



Submission  
In Response to  
Consultation Document  
“Proposed Changes to the  
Regime for the Assessment  
of Regulatory Fees”

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## 1. Introduction

Digicel is pleased to participate in the recent consultation on the proposed changes to the regime for assessment of regulatory fees. However, Digicel must once again note its overwhelming concern at the short period that is allotted for this consultation prior to the proposed implementation date. Comments on the previous consultation were submitted to the OUR in February 2007, and it was not until the last day in November 2007 that the OUR published this second consultation. This is against the background of the aim to implement the new regime for the start of the next financial year. Digicel again implores the OUR to ensure consultations remain legitimate, effective and transparent by affording respondents sufficient time in which to provide comments and debate remaining issues before implementation.

The succeeding comments are not exhaustive and Digicel's decision not to respond to any particular issue raised by the OUR or any party does not necessarily represent agreement, in whole or in part with the OUR's or that party's position 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. Any questions or remarks that may arise as a result of these comments by Digicel may be addressed to:

Gregory Hamilton  
Regulatory Manager  
Digicel (Jamaica) Limited  
Legal and Regulatory Department  
10-16 Grenada Way  
Kingston 5, Jamaica  
Fax: +1 (876) 920 4626  
Tel: +1 (876) 511 5158  
Email: [gregory.hamilton@digicelgroup.com](mailto:gregory.hamilton@digicelgroup.com)

## **2. General Comments**

As was said in the previous consultation, Digicel recognises that every regulator needs to be funded and it is an accepted practice for regulators to be funded through licence fees and regulatory fees. However it is important in establishing regulatory fees that it is understood that this is a cost to carriers/licensees which ultimately affects the price of telecommunications services paid by consumers.

Digicel welcomes the OUR's commitment to moving away from a contribution based on subscriber numbers. On many occasions Digicel has raised significant concerns with the use of subscriber numbers as a determinant for the contribution of regulatory fees. These concerns were discussed at length in previous correspondence.

Digicel raised a number of legitimate concerns with the OUR's previous consultation, not least because there was considerable uncertainty about certain key areas such as the methodology that would have been used to apportion regulatory fees and recovery of the cost of litigation etc. Digicel finds the present consultation document to be a significant improvement on the previous proposal addressing regulatory fees. Even though there are issues that still require clarification, it is clear that attempts were made to address most of the issues Digicel raised.

Digicel considers that the new regime represents a far more equitable arrangement and therefore welcomes the OUR's commitment to implement it for the fiscal year 2008/9. The previous regime resulted in significant detriment to Digicel and as such, we trust that the OUR will not allow the timetable for implementation to slip again.

Finally, Digicel urges the OUR to be cautious in its response to comments made by industry players, as labelling such comments as being "disingenuous" does not allow for open and frank discussions. Additionally, Digicel firmly believes that if

adequate time was given for comments before the proposed implementation date, the OUR would have more time in which to address the concerns raised in these responses, without adversely impacting on its proposed timetable.

## ***2.1 The Principle of Cost Causation***

The OUR must (in accordance with international regulatory practice) adhere to the principle of cost causation – i.e. link the contribution of the regulatory fee to the part of an operator's business that causes the cost to be incurred. For example in the UK, Ofcom helpfully summarises this approach:

*"2.17 The fundamental feature of this approach to attribution is adherence to the principle of causality. Under this principle, costs, assets and liabilities are to be attributed to cost components, services and businesses in accordance with the activities which cause the licence fees to be earned or costs to be incurred [our emphasis] or the assets to be acquired or liabilities to be incurred. ..."*

*2.40 The definition of Turnover for the networks and services and broadcasting sectors **relates directly to the activity regulated in that Regulatory Sector or Regulatory Tier**<sup>1</sup> "*

The regulatory fee is a form of "tax" that is levied on operators to fund the regulator's day to day operations. In an economy where there is one hundred percent effective competition between operators, there would be no dominant operator. In such a scenario there would be no need to regulate the sector (ex ante) as there would be effective competition and this would effectively constrain operators' behaviour.

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<sup>1</sup> See footnote 4 reference

In the real world however (and in particular in the telecoms industry) the situation is very different. Most countries started out with a monopolist (generally state owned) provider of telecommunications services. Monopolies are usually inefficient because they tend to restrict output, causing price to be higher than in a competitive environment. When liberalisation occurs, the incumbent former monopolist has the market power and control of certain essential facility bottlenecks to thwart entry and competition. Consequently, once the decision to liberalise the market has been reached, it is considered prudent to regulate the incumbent so as to prevent abuses of dominance. As regulatory costs are generally created by the incumbent operator, under the principle that costs should be assigned according to cause, costs should mainly be borne by the former monopoly incumbent.

Revenue has never been regarded as an ideal proxy, but is a better way of determining regulatory cost causation than is the number of subscribers, as is currently being used the OUR. Given that the fixed network (virtually still a monopoly) makes up a significantly smaller share of the telecommunications industry revenues in Jamaica, than say, is the case for European Countries, Digicel is encouraged by the OUR's commitment to finding a more accurate apportionment of its costs; and in particular, one that better mirrors cost causation.

The move to a contribution based on revenue should also involve the OUR identifying the regulatory cost associated with each licence and levy regulatory costs on licence holders accordingly. This will ensure a fairer apportionment of regulatory fees among the different sectors of the industry. This principle is set out in section 16 (2) of the Telecommunications Act 2000:–

*“(2)The amount of the regulatory fees shall be such sum as, in the opinion of the Office, is a reasonable estimate of the costs which will be incurred by*

*the Office in relation to the regulation of the specified services to which the licences relate (hereinafter in this section referred to as "regulation costs")."*

Therefore, the mobile sector (which is highly competitive) should require less regulation than the fixed line sector which is a virtual monopoly. Although the revenues from the fixed line sector may be lower, the proportion of regulatory "effort" (and by definition the regulatory fees) dedicated to this sector should be higher.

## ***2.2 Relevant Turnover***

Irrespective of the methodology used, it is essential that the contribution paid towards the OUR's operational costs be proportionate. As noted above, regulatory fees are a form of tax and a requirement for operators to pay a disproportionate amount will have a detrimental effect on investment, innovation and ultimately the quality of service offered to consumers.

In order to ensure that fees remain proportionate and focused to the appropriate part of an operator's business, Ofcom links the level of contribution to those commercial functions which are regulated:

*"2.10 Ofcom's approach to fee setting is to assess options against the criteria set in the Act. This requires fees to be sufficient to meet Ofcom's needs in relation to the services or activities regulated; the fees should be justifiable and proportionate; and the relationship between the cost of regulation and the fees should be transparent."*

*2.11 To meet these requirements tariffs will be set for common groups of services and licences, based on a percentage of the Relevant Turnover in the preceding calendar year."<sup>2</sup>*

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<sup>2</sup> [http://www.ofcom.org.uk/about/account/statement\\_principles.pdf](http://www.ofcom.org.uk/about/account/statement_principles.pdf)

Therefore, it is clear that in regimes where the contribution of regulatory fees is calculated with reference to a percentage of revenue, this is based not on the total revenue of the operator concerned, but rather only on the revenue from the 'regulated' or licensed section of its operation. This ensures that the regulatory fee is properly linked to the degree of regulatory activity incurred by the company.

In Europe, the principle of focusing an operator's regulatory contribution solely to the 'regulated' part of the business (and not the company as a whole) is set out in the Authorisation Directive<sup>3</sup>.

*"Article 12*

*Administrative charges*

*1. Any administrative charges imposed on undertakings providing a service or a network under the general authorisation or to whom a right of use has been granted shall:*

*(a) in total, cover only the administrative costs which will be incurred in the management, control and enforcement of the **general authorisation scheme**<sup>4</sup> [our emphasis] and of rights of use and of specific obligations as referred to in Article 6(2), which may include costs for international cooperation, harmonisation and standardisation, market analysis, monitoring compliance and other market control, as well as regulatory work involving preparation and enforcement of secondary legislation and administrative decisions, such as decisions on access and interconnection; and*

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<sup>3</sup><http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0020:EN:NOT>

<sup>4</sup>The 2002 Authorisation Directive revoked the previous telecoms licensing system in Europe. In its place, the Directive requires Member States to establish a general authorisation for all types of electronic communication services and networks, including fixed and mobile networks and services, data and voice services, broadcasting transmission networks and services, etc.

*(b) be imposed upon the individual undertakings in an objective, transparent and proportionate manner which minimises additional administrative costs and attendant charges.*

The Authorisation Directive is implemented through national legislation. For example, in the UK, in the Statement of Charging Principles<sup>5</sup> Ofcom confirms that the percentage contribution is only made with reference to an operator's "Relevant Turnover":

*"3.1 Ofcom has identified a number of common principles to apply in setting tariffs for licence fees and administrative charges. These are:*

- Use of **Relevant Turnover** [our emphasis] as a common tariff basis across all sectors or the setting of fixed tariffs where applicable. Turnover data is readily obtainable from all licensees and network and services providers and provides a basis for ensuring that the specific fees charged can be derived from a robust source and are broadly proportional to ability to pay..."*

*... 'Relevant Turnover (Networks & Services)' means the turnover generated by the Relevant Person during the Relevant Calendar Year from carrying on any Relevant Activity after the deduction of value added tax and any other applicable sales taxes...*

*'...Relevant Activity' means any of the following:*

- the provision of Public Electronic Communications Services<sup>6</sup> to end-users;*

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<sup>5</sup> [http://www.ofcom.org.uk/consult/condocs/socp/statement/charging\\_principles.pdf](http://www.ofcom.org.uk/consult/condocs/socp/statement/charging_principles.pdf)

<sup>6</sup> Communications Act 2003 –

**32 Meaning of electronic communications networks and services**

(1) In this Act "**electronic communications network**" means—

(a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and

(b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals—

(i) apparatus comprised in the system;

(ii) apparatus used for the switching or routing of the signals; and

(iii) software and stored data.



- *the provision of Electronic Communications Networks, Electronic Communications Services and Network Access to Communications Providers; and/or the making available of Associated Facilities to Communications Providers...*"

### **2.3 Regulatory Efficiency**

It is essential that the OUR always remains cognisant of the fact that excessive regulation and regulatory fees, results in higher retail tariffs, and has a detrimental effect on the level of investment and innovation. As competition continues to develop in the sector, the OUR's level of intervention should decrease and the focus shift away from prescriptive ex ante regulation to increasing reliance on ex post competition law.

In accordance with international best practice, the OUR should seek to minimise its costs wherever appropriate and commit to reducing its operational expenditure year on year. For example, in the UK, Ofcom is subject to a financial cap on its operating costs which means that it can only increase its annual operating costs (and therefore by definition, the regulatory fee) in line with inflation:

*"Ofcom operates within an overall financial cap agreed in 2003 with HM Treasury. The current cap...is set at RPI plus 0%"*

Digicel welcome's the OUR's commitment to capping the maximum percentage contribution that each operator will be required to pay. This is an excellent start, but should also be coupled with a requirement for the OUR to reduce its operating costs year on year.

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(2) In this Act "**electronic communications service**" means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.

### 3. Specific Comments

#### ***3.1 Definition of Revenue***

In the previous consultation, the term revenue was defined as follows:

*“ “Revenues” mean revenues from the licensed business, net of out payments in the case of telecommunications companies...”*

In the present consultation the OUR has defined revenue as follows:

*“For the avoidance of doubt, “Revenues” mean revenues net of local interconnection payments in the case of the telecommunications companies...”*

In light of comments made above, Digicel asserts that the first definition of revenues is correct. It is clear that the OUR should only seek to recover the costs that it incurs through the regulation of the telecommunications sector. As such, its activities are solely focused on licensed activities and not the company's business as a whole. For example, if Digicel decided to operate a bookstore, the revenues from this part of its business is not regulated and/or licensed by the OUR and as such, should not properly be included in the revenue calculation. This surely cannot be the OUR's contention.

In the absence of an explanation for the change in wording, Digicel has assumed that the quote above should be read cumulatively with the previous explanation – i.e. therefore for the purpose of the calculation, the relevant revenues are that of the licensed business, net of local interconnection payments. The OUR should

however clarify that the term revenue only relates to an operator's licensed activities. Further, the term "local interconnection payments" must also be defined.

### ***3.2 Increases in Contribution due to "Extraordinary Events"***

On page 17 of the document, the OUR makes reference to the reservation of its right to impose a one off levy on the sector for extraordinary events. The OUR must clarify which kind of events could require this unforeseen additional expenditure to be incurred and further, the methodology that would be used to fairly apportion such a fee across the sector. For example, if it is the action or omission of a particular party that triggers such additional expenditure, how would this be dealt with? Furthermore, as suggested by the OUR, one must remain cognisant of the need for operators to have certainty in its expenditures. Any provision which would allow the OUR to incur additional unforeseen expenses and for these to be passed to all operators without their consent runs contrary to such a notion.

### ***3.3 Refund of Surplus Fees***

The OUR must ensure that where it collects surplus fees, any 'refunds' must be given in accordance with the ratio of the individual licensee's contributions – i.e. priority must be given to the company making the largest contribution within the sector concerned.

### ***3.4 Litigation***

Digicel cannot agree with the OUR's assertion in relation to the recovery of legal costs where the regulator is held to have erred in its statutory duties. The OUR appears to consider that there is some inherent value in a judicial 'precedent' that the OUR was incorrect in reaching a decision and that this would outweigh the costs which would be incurred for a court to reach that decision. This is simply not correct.

The OUR must always remember that it has a duty to operate with due regard to the law (both legislation and common law) and its substantial degree of independence and autonomy may succeed in taking it outside the normal administrative law principles. The effect of this is to put Digicel in a position where

*'we still cannot regard the corporation as being the agent, [of the Crown] any more than a company is the agent of its shareholders, or even of a sole shareholder. In the eyes of the law, the corporation is its own master and is answerable as ...any other person...It is not the Crown and has none of its immunities...' <sup>7</sup>*

We expect therefore that any acts of the OUR which breaches the applicable laws or any act of negligence in the legal sense and the costs associated therewith ought to be OUR's and not for the account of the operators.

### ***3.5 Regulatory Fee Limit***

Digicel welcomes the OUR's new commitment to capping the percentage of revenues that each operator will be required to pay. As noted by the OUR, such a measure is essential to enable operators to plan their expenditure for each financial year. Unfortunately, Digicel is not clear what the OUR intends by including a proviso that the contribution is capped "*unless otherwise specified in licences or other enabling instruments*" and therefore, asks the OUR to clarify its intention in this regard. Digicel is also unsure how caps are developed for each sector and how this will change in the future.

### ***3.6 Regulatory Fees for New Operators***

The OUR needs to explain in the current proposal how charges will be levied against companies that are currently operating but are yet to file revenue information. These companies may be due to file in the coming financial year but

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<sup>7</sup> per Denning LJ speaking of the British Transport Commission in Tamplin vs. Hannaford [1950] 1KB 18.

are already operating and therefore should be liable for fees. Digicel wishes to remind the OUR that all companies should be treated equally. In August 2000, more than six months before launch Digicel was asked to pay **\$10 million** in regulatory fees, even though there was not even one subscriber. Digicel expects that all new companies will be treated in a similar manner.

The current minimum fees being charged by the OUR are ridiculously low and must be increased significantly (not least to bring them into line with the amount that Digicel was required to pay as a new entrant to the market). Moreover, the current minimum amount was set over five year ago and have since become irrelevant and out dated. The minimum charge should at least maintain the same proportion with total regulatory fees as it did initially.

#### **4. Conclusion**

Digicel supports the OUR proposal to apportion regulatory fees based on revenues, but however cautions that this is not ideal and the OUR should not stop there, but continue searching for ways to allocate its costs between and within sectors in the most efficient way.

The OUR must always adhere to the principle of cost causation – regulated fees can only appropriately be collected from the revenues that are earned from the regulated areas of the business.