

BASIC DETAILS

Consultation title: Consultation on the Annual Work Plan and Budget 2020/2021

Name of respondent: Mr Guy Malone

Representing (self or organisation/s): Digicel (BVI) Limited

Address (if not received by email): Delivered by Email

CONFIDENTIALITY

Please tick below which part of your response you consider is confidential, giving your reasons why

Nothing

Mr. Kevin Smith/Chief Executive Officer

Digicel (BVI) Limited

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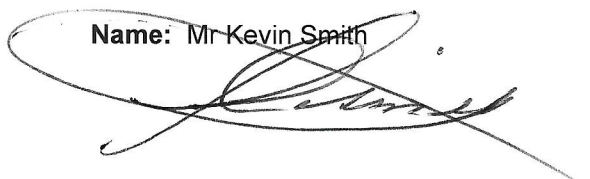
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Name: Mr Kevin Smith

Signed (if hard copy): By Email



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August 27, 2020

Mr. Guy Malone
Chief Executive Officer
Telecommunications Regulatory Commission ("**Commission**")
27 Fish Lock Road
Road Town 1110
TORTOLA

Dear Mr. Malone,

Re: Commission Draft Annual Work Plan and Budget 2020/2021

Digicel BVI Limited ("**Digicel**") thanks the Commission for the opportunity to submit comments on the Commission's Draft Annual Work Plan and Budget 2020/2021, as set out in its consultation document published on 30 July 2020.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in this consultation or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement nor does any position taken by Digicel in this document represent a waiver or concession of Digicel's rights in any way. We expressly reserve all rights in this matter generally.

The Commission will be aware of the Judicial Review BVIHCV2020/0153 proceedings commenced by Digicel in respect of the levy contribution purportedly imposed on it in respect of 2019/2020. In so far as the position taken by Digicel in those proceedings (including by way of legal submissions) are relevant to this consultation, they should be read as incorporated in these comments but not herein repeated.

Detailed below is Digicel's response to the Commission's proposals as set out in the consultation document.

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1. Digicel BVI wishes to respond to the Telecommunications Regulatory Commission ('TRC') consultation document dated 30 July 2020 under Reference Number 1/2020. That is presented as the 'Commission Draft Annual Work Plan and Budget 2020/20201', and will be referred to as the 'Consultation Document'. For reasons that are elaborated upon below, Digicel BVI has been advised that the Consultation Document does not serve the purpose for which it is tendered. That is because the period within which the requisite statutory consultation should have been undertaken in respect of the 2020/2021 financial year has expired. In addition, the period within which Ministerial approval for a Budget for 2020/2021 could have been sought has also expired. Ministerial approval should have been obtained by 30 June 2020 in order for the TRC to have been able lawfully to proceed. There is no evidence that this process has been followed, and TRC pushing ahead with the implementation of its Work Plan and Budget is therefore unlawful.
2. The approval of the Minister is not a formality. Absent the approval the Commission will have been incurring costs without a legal mandate to do so. Should the Minister decline to approve the proposed budget and it is revised downwards then the Commission may have incurred expense which is explicitly unapproved and therefore unrecoverable from the Industry.
3. The failure to adhere to a mandatory statutory timetable is no trivial matter. It completely undermines the budgeting process and the discipline that must be inherent in all such exercises and, for which the scheme of the Telecommunications Act (the "Act") clearly provides. If experience is any guide, Ministerial approval may take several months. As such, it is highly likely that the approval will not occur until after the 2020/2021 financial year has commenced. That is completely at odds with the discipline that should be inherent in forward budgeting.
4. Separate and apart from that difficulty, Digicel wishes to draw attention to the fact that while the Consultation purports to deal with what should be the total industry levy, there has been no consultation whatsoever on the issue of how the contributions of individual licensee/authorisation holders should be assessed. That is statutorily required under the Act, for which purpose the TRC should bring forward its proposals having canvassed the feasible alternatives. Digicel BVI is advised that no levy obligation may be lawfully imposed on it absent such a consultation. As such, it calls on the TRC to undertake such a consultation.
5. Unsurprisingly, this response remains consistent with Digicel, and indeed the wider industry' submissions from years prior. Each consultation year, the TRC engages in purportedly genuine consultation. However, following initial submissions from the industry, charges ahead with what it believes is a properly consulted and final work plan and budget, when in fact it is anything but that.

6. Quite apart from these very fundamental objections to what the TRC is now attempting to do, the Consultation Document is seriously deficient in several respects. It is no more than a repackaged consultation paper that has been repeatedly put forward by the TRC, is light on specifics, and includes promises of work streams and deliverables that have been made on multiple occasions in the past. Digicel refers to each of its prior submissions where the same has been highlighted, completely disregarded by the TRC, evidenced by its insistence on issuing its final paper without reflecting or engaging with all of the submissions made to it. The Consultation on the 2019/2020 Work Plan and Budget is a case in point.
7. In very basic terms, the Work Programme of the TRC is meant to justify the level of costs and expenditure that is projected by the TRC. As disclosed by p.15 of the Consultation Paper, the TRC is projecting estimated operating expenditure of nearly US\$3.5 million alone for 2020/2021, exclusive of any contingency or other permissible provision. The Work Programme included in the Consultation Paper is not an adequate explanation for why such a level of expenditure is justified.
8. Among the huge chunks of the Consultation Paper just copied almost verbatim from previous years, it is possible only to discern the following as meaningful action items or work streams:
 - (i) follow-up on a previous compliance audit;
 - (ii) the development of an in-house LRIC Model; and
 - (iii) certain spectrum related activity.

Almost everything else that the TRC references to is either aspirational or vague in the extreme. A properly constructed Work Programme should identify meaningful tasks identified and described with precision. In addition, that Work Programme should give meaningful insight into what level of resources, human, technological, or otherwise is necessary to sustain major works streams. That should include dedicated or part-time resources as well as an indication of the contribution of distinct activities to the TRC's common costs.

9. The irony in what the TRC is doing currently is that its own work programme and budget would not, if tendered by operators, withstand scrutiny by any diligent regulator. Projected cost information is presented at the highest (most meaningless) level of aggregation possible; no insight is given into cost-drivers or resource allocation. Instead, there are just *ad hoc* pronouncements of the commitment of certain resources or personnel. For example, there is once more (this was consulted upon in what purported to be the 2019/2020 consultation) reference to a Compliance Officer, but with absolutely no insight provided as to what other resources will be put into this exercise. Quite simply, the TRC's work programme fails the basic principles of specificity, cost causation, and activity-based allocation that the very essence of so much telecommunications regulation.
10. By way of comparison, it is useful to consider the nature of the exercise that the TRC plans to undertake with respect to LRIC modelling in the very near future. At minimum, and quite apart from other efficiency corrections that may be permissibly applied to whatever service costs it is used to model, operators can expect that only costs that they have incurred that are relevant to those service will be used for calculation purposes. Moreover, operators will expect that the principle of cost-causation will be fully respected. There is no evidence of any such rigour with respect to the TRC's proposed activities and as such the Consultation Paper is redolent of a double standard in action.

Part 1

11. Apart from updating details and terms of current Commissioners, and after reciting Principles of Regulation, the Consultation Paper does little more than to repeat Strategic Aims and Objectives all of which are very general. Improving Services and Supporting Government Initiatives contain no specifics. With respect to the latter, there is reference to '*several key plans*', none of which are identified. In relation to Heightened Consumer Awareness, the focus is on public awareness of the TRC's work, but that just begs the question; what precisely is or should the TRC be doing?
12. Positive Stakeholder Engagement is also identified as a Strategic Aim and that includes a commitment to "*positively increase our interaction with local licensees to better understand the challenges they face*". Given the context, namely, the Covid-19 pandemic, one is left to wonder what that means in practice. Quite clearly, the TRC is largely undeflected in respect of its levy plans despite the pandemic. "Support Industry Amidst Covid19 Pandemic" is also identified as a Strategic Aim, but again, consistent with the general lack of specificity, not even one initiative directed at doing so is identified by the TRC in the Consultation. Instead, the TRC is forging ahead with a total industry levy at roughly the same level of magnitude as previous proposals.

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13. A separate commitment to “International Best Practice” is welcome in principle, but apart from the recitation of the names of certain regulators, it is short on specifics. Later references in the document to interaction with the Gibraltar regulator refer to past actions. There is nothing of detail identified as to any aspect of best practice. In that regard, Digicel BVI wishes to refer to a 2002 Study undertaken by Atkins/Oxera (attached) in the UK for the Treasury that looked at the efficiency of regulators, much of which has since been taken forward there and that is equally if not more pertinent to the BVI. The UK study, which came at a moment that corresponds to some degree with the current position of the TRC (with respect to telecommunications regulation), identified the need for much greater transparency with respect to the allocation of resources. That in a nutshell and quite apart from the serious legal and accounting deficiencies in its construction is the single biggest deficiency in the Consultation Document.
14. Finally, there is by now ritualistic commitment to the developments of a Strategic Plan. It is perfectly clear that the failure to have such a plan in place has led to the now established pattern of *ad hoc* annual work plans that simply record slight changes in trajectory but with no wider strategy directing that work. Digicel would urge the TRC to abandon all non-essential elements of its proposed Work Plan to instead prioritise the development of a 3-year strategic plan. Preparation of such a plan will require meaningful engagement with the sector and the public for which much greater detail and accountability will be required from the TRC.

Part 2

Spectrum

15. As previously noted, the actual work plan for 2020/2021 includes reference to certain spectrum initiatives, including the release of LTE spectrum. The Consultation then refers to “*other activities*” identified in a previous Implementation Plan being prioritised by the TRC. There is no indication of what they are or the basis on which they will be prioritised. Similarly, there is no reference to the resources that are planned to be committed to those initiatives, whatever they may be.
16. Concerning the reference to a type approval framework, Digicel is concerned that the TRC is in effect seeking to re-invent the wheel. The BVI has no indigenous equipment manufacture, it does not set standalone national standards for electromagnetic compatibility nor does it set service standards such as set by ANSI or ETSI. All electrical and electronic equipment must be imported. Given the size of the market in BVI none of this equipment will be developed using bespoke standards solely for BVI. It will have been developed, tested and type approved against standards

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primarily in the US and European Union. The spectrum plans adopted by the Commission and against service standards for the mobile and fixed services supplied by operators in the BVI conform to these international standards.

17. Type approval testing is in general obtained by equipment manufacturers using specialised “testing houses”, The Commission has neither the resources nor the facilities to replicate a full type approval process. In light of this any proposed framework can amount to no more than some type of “rubber stamp” activity. The apprehension must be that the fees associated with the proposed framework are little more than an administrative mechanism to extract monies from the Industry.
18. Based on the realities and practicalities of international standardisation and type approvals a simple list of automatically recognised international type approvals would be more than adequate to ensure that the Commission could oversee the correct use of equipment and the protection of services and consumer safety. If that is what is meant by a ‘framework’, Digicel would support it, but not otherwise. No reasonable regulator would embark on anything more elaborate.
19. Digicel notes that at Section 2.7 of the workplan the Commission outlines that it intends to move to “cloud” based services which will result in cost savings. No cost benefit analysis is set out nor is there any indication of where these savings are reflected in the proposed budget. Section 2.8 outlines a workstream to establish a recovery site in the case of natural disaster. Digicel notes that this seems to run counter to the activity proposed in Section 2.7. A move to “cloud” based services would obviate the need for a dedicated physical back-up site as the Commission could continue to function using remote working from any location. The TRC is requested to clarify its thinking on this issue.
20. Separately, the Commission appears to have tendered for a comprehensive audit of frequency use and local service capability. This is more than surprising considering that previously the TRC had gone ahead to purchase a spectrum tool (mobile monitoring unit) in respect of which it must be assumed to have qualified personnel capable of deploying in the field. Now, it is proposed to incur further costs, this time by also engaging a third party vendor to do a task that the TRC was assumed to be capable of fulfilling. As such, Digicel calls on the TRC to clarify what is the difference if any between the exercises described at Paragraphs 2.4 and 2.5 of the Consultation Document, and why it is that the exercise referred to in 2.4 (the approximate cost of which should be flagged) cannot be performed in-house.

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21. Separately, the review of licensing, as with so many TRC work streams has moved inexorably from the 2019/2020 Work Plan into the 2020/2021 Plan. This time the claim is that the TRC is in the process of developing a compliance programme for each operator. To the extent that this signals a more collaborative approach to these issues, that is to be welcome. In addition, the TRC refers to making recommendations for revisions to the Act. Regrettably, in separate correspondence, the TRC has refused to share the underlying 'gap analysis' that presumably has informed whatever changes it considers to be necessary in that regard.

Economic Remedies

22. As with previous consultation, the main initiative is the development of what is described as an 'in-house' model. If that is the preferred approach then it is therefore understandable that the TRC would wish to appoint a Chief Economist, a position that has previously been occupied in the TRC. Nevertheless, Digicel BVI is concerned that as with certain spectrum related activity, there may be significant external resources also engaged for that purpose thereby inflating the costs of regulation.

User Involvement

23. While generally commendable, this part of the Work Plan is entirely lacking in specifics or substance. Public education as to the activities of the Commission is fine in theory but technical aspects of what the TRC is about will hardly capture public attention. Separately, Digicel notes the commitment to publish audited financials. It is, however, impossible for a levy to be lawfully calculated for 2020/2021 unless audited accounts are available for 2019/2020 that evidence, properly, the relevant deficit or surplus to be carried forward. Digicel BVI welcomes receiving this information ahead of any further steps taken to finalise the work plan or budget, and certainly expects further round of consultation to address Digicel BVI's comments and concerns.

Part 3

24. With respect to on-going duties, Digicel acknowledges that certain of the TRC's activities will necessarily be of that nature. We do, however, note a significant degree of overlap with what is identified in Part 3, especially in relation to compliance. Section 3.3 refers to industry compliance, but that is clearly the subject of at least two distinct work streams in the preceding section (namely spectrum monitoring and compliance reviews). Similarly, Digicel would ask what differences arise

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as between the matters referred to in section 3.5 and 3.6 and similar work streams identified in Part 2? Digicel expects a response and welcomes the same ahead of any further steps taken.

25. For its part, Digicel considers that the duplication occurs in part because several of the distinct work streams identified in Part 2 have been rolled-over indefinitely. There is also, in a document that is supposed to be forward looking in nature, reliance on events that have taken place in the past, such as a 2018 cocktail reception for industry stakeholders. While Digicel appreciates the hospitality of the TRC, a Work Plan for 2020/2021 requires new ideas and specifics. We invite the TRC to do so now and to consult upon them.

Part 4

26. The Consultation Paper proceeds to set out the proposed budget for 2020/20201. In doing so, there appears to be a fundamental method error. Under the Act, the Commission is obliged to calculate net estimated expenditure. That requires it to work out all projected income (exclusive of any levy) together with an estimate of expenditure, which will then yield a total industry levy. That has not been done. As already noted, there are no audited accounts available to show a deficit or surplus for 2019/2020 and as such, any total industry levy cannot, and must not be calculated, if there is to be compliance with the applicable legal requirements of the Act.
27. In addition, and as alluded to at the outset, figures included with respect to Estimated Expenditure (at p.15) are highly aggregated. Employee compensation at nearly US\$1.4 million is - as with all the other cost categories - not broken down at all. By way of contrast, OFCOM in the UK publishes the salaries of its entire senior function heads. Moreover, even when new posts are signalled, such as a Compliance Officer (previously disclosed in the 2019/2020) consultation, there is no salary cost provided.
28. Similarly, the level of explanation provided with respect to changes in various categories of expenditure is patchy. Salaries for 18 employees have increased by 4%. By contrast, and this is welcome, expected expenditure on conferences and travel has been curtailed in the light of the pandemic. This is the only instance in the Consultation Paper where the pandemic seems to have had meaningful corrective effects. As against this, maintenance costs have increased by 47% but with no indication of what the new equipment in question is that has necessitated such an increase.
29. In keeping with previous submissions, Digicel remains disappointed that under Part 4 TRC fails to properly set out or itemise its forecasted costs.

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30. While the TRC emphasises that Professional Services have dropped by some 25%, it has once again failed to properly account for what these costs are likely to be incurred on, how these services are decided upon, the rationale for it and whether these would go towards the betterment of the industry. Expecting the industry to pick up costs unknown or likely not needed, is unacceptable at best. Much the same goes for the General and Administration costs. Under such heading, one might expect anything that does not fall under the other headings may be dropped in to this cost heading and justified by suggestions that it is required due it is general or administrative nature – yet what these are will never be known. As with past consultations, information requests by the industry is ignored and the TRC avoids its obligations towards accountability.
31. Finally, the Special Projects costs, which appears to be a cost incurred by TRC and paid for by industry is related to work that should otherwise be done by the TRC and not external law firms or audit firms. It remains a concern that with all the expertise employed within TRC, there remains a fundamental lack of knowledge of its own Act, and what is required under the legislation. To require the services of an external firm to better understand an industry that TRC is mandated to regulate but more importantly support, is clear evidence of the failings of the TRC in understanding its operators, stakeholders and ultimately properly executing what it is established to do under the Act by its Minister.