



Digicel

Digicel (Vanuatu) Limited
Ellouk Plateau
Port Vila
Vanuatu

Thursday, 27 April 2017

Ms. Dalsie Baniala
Telecommunications Radiocommunications Regulator
PORT VILA

Dear Ms. Baniala

Without Prejudice

Re: Digicel's Invitation for an Internal Review of the TRR's Decision pursuant to section 52(1) of the Telecommunications and Radiocommunications Regulation Act 2009 ("Act") | Wantok's Request to Interconnect with Digicel

Introduction

Digicel hereby wishes to invite the TRR to internally review a decision made by the TRR in a letter dated 18 April 2016 ("**Letter**"). We note that the letter is incorrectly dated 2016 by the TRR and was received by Digicel after business hours, at 6.11pm on 18 April 2017. Specifically, the TRR's decision ("**Decision**"), which is the subject of this invitation is contained in the letter, and reproduced below for convenience:

"...TRR does not find the indemnity condition by Digicel to be a valid condition in the Interconnection Agreement and, therefore, is hereby giving Digicel 5 days to enter into Interconnection Agreement and the actual Interconnection with Wantok".

In this letter, Digicel sets out its reasons for inviting the TRR to undertake an internal review of its Decision and the legal framework that it believes is relevant to the invitation.

1.0 Legal Framework

1.1 Digicel makes this request under section 52(1) of the Telecommunications and Radiocommunications Regulation Act 2009 ("**Act**"), which states that "*Any person aggrieved by a decision of the Regulator may invite the Regulator to reconsider such decision*".

1.2 Digicel notes that under the provisions of section 52(5), the TRR may:

*"(a) Confirm the decision; or
(b) Vary the decision; or
(c) Revoke the decision; or
(d) If the decision is revoked, make a new decision."*

1.3 Digicel also notes that this invitation must be in writing, and include all the material on which this invitation is based. Therefore, in addition to the material provided in this letter, Digicel refers the TRR to and relies upon the content of each correspondence and documents, which it believes are relevant to this review. They are:



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- **4 April 2016** Letter from TRR to All Licensee's entitled *Interconnection Arrangements and Agreements between Licensed Operators*.
- **18 April 2016** Letter from TRR to Digicel entitled *Resolution of Wantok Disagreement over Provision of Indemnity for the Purposes of Interconnection with Digicel*.
- **22 April 2016** Letter from Digicel to TRR entitled *Interconnection with Wantok*.
- **22 April 2016** Letter from Digicel to TRR entitled *Interconnection with Wantok*.
- **9 June 2016** Letter from TRR to Digicel entitled *Interconnection with Wantok*.
- **13 January 2017** Letter from Digicel to TRR entitled *Wantok License*.
- **19 January 2017** Letter from Digicel to TRR entitled *Wantok License*.
- **25 January 2017** Letter from Digicel to TRR entitled *Wantok License*.
- **21 February 2017** Letter from Digicel to TRR entitled *Digicel License Conditions and Purported Interconnection Agreement between TVL and Wantok*.
- **28 February 2017** Letter from Digicel to TRR entitled *Formal Complaint relating to Wantok's Advertising and Promotions – "Free Calls". "...Fastest Internet on 4G in Vanuatu", and its derogatory and offensive language used against its competitors*.
- **28 February 2017** Letter from Digicel to TRR entitled *Wantok further Breaches of its License obligations*.
- **30 March 2017** Letter from Digicel to TRR entitled *Resolution of Wantok Disagreement over Provision of Indemnity*.
- **18 April 2017** Letter from Digicel to TRR entitled *Follow up on Matters relating to Wantok*.
- Telecommunications Licence Amendment – Wantok Network Limited, dated 16 December 2016 ("**Amendment Licence**").
- The Telecommunications and Radiocommunications Regulations Act 2009.

1.4 Digicel understands that the TRR already has access to the above material but would be happy to furnish copies if required.

1.5 Digicel notes that it has not yet commenced any Judicial Review Proceedings in relation to this matter, however, receives its rights to do so.

2.0 Grounds for requesting the Internal Review

2.1 Digicel's principle reason for requesting the Internal Review is that the TRR has not followed a fair process in making the Decision.

2.2 In its letter to the TRR dated 30 March 2107, Digicel proposed such a process for determining the dispute between Digicel and Wantok as to whether or not an indemnity should be provided by Wantok. That proposed process was consistent with the requirements of natural justice and would have ensured that the parties' legitimate expectation for a fair process would be met and included the following steps:

"1. a statement detailing the matter to be determined. In this case, that matter is:

Whether, in the event that:



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- a. *either the Telecommunications and Radiocommunications Regulator ("TRR") or a Court determines that Wantok is not:*

 - i. *lawfully entitled to provide voice services in Vanuatu; or*
 - ii. *lawfully entitled to interconnect with the networks of other licensees; or*

- b. *despite being lawfully entitled to do so, Wantok does not give effect to an interconnection agreement with Digicel within three months of that interconnection agreement either having been commercially agreed or otherwise determined by the TRR,*

Wantok should be required to indemnify Digicel against any and all costs that it has or may incur in connection with, or as a result of, the interconnection discussions.

2. *a requirement that each party provide written submissions to the TRR setting out its position with respect to the matter that is to be determined;*
3. *an opportunity for each party to make a submission in reply to the other party's submissions;*
4. *a draft determination by the TRR;*
5. *a further opportunity for parties to make submissions on the TRR's draft determination; and*
6. *a final determination by the TRR."*

2.3 However, the TRR has done none of above things and instead made a decision without affording any opportunity for Digicel to:

- set out its case in support of its position; or
- be able to review any submissions or correspondence from Wantok in relation to the matter and to have a fair opportunity to correct, contradict or comment on any statements that were made by Wantok.

2.4 Instead, Digicel has been denied the right to a fair hearing and the TRR has made a decision which, in all the circumstances, Digicel respectfully submits is unreasonable and fails to ensure that Digicel's legitimate commercial interests and the interests of its customers are protected as is required under section 26(4) of the Act.

2.5 Moreover, the TRR has not only sought to determine the matter that is in dispute between Digicel and Wantok but has gone further by purporting to direct Digicel as follows:



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"TRR ... is hereby giving Digicel 5 days to enter into Interconnection Agreement and the actual interconnection with Wantok."

- 2.6 This is despite there being no agreed interconnection terms or technical arrangements for such interconnection. Such a direction is manifestly unreasonable and inconsistent with the requirements of the Act.
- 2.7 Digicel also denies that, by requesting the TRR to follow a fair process to determine the matter that is in dispute between Digicel and Wantok that Digicel has breached its interconnection obligation to negotiate in good faith with Wantok as is required pursuant to section 26(2) of the Act.
- 2.8 Digicel has at all times been responsive to Wantok and sought to find an amicable way to move forward on the interconnection discussions and does not understand Wantok's objection to providing the indemnity that has been requested.
- 2.9 Further, and as previously advised by Digicel to both Wantok and the TRR, if Wantok sees no reason to doubt the lawfulness of its right to provide voice services or to interconnect with Digicel in Vanuatu, Wantok should be more willing and prepared to provide such indemnity without hesitation. Had Wantok done so, Digicel would have proceeded immediately after, as it has stated in numerous correspondence both to the TRR and Wantok, to continue to cooperate in good faith and resume interconnection discussions. This continued reluctance by Wantok, and the failure of the TRR to follow proper process in determining the matter, gives rise to further concern.
- 2.10 The TRR's failure to follow a proper process as required by the principles of natural justice, is highlighted at paragraph 9 of its Letter, which states:
- "...the proposed indemnity may include any number of potential costs for which Digicel has made little attempt to provide any detailed substantiation".*
- 2.11 This strong statement criticizing Digicel's failure to provide details in support of its case is simply a reflection of the TRR's own failure to afford Digicel the opportunity to submit its detailed views, evidence or arguments in circumstances where Digicel had clearly requested that a proper process be followed before the TRR reached its decision regarding Digicel's indemnity request. In fact, Digicel, in its letter to Wantok dated 21 February 2017, and in its more recent letter to the TRR dated 30 March 2017, articulated this request, and provided as follows:
- "...Digicel is willing to submit any disagreement over the provision of an indemnity to the TRR for determination. However, any such determination should follow a proper process, which, consistent with international practice and the requirements of natural justice and procedural fairness..."*
- 2.12 As stated above, Digicel is concerned that the TRR ignored this request and chose to instead determine the matter in the absence of any proper processes being followed, or without allowing Digicel to provide evidence to support its view or to submit its detailed evidence to support its arguments. This determination is therefore in clear breach of the principles of natural justice and perverts the cause of justice, which has otherwise been a foundation of the TRR and the Government of Vanuatu.



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- 2.13 It is also apparent from the Letter that, despite Digicel being denied an opportunity to make out its own case, the TRR has engaged with Wantok to gain its views. For example, at paragraph 10 of its Letter, the TRR states:

*“...Digicel has previously raised technical concerns, which **Wantok has addressed by procuring equipment, at substantial cost to itself, to enable interconnection and absolving Digicel from significant equipment or related technical costs.**” [Emphasis Added].*

- 2.14 At no time, prior to receiving the Letter, has such information been provided to Digicel by the TRR. Such failure to disclose information raises further serious procedural questions in relation to the Decision.
- 2.15 If Digicel’s reasonable request to follow a proper process was accepted, both parties would have had the opportunity to submit its arguments, views and comments and more importantly, provide such evidence as may have been necessary to properly deal with this matter. Such a process could have been undertaken in an expeditious way and would not unduly delay the progress of interconnection negotiations in circumstances where Wantok itself has taken many months to respond to questions that have previously been put to it by Digicel.
- 2.16 For example, in Digicel’s letter dated 22 April 2016 to the TRR, Digicel confirmed that it remained “very responsive to Wantok and is continuing to engage in good faith”, “despite Wantok” themselves having taken months to respond to Digicel’s “initial information request and continuing to be slow to respond to issues that have been raised”.

3.0 Remedies Sought

- 3.1 Digicel respectfully requests the following remedies to be applied in relation to the Decision it has invited the TRR to review:
- i. The TRR withdraws the Letter and the Decision; and
 - ii. The TRR engage in a process, consistent with the requirements of natural justice and procedural fairness to determine the matter that is in dispute between Digicel and Wantok and which is consistent with the process described in paragraph 2.2. of this letter.
- 3.2 Digicel urges the TRR to reconsider its Decision and apply remedies that are sought, which would ensure that a fair outcome is achieved for all concerned.

Conclusion

Digicel would like to take this opportunity to thank the TRR for her further consideration of this important matter. Digicel has not requested this review lightly but believes that this issue has yet to be resolved satisfactorily. Digicel looks forward to working with the TRR to resolve this matter as quickly as possible to the benefit of the telecommunications industry and the people of Vanuatu who use the services it provides and also as a matter of both good policy and good regulation.

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Please do not hesitate to contact me if you would like to discuss any of these issues in more detail.

Yours sincerely

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Yaser Maher
Chief Executive Officer
Digicel (Vanuatu) Li