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## **TRR'S DECISION RELATING TO DIGICEL'S REQUEST FOR INTERNAL REVIEW OF TRR'S DECISION OF 18 APRIL 2017**

### **I. BACKGROUND**

1. This Decision arises in part from a request on 27 April 2017 by Digicel (Vanuatu) Ltd. ("Digicel"), for an "internal review" of the decision in TRR's letter of 18 April 2017 ("TRR's Prior Decision"). Digicel's Review Request was made pursuant to section 52 of the Telecommunications & Radiocommunications Regulations Act No. 30 of 2009 ("the TRR Act").
2. TRR's Prior Decision arose out of a request by Wantok Networks Ltd. ("Wantok") for interconnection services from Digicel. According to correspondence provided by Digicel, Wantok initially began seeking interconnection from Digicel in June 2015.
3. More recently, on 24 January 2017, Wantok again requested interconnection from Digicel.
4. In response, Digicel informed Wantok that Digicel had concerns that Wantok was not licensed or authorized to provide any voice services, and accordingly was not entitled to interconnection for that purpose. Digicel also informed Wantok that due to this claim or concern, Digicel would impose certain pre-conditions on having further interconnection negotiations or discussions with Wantok. Digicel's letter to Wantok of 31 January 2017 stated:

"Nevertheless, and subject to the following conditions, Digicel, as a demonstration of its good faith in the matter, is willing to proceed to

engage further with Wantok in respect of interconnection discussions. Those conditions are:

1. Any interconnection discussions are conducted on a “without prejudice” basis with respect to Digicel’s views on whether or not Wantok is lawfully entitled to provide voice services in Vanuatu or to interconnect with the networks of other licensees in order to provide voice services;
2. **Wantok agrees, in the event that either the Telecommunications Regulator or a Court determines that Wantok is not:**
  - a. **lawfully entitled to provide voice services in Vanuatu; or**
  - b. **lawfully entitled to interconnect with the networks of other licensees;**

**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;**

3. Digicel reserves the right to suspend or discontinue interconnection discussions if, in its reasonable opinion, the continuation of those interconnection discussions is likely to prejudice Digicel’s position with respect to Wantok’s lawful entitlement to provide voice services in Vanuatu or to interconnect with other licensees in order to provide voice services.

(emphasis added). This condition was confirmed to Wantok in later correspondence.

5. Digicel also wrote TRR on 21 February 2017 confirming its requirement for such an indemnity from Wantok, and explaining the reasons for Digicel requiring this indemnity.
6. On 28 February 2017, Wantok wrote to Digicel (copying TRR), rejecting Digicel’s proposed indemnity and stating: “Wantok has no doubts as to their rights to deploy voice services, and view Digicel’s demand for an indemnity to be high-handed, unnecessary and possibly as just a means to seek delay fair competition. As we do not see eye to eye on this issue, and in order to avoid any further delays to interconnection, our next step will be to write to TRR to formally request that they resolve this difference at their earliest convenience”.

7. By letter dated 3 March 2017, Wantok wrote TRR, referring to the above letter to Digicel, and formally requesting assistance from TRR “in order to resolve the current impasse we are facing in pursuing domestic interconnect negotiations with Digicel”.
8. On 14 March 2017, TRR wrote Digicel, stating: “TRR is acting upon a request from Wantok Networks Ltd. for assistance on the interconnection with Digicel (Vanuatu) Limited. From the information obtained the one area of concern and cause of delay is the requirement for Digicel to be indemnified by Wantok for interconnection. The TRR would like to obtain clarification from Digicel on exactly what type of indemnification is required from Wantok.”
9. Digicel responded by way of a letter to TRR dated 30 March 2017. Digicel referred to its letters of 31 January 2017 to Wantok, and 21 February 2017 to TRR setting out the above indemnity and Digicel’s reasons for seeking it. Digicel also agreed to have the dispute over this indemnity determined by TRR, and proposed that TRR use a 5-step process (which included two sets of submissions by each of Digicel and Wantok initially, issuance by TRR of a draft decision, further written comments by each of Digicel and Wantok on that draft decision, and then a final decision by TRR).
10. TRR did not agree to engage in the extended process proposed by Digicel. Instead, it considered the indemnity issue and provided its Prior Decision, by letter dated 18 April 2017. TRR concluded that the indemnity condition advanced by Digicel was not a valid pre-condition for Digicel to insist upon prior to engaging in further discussions with Wantok about providing the interconnection requested. TRR stated:

“In conclusion, 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. Failure to do so will result in the issuance of an Order to enter into interconnection in accordance with its power on the Act. “

11. This was followed, on 27 April 2017, by Digicel making its Request for Internal Review of TRR’s Decision of 18 April 2017, (“Digicel’s Review Request”), which is attached as Annexure 1.

## **II. TRR’S CONSIDERATION OF DIGICEL’S REVIEW REQUEST**

### **A. Digicel’s Claims Of Unlawful Denial Of “Natural Justice”**

12. Digicel's Review Request states that its "principle reason" for requesting internal review is its belief that TRR has acted illegally by not engaged in a fair process in making TRR's Prior Decision, thereby denying Digicel "natural justice."
13. In particular, Digicel claims that it has not had an opportunity to "set out its case" in support of it requiring this indemnity from Wantok, and has not had a fair opportunity to review and comment on "any submissions or correspondence" of Wantok that TRR received relating to the above indemnity. Digicel also claimed that principles of natural justice required TRR to use the 5-step process Digicel proposed (or a similar process).
14. TRR does not agree that in making its Prior Decision, TRR acted unlawfully by denying Digicel natural justice or procedural fairness, or that TRR was required to use the 5-step consultation process suggested by Digicel. TRR's reasons include that:
  - a) Before TRR's Prior Decision, Digicel had prior opportunity to put forward its reasons for requiring such an indemnity, and did so. This occurred, for example, in Digicel's letters of 31 March 2017 and 21 February 2017 about this indemnity (which are referred to in Digicel's letter to TRR of 30 March 2017 and were reviewed and considered in making TRR's Prior Decision);
  - b) It seems at best unclear, and perhaps doubtful, that there is relevant or material information or submissions that Digicel has not already put forward, and that has not been considered by TRR, relating to this indemnity condition: Digicel has on a number of different occasions before TRR's Prior Decision (in writing and in person) had the opportunity to present, and presented to TRR in some detail, Digicel's objections to Wantok being licensed or authorized to provide voice services either at all, or without certain conditions, or receiving interconnection from Digicel, and Digicel's reasons for requiring the indemnity, (which were considered by TRR in making its Prior Decision).
  - c) If Digicel had further submissions or information that it wanted TRR to consider relating to TRR's Prior Decision, Digicel could have put these before TRR as part of Digicel's Review Request. Section 52(4) of the Act requires that such a request for Internal Review "must be in writing and must contain all the material on which the invitation was based." Digicel's position appears to be that it has submissions or information relevant to TRR's Prior Decision that it had not provided to TRR at the time of its Prior Decision, and still has not provided with Digicel's Review Request, and that Digicel nevertheless has been denied an opportunity to put forward and have TRR consider such materials. TRR has substantial doubt whether such a claim for denial of natural justice is valid.

15. Although TRR believes that Digicel's claim of an unlawful denial of natural justice lacks merit, TRR also believes that in this instance it is better to address such claims by providing some further process, rather than allowing such claims to potentially form the basis for a judicial review claim by Digicel of denial of "natural justice." Such a court case has the potential to take many months to resolve, be expensive for all parties involved, and upon its conclusion, not address the substance of this indemnity issue (or any other disputed technical or commercial interconnection terms that may arise from Wantok's interconnection request).
16. TRR accordingly has decided to revoke its Prior Decision and make a new decision that provides for further procedural steps and protections for Digicel and Wantok, as referred to in Part III below.
17. Digicel 's Review Request also objects to the following statements in TRR's Prior Decision:

"The request for indemnity by Digicel appears to broadly encapsulate any and all costs that Digicel has or may incur relating to or resulting from its interconnection discussions. The proposed indemnity may include any number of potential costs for which Digicel has made little attempt to provide any detailed substantiation.

TRR notes that 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. Given the costs already incurred by Wantok to progress technical interconnection, the potential Court proceedings that may arise, as implied by the terms of Digicel's indemnity, indicates a significant proportion of the potential costs for which Wantok is to indemnify Digicel may be for any legal costs incurred by Digicel's to contest Wantok's rights to provide services or to interconnect."
18. These objections are no longer material given the revocation of TRR's Prior Decision and the further opportunity given to Digicel to explain the scope or other aspects of the indemnity condition it advances.
19. TRR also notes that the indemnity being required by Digicel is indeed in broad terms, as stated, and that the reference to "equipment procurement" costs of Wantok in TRR's Prior Decision was a reference to media gateway equipment that Wantok informed TRR it had procured to convert Wantok signals at the Point of Interconnection with Digicel, as an alternative to Digicel incurring costs to implement interconnection without such signal conversion by Wantok.

These costs or issues now can be the subject of further submissions by Digicel, or Wantok, if required.

## **B. Digicel's Claim Of An Unlawful Direction By TRR**

20. Digicel also claims that TRR's Prior Decision "directs" Digicel to reach an interconnection agreement and put in place actual interconnection with Wantok within 5 days. Digicel also claims that this is "manifestly unreasonable and inconsistent with the requirements of the Act" as "there are no agreed interconnection terms or technical arrangements for such interconnection."
21. TRR does not believe that its Prior Decision made any binding Order or direction under the Act, as claimed by Digicel. The final two Paragraphs of TRR's Prior Decision stated, among other things, that TRR "currently does not see a reasonable basis for Digicel's broad request for an indemnity", that by requiring such an indemnity Digicel "may not be acting in accordance with" certain obligations under the Act, gave Digicel 5 days to enter into an Interconnection Agreement and actual interconnection with Wantok, and stated that if Digicel did not do so, then TRR will issue an Order for Digicel to enter into interconnection with Wantok.
22. TRR also acknowledges that the language used in the above portions of TRR's Prior Decision was not as clear as it could have been, as to whether Digicel was formally or effectively required to interconnect with Wantok within 5 days. Further, in light of TRR's decision to afford some specific further procedural protections to Digicel and Wantok prior to ruling on this indemnity issue, and revoke its Prior Decision, the above statements as to a five day period or an Order thereafter by TRR are no longer relevant.
23. TRR also notes Digicel's statement that there are **no** agreed technical or other interconnection terms with Wantok. This would be a cause for concern if it suggests the parties are starting from a blank slate relating to interconnection, or that there are a significant number of disputed objections or requirements Digicel has to providing interconnect to Wantok, other than those forming part of the indemnity issue, and that are not yet known to Wantok (or TRR).
24. The TRR Act and Digicel's Licence contemplate that interconnection is to be promptly available on transparent, reasonable and non-discriminatory terms. This is illustrated, for example, by Sections 26 – 31 of the Act, and Clauses 6.1 and 6.2 of Digicel's Licence.
25. In addition, especially as Digicel is designated as a dominant service provider, a failure to provide interconnection within a reasonable time and on reasonable and non-discriminatory terms could involve anti-competitive conduct under Section 22 and 23 of the TRR Act, and/or Clause 12 of Digicel's Licence.

26. TRR also notes that the interconnection service sought by Wantok is well-known in the telecommunications industry, technically feasible, and should not involve a large number of disputed highly contentious, or obscure, technical or commercial terms. One reason for this is that TRR has issued a detailed Reference Interconnection Offer (“RIO”), pursuant to Section 27 of the Act, that specifies the detailed terms and conditions on which Digicel and TVL are to offer interconnection to access seekers such as Wantok.
27. TVL and Digicel also provide interconnection to each other pursuant to a longstanding and detailed agreement that is published on TRR’s website. In formally requesting interconnection from Digicel in January 2017, Wantok expressly requested that Digicel provide a draft interconnection agreement for review and comment, or a copy of the current Digicel/TVL interconnection agreement in word format for such commentary.
28. TRR also has noted that Digicel’s letter to Wantok of 31 January 2017 (quoted above at Paragraph 4) contains conditions for interconnection discussions other than the indemnity condition, such as: “Digicel reserves the right to suspend or discontinue interconnection discussions if, in its reasonable opinion, the continuation of those interconnection discussions is likely to prejudice Digicel’s position with respect to Wantok’s lawful entitlement to provide voice services in Vanuatu or to interconnect with other licensees in order to provide voice services.”
29. It would not promote the purpose of the Act, or be consistent with the requirements for interconnection in Part 6, for pre-conditions for interconnection to be dealt with in a piecemeal or unduly time-consuming way, for example by addressing only the indemnity condition, and leaving other disputed terms unresolved.
30. Instead, it is appropriate for the parties to identify whether disputes, other than the indemnity condition, exist and are blocking interconnection and, if possible, for these disputes to be promptly resolved. TRR has taken this into account in making this Decision, as described further below.

### **III. TRR’s Decision**

31. Section 7 of the TRR Act provides that TRR’s role and duties include to “implement, facilitate, and enforce the provisions of this Act.”
32. TRR considers that the best way to do this in relation to the above issues is to provide further processes to maximize the prospect for efficient resolution, or narrowing, of procedural and substantive disputes about Wantok’s

interconnection request. In particular, TRR had decided to revoke its Prior Decision, and make a new decision, as follows:

- a) For the purpose of addressing any claims of a denial of procedural fairness or natural justice and allowing a more complete consideration by TRR, TRR will allow Wantok and Digicel 7 days to provide additional information, submissions or comment on the indemnity issue referred to TRR and Digicel and the subject of TRR's Prior Decision;
- b) For the purpose of facilitating, but not limiting, any such further input on this issue, TRR has provided, at Annexure 2, a Draft Decision relating to this indemnity issue. It is not a final, binding, effective or reviewable decision by TRR, and is provided solely for the purpose just stated;
- c) Within 7 days, each of Digicel and Wantok also will, in writing, identify and summarise to each other and TRR any other terms or technical issues for the interconnection requested by Wantok that they believe are disputed or not yet agreed. TRR requests that this be done by reference to any additions or variations to the December 2013 RIO, (which is published on TRR's website), or to the existing TVL/Digicel Interconnection Agreement;
- d) On 29 June 2017 at TRR's offices at 9:00am, or such other time prior to 30 June 2017 as may be agreed, TRR will convene and make itself available for discussions with Wantok and Digicel to seek to resolve the above indemnity issue, and any other disputed terms or conditions for interconnection that are not yet agreed.
- e) Following this discussion, TRR promptly will make a written decision and any required Orders relating to the indemnity condition (if still sought to be imposed by Digicel), or any other disputed terms or conditions for interconnection referred to TRR by one or both of these parties for resolution. TRR would expect to complete such a decision by 7 July 2017.

33. The accompanying Order No. 6 of 2017 gives effect to the above decisions and process.

This Decision is made on this 20<sup>th</sup> day of June 2017.

**Dalsie Baniala**  
**Telecommunications and Radio Communications Regulator**

