



Submission  
In Response to the OUR's  
Proposed Management Plan for Fiscal Years 2010/11 – 2012/13 and Budget for Fiscal year  
2010/11

27 January 2010

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## **OFFICIAL STATEMENT**

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 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:

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## **1 EXECUTIVE SUMMARY**

Digicel welcomes the opportunity to comment on these proposals. Digicel has the following concerns in respect of matters relating to telecommunications:

### 1. Mission Statements

A separate mission statement is required to guide the regulation of the telecommunications sector. The telecommunications industry is now an industry premised on competition, diversified customer offerings, innovation and risk taking. Telecommunications has therefore grown apart from industries such as electricity and water which are monopolies providing homogeneous commodity products. A different approach is needed mentally and structurally for telecommunications. Telecommunications regulation should focus on enhancing competition and innovation and maximizing the chances of the investment required to achieve this. This divergence should also be reflected in respect of a separation within the polices, compliance and enforcement functions of the Office.

### 2. By-pass Activities

There seem to be no mention of the very important and damaging existence of extensive by-pass operations in place in Jamaica today. Given the predominance of By-pass activities in the telecommunications sector in Jamaica and its negative impact on the industry and Country as a whole greater focus and attention must be placed by the OUR on combating this issue.

### 3. Dispute Resolution

The OUR needs to focus on establishing better and faster dispute resolution mechanisms in order to maximize the benefits to the sector. We believe that the role of the OUR should remain limited to pre-contractual disputes, as prescribed in the Telecommunications Act, and that it should not interfere in existing contractual relationships between the operators. We believe that the majority of pre-contractual disputes could be avoided or could have been resolved much more rapidly if the correct systems had been put in place. Failure to implement such measures has the potential of acting as a significant drag on the sector.

### 4. Budget Concerns

We question the basis for an increase in the budget at all for 2010/2011 of the OUR given the current financial environment. In our view the Office needs to reassess the priorities for telecommunications and limit costs by narrowing its focus on priorities at this time. We indicate below what we believe the priorities to be.

## **2 MAIN SECTION OF RESPONSE**

### **2.1 The OUR's Mission Statement**

The Office's mission statement is:

*“To contribute to national development by creating an environment for the efficient delivery of utility services to the customer whilst assuring that service providers have the opportunity to make a reasonable return on their investments.”*

We think that this is a good mission statement for the regulation of undifferentiated, homogeneous commodity products such as electricity and water. However we are sure that it is inappropriate and in fact harmful when regulating the competitive, dynamic, fast changing, more innovative and risky industry that telecommunications has become in Jamaica over the last ten years. Telecommunications has pulled far away from the other sectors that the OUR regulates and a different regulatory mindset needs to be brought to bear in order to get the most out of the sector.

A single mission statement can no longer be used for all the sectors under the ambit of the OUR. Absolutely fundamental and most importantly to the mentality of regulating telecommunications is that uppermost in their minds regulators aim: 1/ to promote competition in the sector; and 2/ to encourage the investment (in spite of the risk) and therefore the innovation without which competition in the sector will not exist or will be much weaker. Language about the primacy of competition can be tempered by references to efficiency if desired but efficiency should not be the driving factor in terms of regulatory objectives for telecommunications.

Competition is much better at efficient allocations of resources in competitive sectors. It becomes too complex for a regulator to judge what is and is not efficient as the number of competitors and variables grows and the complexity of the market increases. Well intended regulatory interventions, or regulatory slowness in releasing the market from constraints, can become a drag on the market in such an environment. A competitive market can generally segment its offerings to deliver maximum benefits depending on the needs of individuals and groups of citizens, and therefore deliver more efficient outcomes than regulation could hope to match.

Since the mission statement is meant to be the OUR's guiding light when making regulatory decisions we are sure that its current wording is leading, and will lead to, inappropriate regulation of the telecommunications sector and is stymieing and will continue to stymie competition. The same monopoly and commodity approach can be seen running through the list of OUR objectives in paragraph 2.8 and the list of commitments detailed in paragraph 3.1 with respect to its corporate plan. Those are also leading to sub optimal outcomes in the

telecommunications sector since they do not focus the attention of the Office on those things which will lead to most benefits.

**We suggest and request therefore that the Office should begin, and make it a priority, creating a separate mission statement for telecommunications regulation in consultation with stakeholders. Further the Office should split its operations such that policy, enforcement and compliance functions for telecommunications are separated entirely from other industries.**

Unless this is done we believe that the OUR will unavoidably bring an incorrect mentality to the regulation of the sector, and make missteps by applying monopoly and commodity approaches to an industry which has evolved dramatically due to technological breakthroughs and consequently grown apart from other industries under the OUR's ambit.

Further Digicel is concerned about the indications that the cap of 0.3% of the revenues in respect of payments towards regulatory fees might be lifted. The current financial situation is very challenging and should the regulatory fees be increased this will have a direct negative impact on the operators in Jamaica. If anything, the minimum regulatory fees should be increased; e.g. for International Carrier Licenses and Small Service Providers, which today are far too low.

## **2.2 Establishing Priorities**

Many areas of work are identified in the OUR's workplan. We believe that the Office should focus its efforts where they will make the most difference. We do not believe that is demonstrated by the plan. As indicated above promoting competition and encouraging the investment to create competition should in Digicel's view be the prime considerations when determining how to prioritise the Office's time. Digicel would welcome more frequent meetings between the OUR and the industry to give the OUR a better insight in to the priorities and how to improve of the commercial reality of the operators. We recognize that time must also be spent on business as normal activities such as numbering since numbers provide some of the raw materials which the sector uses to help to provide the large array of new services that are appearing.

It is noteworthy in this regard that nowhere in its consultation does the Office explicitly state that it is focused on promoting competition or encouraging investment and innovation in spite of the fact that this is key to the majority of the benefits that a liberalized market can bring.

An area which the Office needs to concentrate is to create an effective means to resolve pre-contractual disputes. The aim of such measures shall be to resolve matters at an early stage and encourage competition in the market place. This will stimulate investment in new services and increase efficiencies in the market.

We believe that not enough attention has been paid to such fundamental matters in the past and that the Office should return to them. The foundations for regulation of the telecommunications sector have to be built properly before the Office can start working on the walls and the upper floors.

For example the matter of direct mobile to mobile interconnection between Digicel and LIME has been outstanding for around 8 years. Money is being diverted in to paying for what is a largely non-existent service (transit between LIME's fixed and mobile networks). This is only a "piece of wire" within a switch building. The service is largely a fiction and has for years been used to try and conceal what is really an asymmetric mobile termination rate in favour of LIME. The money that has been unfairly extracted from competitors for this fictional service could have gone in to the provision of new and better networks and services for consumers.

The lack of an effective means through which the Office may resolve pre-contractual disputes and the potential time it would take to resolve such disputes is undoubtedly discouraging or delaying investment and the deployment of new services. Undoubtedly many potential investors would be scared away by the fact that if a matter went to dispute they might have to wait years for resolution and meanwhile they would run out of money and go out of business, or the original business plan would become a failure, so they would not commence implementation at all. We are concerned again therefore that in paragraph 5.11 which is the only place that the Office attempts to pick some priorities for telecommunication regulation absolutely no mention is made of undertaking any work aimed at encouraging investment, dispute resolution, furthering competition or in respect of interconnection.

We are specifically questioning the work that has already been initiated in relation to quality of services in the telecommunications sector. We have very few complaints about the quality of the services we provide. It is in our own interest to keep our customers happy since we operate in a competitive market and they would inevitably leave us for a competitor if they were dissatisfied with our quality or service levels. Quality is a competitive distinction and as such operators should be allowed to provide services at the level their customers are happy with. In addition, complaints (whether written or over the phone to our customer care) are expensive to deal with and as such it is in our own interest to prevent them. Based on information from various reports from the OUR we cannot see that the number of complaint is worrying, especially when compared to the other utilities the OUR is set to scrutinize. This is clearly in our view a project that only will consume monetary as well as human resources – resources that would be better used elsewhere in the OUR's duties.

### **2.3 New Policies on Dispute Resolution**

We believe that the office should in terms of its consultation and implementation schedule make improved dispute resolution processes for pre-contractual disputes and the implementation of

outcomes from such processes as a priority. The Office should have much shorter and much harder deadlines for dispute processes which decisions to be made in no more than a few months (we suggest four months at most), save in exceptional circumstances where the issues to be tried are very complex.

This will require the Office to focus only on the most important information before it. If market participants did not submit any information that the OUR requested to help it make its decision according to schedules within that three month decision making process then again, exceptional circumstances aside, such information would be ignored.

For the avoidance of doubt, Digicel believes that any such Dispute Resolution processes should be limited to pre-contractual issues and that the OUR should not interfere or intervene in relation to pre-existing contractual agreements between market participants. As such post contractual disputes should be dealt with in accordance with the provisions in the Agreements signed and agreed by the contracting parties.

Jamaica must have a dispute mechanism which is timely and fair otherwise the two key planks of promoting competition and encouraging investment will be frustrated.

## **2.4 Bringing Accountability to Disputes where the OUR is a Party**

Digicel believes that there is a potential accountability deficit where the OUR is in dispute with one of the market participants. This is because irrespective of the merits or otherwise of any case taken by the OUR it has no financial accountability for the associated, and potentially very high, legal and other costs as they are merely re-charged to industry. Thus the Office could pursue a case with little chance of success knowing that it can simply bill the industry. Meanwhile, not only does an operator have to pay its own legal costs but the operator and the industry also has to pay for the OUR's costs.

In other words the harder the operator fights the more it would be forced to pay even if it had an overwhelming case in its favour. Further it is not usually possible to recover all legal costs even if a party wins, and an operator's internal costs will never be recovered. Further still, the Office could then have spent much of its resources on a fight which would have been better allocated to other regulatory work. There would be no justice, fairness or sense in such situations arising.

We believe therefore that before a legal case is taken or defended, the Office should obtain a barrister's opinion that there is at least 60% chance of success by the Office. A revised opinion should be obtained every year to ensure the 60% threshold is maintained. Failing this the case would not be taken or would be dropped. It would also be a requirement that the OUR would not take a regulatory case or continue with it unless the Office determined that it had the same chances of success.

If the chances of success by the Office were considered to be less than 60% for regulatory or court matters, that would indicate to us that even if the Office were objectively considered to be right in principle, the law should be changed as it would not sufficiently clearly support the OUR's actions. In these circumstances the right way to go would be for the Office to attempt to have the legislation changed.

## **2.5 Rate Regulation and the Objective of the Regulation and Policy Division**

The monopoly and commodity approach is also present in the Office's approach to policy. Paragraph 4.50 states the objective of the Regulation and Policy Division is:

“

*4.50. To provide the Office with such economic and technical advice as to ensure that consumers of utility services enjoy acceptable quality of service at lowest economic cost and to ensure security of service for the future.*

“

Again, and clearly because of the fact that the Office is trying to come up with a single objective for regulating monopoly and commodity sectors as well as telecommunications no mention is made of driving competition and encouraging investment. However this means that what should be the most important objectives of the Regulation and Policy Division in respect of telecommunications are not even mentioned. With this mandate we do not believe that the Regulation and Policy division can carry out its duties with respect to telecommunications in the best interests of consumers, operators, or the economy. Rather, its current mandate will lead to lower investment, a more limited range of products and services, and less competition than would otherwise be the case.

In other words the Office's treatment of the sector will be a self-fulfilling prophecy – treat telecommunications like a monopoly, homogeneous, commodity sector, and that will result in outcomes more similar to the ones that would be expected in the latter kind of industry.

## **2.6 Duties of the General Counsel**

We note that the draft strategy for the General Counsel includes the following wording:

“

*...to engage in constant legal research and updates with a view to reducing challenges and the success of such challenges to decisions issued by the OUR.*

”

Firstly, we are unsure why the General Counsel needs to engage in “constant” research. Surely this is only required as necessary? Unnecessary research will drive up costs.



Further we do not agree that the strategy of the General Counsel should only mention defending the OUR's decisions. As mentioned above we believe that the General Counsel should only advise that a case is pursued either initially or on an ongoing basis if it is believed that the OUR has at least a 60% chance of success. The OUR should not engage in "strategic" litigation irrespective of the OUR's perceived chances of success especially given that the industry has to pick up its own costs and the OUR's in these circumstances.

The strategy should therefore also incorporate a threshold factor below which it will not seek to pursue or defend litigation. The prime aspects of the strategy should be to advise the office as to whether its actions are lawful. The Office should not defend its actions irrespective of their merits or chances of success.

We further believe that the General Counsel should be responsible for drafting proposals to new legislation where the Office believe that the existing is insufficient, as an example Digicel has on several occasions discussed the problem of by-pass in Jamaica. The Office expressed the view that it does not believe that the current legislation is sufficient to capture these illegal activities. This would be an example of a situation where the OUR could and should be more active in lobbying for changes to the Act in order for the Office to function properly.

## **2.7 List of Priority Areas**

In Digicel's opinion, as indicated above, telecommunications must be separated in mind, policies, objectives, and in deeds as well as structurally from the other sectors under the OUR's remit.

The following are Digicel's views of the priority areas for telecommunications:

1. Revise mission statement, policies, objectives for telecommunications and separate policy, compliance and enforcement functions from the other sectors.
2. Take steps to reduce By-pass. By-pass is having a number of very damaging effects socially and competitively. By-pass operators are not paying towards the universal service fund. They gain a competitive advantage by being able to sell international minutes to Jamaica below the rates of operators who are collecting the universal service levy. Further, operators who are still collecting the levy therefore lose traffic to the other operators and lose revenues as a result. If the OUR needs to lobby to have the legislation changed to enable it to take action in this instance then it should do so.
3. Contribute to development of more effective competition law.
4. Revise and implement effective pre-contractual dispute resolution procedures.
5. Deal with long outstanding disputes.
6. Consult on a Regime for short code use.
7. NPA Relief Planning.

8. Develop submarine cable legislation.
9. Consult on ENUM.

Ongoing – publish annual reports on telecoms usage.

In paragraph 4.14 the OUR states the following:

“

*Performance with regard to maintaining timelines for projects in the telecommunications sector was affected by constraints on available regulatory resources during the year. By far the most significant impediments, however, were the need to respond to requests for reconsideration and appeals to the Telecommunication Appeals Tribunal (TAT).*

“

In Digicel's view this highlights how inappropriate the OUR's attempted intervention in mobile termination rates has been. As Digicel indicated in its May 2004 response to the OUR even the Office's own relatively narrow set of benchmark data at the time indicated that the average benchmark rate was 104% higher than Digicel's very low fixed to mobile termination rate. A wider and more representative sample demonstrated that the mobile termination rate was substantially lower in Jamaica by comparison to other countries even than this. This was ample evidence that no regulatory intervention was necessary. Instead very significant resources and monies have been unnecessarily poured in to this matter over a period of years to the country's detriment.

The OUR makes the following statement in paragraph 4.10:

“

*The telecommunications sector remains buoyant. The major companies continue to demonstrate a positive outlook and confidence in the future of the sector. This is demonstrated by the drive to expand and modernise networks, introduce new services, adopt emerging technologies and employ a variety of innovative marketing strategies. There is also significant roll out of 3G networks and the offering of converged services is expected to become the norm over the next three years. The effect of all of this is that more and more the country can maintain its boast of a cutting edge national telecommunications infrastructure that should be a catalyst for increased investment.*

“

Major companies will always try and demonstrate a positive outlook as will most people in their personal lives irrespective of their relative circumstances. The Jamaican telecommunications sector is nonetheless suffering from the effects of the global economic downturn like any other. Revenues have been reduced, investment plans have slowed down, delayed or stopped. Taxes were already especially high on the sector in and they have been increased again significantly in spite of this fact thus placing further drag on the industry.

We note also for example from the ITU's country data that Jamaica has one of the world's worst ratios of fixed line penetration to mobile penetration given the Jamaican mobile penetration figures for 2008. This is hardly a demonstration of success unless the OUR does not attach

much importance to fixed line penetration. In comparison for example Australia has greater mobile penetration than Jamaica yet the ratio of mobiles to fixed lines is a mere 2.4 to 1 per hundred people compared to Jamaica's 8.6 to 1. Fixed line penetration is about 45 per hundred people in Australia compared to just about 12 per hundred people in Jamaica.

Further if we look at other countries with virtually the same mobile penetration as Jamaica such as Slovenia and the British Virgin Islands the ratios are a mere 2:1 and 1.2:1 respectively which means there were 50 and 83 fixed lines respectively per 100 people. Jamaican mobile penetration would also be at the bottom of the rankings if comparisons are made with European figures for example, and especially with respect to Western European countries. It boils down to which countries Jamaica wishes to compare itself against.

We have highlighted these figures to illustrate that we must keep our feet on the ground and not mislead ourselves in to thinking that Jamaica is doing better than is actually the case. The OUR cannot look merely at what has taken place in Jamaica and say that is evidence of everything being rosy in the telecommunications sector. Rather one must look at what could have happened and at comparative indicators. We are clear that the industry could be further advanced with policies and approaches tailored specifically for the sector.

## **2.8 Budget for 2010 to 2011**

We note the intention to increase the OUR's budget dramatically by 33% and this is being suggested in an environment where:

1. The telecommunications sector has been burdened with additional tax on top of an already exceptionally high tax regime focused just on the telecommunications sector;
2. There is a weaker telecommunications market due to the economic recession;
3. Operators have been putting in place wage and staff recruitment freezes.

Digicel expects the Office to be cognisant of current circumstances. Consequently, to be reasonable, we expect either no increase or even a decrease in the budget for the telecommunications sector – this is the reality Digicel as an operator faces and this should be recognized by the Office.

Cost savings can be made by not undertaking some of the work listed by the OUR in its workplan, and by concentrating only on those areas which will deliver the most in terms of promoting competition and encouraging investment.

Given that the OUR is intending to add 8 more colleagues to its payroll and move from 49 to 57 people which represents only a 16% increase, we do not follow why other payroll related costs have to rise by 71%. Can the Office please explain this? We cannot agree that the overall increase of 54% in payroll related costs is in any way justifiable.

The huge increase in legal and professional fees was largely avoidable in our view if the OUR were to follow reasonable procedural requirements, to implement fit for purpose dispute procedures, and only to become involved in disputes or legal proceedings where it had a clear mandate to act. This simply highlights to us that this area needs to be prioritized in terms of the OUR's workplan. The Office might also consider ceasing further action in respect of some matters in dispute to which it is a party and instead seek revised legislation where it feels its mandate needs to be changed.

We see no basis for increasing office rental costs by 29%. Rentals should be falling. Can the Office please explain the basis for this increase.

The public relations budget is proposed to rise by 22%. But in current times the Office should be reducing such expenditures. We do not see how an increase can be justified. In fact we would expect a fall. Can there be any justification for the OUR to sponsor radio and tv programmes? – this is an unusual expense in Digicel's experience of regulation worldwide. Information leaflets, press notices, school visits and the Office's website strike us as a much more effective and lower cost way to deliver messages about public services.

Why are finance charges proposed to increase by 72%? Can the Office please explain this. The various membership fees seem high overall. For example Jamaica's ITU fee for 2010 is J\$6.8m only and since the relevant Ministry and the SMA among others benefit from this they should be contributing. In fact central government is the lead representative presumably and should pick up the majority if not all of the ITU costs. Consequently we cannot see how over \$16m in membership fees is derived or can justifiably be levied on the telecommunications sector. Could we please have a breakdown of the membership fees and an explanation of how the costs are allocated and if they really are necessary for the Office to conduct its duties.