not provide the necessary powers in our view. The power has to be with the inspector during his visit to an operator. One category of information that an inspector might require, for example, would be electronic records held on switches. Consequently, we suggest revised wording as follows:

> *92 (1) The Authority, when necessary to conduct an investigation, may designate any member of the staff, or any other qualified person, to be an inspector.*
>
> *(2) The Authority may authorise the inspector to—*
>
> *(a) enter any premises during ordinary business hours;*
>
> *(b) search the premises;*
>
> *(c) seize any document, **record** (in electronic format or otherwise), attach his **equipment to other equipment for the purpose** of extracting such information, or require a person **or entity to copy the information for him**;*
>
> *(f) seize any object.*

RAA Section 94 (Financial Penalties)

The intention is to give the regulator very draconian powers and allow it to impose fines up to 10% of turnover. If such powers are being taken, which can impose tremendous business risk, we believe that there is an obligation to set out a clear framework within which fines will be determined so that licensees have some understanding of what they are facing. To give an example of the difficulties here, one can consider the case of an operator which takes an illegal an action preventing market entry by another. How would the damage be assessed in this case? The operator claiming damages could allege that it would have obtained 50% of the market quickly, whereas the other operator might claim the competitor would have had limited or no success.

Consequently we suggest that the Authority should be obliged to provide further guidance to the sector on the approach to be adopted when assessing what level of fines to impose and we therefore suggest the following revision to Section 94(1)(e):

> *...the Authority may impose a penalty of up to ten percent of total annual turnover, as defined by sectoral legislation, and provided that the Authority has provided a reasonably detailed level of*

guidance about the manner in which the level of a fine to be imposed will be assessed in a particular circumstance, at least three (3) months before it imposes any such fine.

RAA Section 96 (Action for Damages in the Supreme Court)

The time limitation on claiming for damages in the Supreme Court should take in to account the amount of time that the Authority takes to make a determination on whether an operator has committed a regulatory breach. This is because the finding by the Authority may be the proof which allows the operator to make a successful claim in the courts.

Consequently we suggest the following revised wording for Section 96(2):

> *(2) Unless provided otherwise in sectoral legislation, an action may not be brought in respect of any loss or damage referred to in subsection (1) more than two years after the day on which the act or omission occurred, or more than two years after the day on which the Authority finds an operator committed any relevant illegal act or omission, whichever is later.*

d/ Draft Electronic Communications Act – Detailed Comments

ECA Section 2 (Interpretation)

A potentially important bottleneck stifling competition can be the prevalence of corporations using private branch exchanges supplied by an incumbent. A competitor may wish to connect its equipment to a PBX in order to enable a customer to route his calls via whichever network he chooses. What often prevents this however are contractual terms preventing connection to PBXs and thus the customer is held captive by the incumbent. Competitors need to have access to PBXs. Consequently we have suggested the revised wording below for the definition of "associated facilities":

Further we wish to avoid the creation of any loophole in terms of what is deemed to be "interconnection" and we have therefore included an additional sentence in the definition of "interconnection" to deal with the joining of two third party networks via another. A follow on change to the definition of "interoperability" was required.

> *"associated facilities" means those associated services, physical infrastructures and other facilities or elements associated with electronic communications that enable or support the provision of services via an electronic communications network or service or have the potential to do so, and include buildings or entries to buildings, building wiring, antennae, private branch exchanges, towers and other supporting constructions, ducts, conduits, masts, manholes, cabinets and such other facilities that may be specified by the Authority;*
>
> *"interconnection" means the physical and logical linking of public electronic communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking within the meaning of section 23(7). It includes the provision of services such as transit services (including domestic transit, and outbound international transit) required to connect two third party networks to one another;*
>
> *"interoperability" means the technical features or functional capability of a group of interconnected systems, including equipment owned and operated by the customer that is attached to a public electronic communications network, which ensure or enable end-to-end provision of a given service in a consistent and predictable manner;*

ECA Section 6 (Purposes of the Act)

We believe that the aim of provision 6(1)(d) is to encourage providers of telecommunications services and networks to invest in the latest networks and services in Bermuda. This does not seem technology neutral as currently drafted and suggests that providers will in some way be given additional incentives to provide particular networks and/or services. It is normally considered best practice to let the market

pick the technologies. We suggest therefore that this clause could be re-worded to encourage innovation in the following manner:

> *Encourage innovation in telecommunications networks and services through, inter alia, stimulating the necessary investment.*

ECA Section 22 (Market Review Procedures)

This section appears to be fairly similar to the European Commission's market analysis guidelines except that the criteria listed relate only to the assessment of dominance/significant market power. In order to assess an operator for dominance the first step is to establish whether there is an economic market in the first place in which a provider could be dominant. This involves an analysis of the potential for demand and supply side substitutability and the potential for new market entry. Given that the Section is so detailed in outlining market analysis in other respects we believe that it should at least mention the fundamentals required when defining economic markets initially, otherwise one might read the Section as implying some new approach to market definitions will be instituted. We therefore suggest inserting a new (additional not replacement) clause 22 (2) (a) as follows:

> *the potential for demand and/or supply side substitution and/or for competitive entry to the market*

ECA Section 23(1) (Imposition of Ex Ante Remedies)

An obligation for an operator to provide in advance wholesale access or interconnection services prior to the introduction of associated downstream services will work effectively as a competitive tool only if the advance notice is sufficient to let a reasonably efficient competitor introduce competing downstream services at the same time as the incumbent. We suggest therefore that the Authority is given the discretion here to decide on the period in question, but that in the absence of a specific period the default period of advance notice should be thirty (30) days. Consequently we suggest revised wording for clause 23(1)(h) as follows:

> *the obligation to provide certain types of wholesale access or interconnection prior to introducing associated downstream services that rely on such inputs. The amount of time may be determined by the Authority, but in the absence of a specific determination it shall be thirty (30) days;*

In order to assist competition in the international market we believe that the regulator should have the backstop power to require undersea cable operators landing in Bermuda to provide Indefeasible Rights of Use (IRUs) at competitive prices. Since IRUs are agreements to take capacity from a particular cable during its entire operational lifespan, these are much more cost effective than annual lease rates. Consequently we suggest inserting a new 23 (1)(c)(vi):

Indefeasible Rights of Use.

The option to remove a regulatory obligation altogether has been omitted from clause 23(4). We suggest simply adding this option. Thus the clause would read:

> *Following further review by the Authority of a relevant market that is already subject to one or more ex ante remedies and that continues to be characterised by significant market power, the Authority may, following public consultation, make an administrative determination modifying or removing any relevant obligations or imposing such additional remedies as it deems necessary, taking into account the impact and efficacy of the existing obligations and the costs and benefits of any changes.*

ECA Section 24 (Withdrawal of Ex Ante Remedies)

Our reading of the views of regulators including that of Ofcom, the UK regulator, is that it is deemed sensible to retain the option to allow for transitional measures where obligations are being withdrawn as there may be unanticipated shocks to the market if for example a provider is not longer required to provide a particular wholesale product and withdraws provision of it immediately. Consequently, we suggest re-wording as follows:

> *Where, as a result of a market review conducted pursuant to section 22, the Authority determines that a relevant market is effectively competitive, it shall not impose any ex ante remedies in respect of that market and shall remove any ex ante remedies previously imposed, unless the Authority determines that certain obligations, including transparency and accounting separation, are necessary to preserve effective competition in cases where a closely related relevant market is characterised by significant market power. The Authority may also implement transitional provisions following the removal of ex ante remedies which should be reviewed at least every twelve (12) months to establish if they remain necessary and if not such transitional measures shall be removed.*

ECA Section 33 (Universal Service Policy)

Digicel believes that it is generally accepted to be best regulatory practice that a competitive market should be given a reasonable opportunity to meet policy objectives for the electronic communications sector before there is any resort to regulatory intervention in the form of a universal service obligation.

Consequently we believe that this section should provide the option to implement some kind of universal service scheme or fund but not compel it irrespective of other circumstances. Even if some kind of universal service scheme is felt to be necessary there may be many ways to achieve its objectives including coverage requirements, low user packages, and reverse auctions based on a mixture of minimum quality and cost criteria. We also believe that is generally accepted best regulatory practice to

avoid technology specific regulation where possible. Thus if the Minister wished to require a connection to voice services he should not specify that it must be via fixed services only. It should also be possible to provide the services via mobile. If there are concerns around the pricing of mobile services then a mobile operator would have to be given the option to bid for and meet the universal service objectives at certain pricing levels. We have also revised the wording to allow for the services to be included in universal service requirements to be changed from time to time by the Minister. We suggest the following wording for the section:

> *33 (1) The Minister may make general policies and, as necessary, regulations concerning the provision of universal service by one or more providers of public electronic communications, including—*
>
> > *(a) the types of services that may be subject to mandatory universal service provision;*
> >
> > *(b) whether any particular type or group of users should be eligible for certain universal services pursuant to social tariffs;*
> >
> > *(c) the sources of any funding that may be required, and the basic framework of any associated funding scheme; and*
> >
> > *(d) the structure of any auction allowing for competitive bids to meet universal service objectives.*
>
> *(2) Any policies made by the Minister, and any applicable regulations, shall ensure that requests for connection by end-users ~~at a fixed location~~ to a public electronic communications network or networks covering the island of Bermuda and offering international access via undersea cable can be met by at least one ICOL holder, and that the connection provided is at a minimum capable of supporting ~~voice telephony, facsimilie and functional Internet access~~ a range of services to the standards and at prices that may be specified by the Minister in regulations from time to time.*

ECA Section 34 (Functions of the Authority)

Certain provisions in section 34 would also need flexibility to make them consistent with our proposed changes to section 33 above. We propose the following wording for clause 34(2):

> *(a) defining the specific electronic communications services which may be subject to a universal access obligation based on consideration of the relevant costs, needs of the public, affordability of the service or services, and advances in technology;*
>
> *(b) specifying the criteria of eligibility for any social tariffs that may be imposed as a matter of policy or by regulation;*

(c) establishing the terms and conditions pursuant to which one or more designated communications providers may be obligated to provide universal services defined or specified pursuant to paragraph (2)(a) or (2)(b);

(d) establishing the detailed provisions of any mechanism for achieving universal service objectives and/or any universal service funding scheme, if applicable, pursuant to section 35;

(e) ensuring that designated communications providers comply with any universal service obligations or conditions that may be imposed and facilitating the functioning of the scheme;

(f) establishing the mechanism for any auction to providers of the opportunity to meet universal service obligations; and

(g) implementing any other method of meeting universal service objectives.

ECA Section 35 (Establishment of a Universal Service Fund)

In Digicel's experience it can be the case that one arm of government can to some extent conflict in its actions with another in terms of the implementation of measures aimed at meeting universal service objectives. In particular the Ministries responsible for communications and planning. We believe therefore that as a minimum the Ministry responsible for communications should be required to consult with other Ministers about proposed universal service measures especially where infrastructure development may be required.

As a matter of good practice we also expect that there will be an independent audit of any universal service fund.

We therefore propose adding the following clauses:

A new (additional not replacement) 35(6) (b):

Require the Minister to consult with relevant other Ministers about the most effective implementation of universal service objectives and to seek the co-operation of other Ministers especially with respect to obtaining any government permissions that may be required.

A new 35(8):

Any Universal Service funding scheme shall be subject to an annual independent audit which shall be published.

ECA Section 41 (fees for spectrum licences and permits for radio stations and apparatus)

It can be extremely difficult to identify "fair" prices for spectrum. As a result the prices for any particular spectrum may vary extremely widely between countries (references to opportunity costs or benchmarking do not narrow down the possible range sufficiently). Consequently, It is not at all apparent even what range of prices might be introduced for particular spectrum in Bermuda. This creates great uncertainty and therefore represents significant business risk. Further, in many countries, given the possible range of prices that can be argued for spectrum, a spectrum sale is often seen as mainly as a revenue raising opportunity for central government and therefore the tendency is often to create auction rules, or to use benchmarks, which drive up the price of spectrum or at least ensure that prices are at the high end of the scale. We think that this would be a major policy failing since it undermines the development of the very sector that uses the spectrum.

Further, the evidence demonstrates in our view that auctions do not always provide desirable outcomes. Very high prices can result in excessive debt levels for operators and weaken their ability and/or desire to invest as much as would otherwise have been the case.

In our view the spectrum fees policy should therefore clearly require that fees should be set at levels which help to ensure that spectrum is allocated at least cost to those able to make the best use of it for the benefit of consumers and the economy. Consequently we suggest such a clause as a new (additional not replacement) 41(1)(a):

> *The objective for spectrum pricing shall be to establish fees at the minimum level required to ensure that spectrum is allocated to those best able to make use of it for the benefit of consumers and the economy.*

ECA Section 77 (Timing of other actions by the Authority to facilitate the transition to ICOLs)

There exists the potential for gaming of the transitional process in order to delay market entry by a operator in to a new area of communications activity. This would be achieved by either challenging a finding of non-dominance, or challenging the remedies deemed appropriate to deal with a finding of dominance. To avoid this we believe that an additional clause 77(b)(iii) should be added as follows:

> *the findings of the Authority shall have effect, unless and until, a court determines that they are unlawful.*