



**LIME'S RESPONSE TO THE INDUSTRY
RESPONSE TO THE OUR'S SECOND
CONSULTATION DOCUMENT ON
'COST MODEL FOR MOBILE
TERMINATION RATES'**

July 6, 2012

I. Introduction

1. LIME welcomes the opportunity presented by the OUR to respond to the Industry responses to its second consultation document on Cost Model for Mobile Termination Rates. Since Digicel and LIME were the only two respondents, LIME's response of necessity addresses only Digicel's comments.
2. LIME considers it regrettable and an abuse of process for Digicel to use the opportunity to comment on the single question posed by OUR in this second consultation regarding the glide path from TLRIC to pure LRIC MTRs to:
 - a. criticize the determinations and deliberative process of the Parliament of Jamaica;
 - b. cast baseless aspersions regarding the OUR's intentions;
 - c. misrepresent the pure LRIC approach; and
 - d. set out illogical reasons for delaying the implementation of pure LRIC based MTRs.
3. LIME addresses these issues in turn, then takes up Digicel's brief comments relevant to this proceeding—on the glidepath—which unfortunately amount to a simple attempt to prolong the status quo MTR regime and all its negative implications.

II. Criticism of the Parliament of Jamaica is unfounded and has no place in this proceeding

4. Echoing its attempts outside this proceeding to maintain the status quo, Digicel begins by making very disparaging and inaccurate remarks about Jamaica's Parliament. It posits that the Parliament did not engage in a proper consultation process before the enactment of the amendments to the 2000 Telecommunications Act (hereafter referred to as the Act). It also attempts to undermine the credibility of Advisors to the Parliament. Simply put, Digicel is claiming that the Parliament acted improperly. This characterization is spurious.
5. Simply because Digicel may not like the outcomes resulting from any amendments to the Act, does not make them erroneous. Frankly, Digicel is not above the law, and it is improper for it to seek to rely on the Act when it suits its purposes, but want it sidelined when it does not.
5. Any attempt by Digicel to malign the good faith effort by the Parliament of Jamaica to put in place a legal and regulatory framework which facilitates sustainable competition in Jamaica must be roundly rejected. Instead the Parliament should be commended for the urgency with which it acted (and not "hurried and dramatic" as suggested by Digicel) to ensure that Jamaica does not return to the days of a monopoly provider, with Digicel being that monopoly.

III. Aspersions cast on the OUR are baseless

6. Again, without properly accounting for the facts, Digicel suggests there now exists regulatory risk created by the OUR (along with the Government) which is now "sky high" due to sudden and dramatic changes and that this now needs to be reflected in the cost of capital set by the OUR for Telecommunications Providers in Jamaica. Digicel asks rhetorically

“What is to prevent the OUR/ Government completely overhauling legislation and regulation at a whim again sometime in the future without proper consultation and consideration on the issues.” Such a view is incorrect.”

8. What the OUR (and Government) is now seeking to do is neither sudden nor dramatic considering:
 - a. the OUR has been attempting to regulate mobile termination rates since 2004 against Digicel’s opposition;
 - b. the previous Government attempted to have Digicel lower its rates in light of its acquisition of Claro and, in light of Digicel’s intransigence, led the Prime Minister to state in Parliament that “emergency legislation would be passed in six weeks” to achieve what was required; and
 - c. Digicel has been invited to reveal and justify to the OUR its current mobile termination costs and it did not do so.
9. Any adverse risk that Digicel may face as a result of the implementation of cost-based MTRs cannot be attributed to the actions of the OUR, which has been consistent in its communication to the Industry regarding its views on LRIC, including pure LRIC. The OUR ought not to be held responsible for Digicel’s mistaken view, oft repeated, that “permanent” MTRs were agreed on upon its entry into the market (the implication being that it is entitled to them in perpetuity!).
10. Digicel conveniently fails to accept that the OUR’s necessary intervention into the market is to correct the present market failure and is necessary to foster sustainable competition. It refuses to concede that its undeniable dominance in the retail market (by measure of market share, revenues and traffic) as well as its wholesale market for mobile voice call termination, has enabled it to act independently of its competitors for years and that it has in fact benefited from massive transfers from LIME as a result of its MTRs not being cost-based. The implementation of pure LRIC rates is a remedy for Digicel’s ring-fencing of its subscribers for years and the need to remove the potential and actual use of above-cost MTRs as a high input cost to its competitors, such that they cannot effectively set competitive retail rates that would attract new subscribers to their network(s).
11. Digicel ought not to have expected the current market failure which exists in Jamaica, and nowhere else in the Caribbean to go on forever. No prudent commercial entity would, especially given the clear signals sent by the Regulator and Government. Digicel’s suggestion that the actions of the OUR are “damaging” to its business, and implying that they are arbitrary and irresponsibly radical, is self serving, incorrect and misleading.
12. In fact, quite to the contrary of representing additional risk, the assertion of authority by the OUR (and Government) to address market failure should be perceived by investors as the creation of a more stable business environment.

IV. Inaccurate statements about pure LRIC

13. Digicel makes numerous misrepresentations of the pure LRIC approach. Digicel begins by rehashing many of the arguments it already made in opposing the implementation of pure LRIC in the Mobile Cost Model proceeding. We hesitate to address these arguments as they are now moot--as pure LRIC is embedded in the Act and a requirement for the OUR implementation. However, it is important to address these comments as Digicel subsequently uses them as justification for delay or reason to change the OUR's approach to other aspects of costing to effectively "make up" for the faults it sees in pure LRIC.
14. Digicel starts off in paragraph 2 by making use of a document from the Centre for Economic Policy (CEP) as the basis of its attack on pure LRIC. Each of the points it attributes to that study are either cited in a misleading fashion or otherwise worthy of rejection. For example, Digicel suggests CEP states that
 - Pure LRIC is "*unsustainable*". CEP argues that, *if applied to all mobile services*, pure LRIC would be unsustainable. The CEP document does not suggest that setting *mobile termination rates* to pure LRIC is unsustainable.
 - Pure LRIC will lead to "*arbitrary*" results. The CEP does not say that the pure LRIC approach will lead to arbitrary results. It argues that the choice of excluding the recovery of common costs from termination services, as opposed to others, is rather arbitrary. However, elsewhere market conditions and competition policy requirements have been successfully argued as legitimate reasons for excluding these costs from mobile termination.
 - Pure LRIC cannot be set because of the lack of knowledge. In fact, CEP is speaking, not about pure LRIC per se, but generally about regulation that attempts to set prices at a welfare-maximizing level. That level cannot be known, according to CEP. This may be true, but the same criticism could be made of Total LRIC approach or, in fact, of any other approach save a purely theoretical price setting mechanism.
 - Pure LRIC will lead to a misallocation of capital. Again, CEP is speaking about price regulation generally, in a Hayekian sense. CEP does not present any evidence or argument that pure LRIC would result in any more or less misallocation of capital than, say, LRIC plus.
15. Still other points made in the CEP document, which Digicel cites, are unsubstantiated or unconvincingly argued:
 - CEP speaks of "*cross-subsidy*" without defining cross-subsidy or how cross-subsidy in this context differs from innumerable other cross-subsidies that are typically embedded in the mobile pricing (e.g., free minute bundles, handset subsidies, etc.), absent regulation.
 - CEP states that pure LRIC leads to prices that differ from what would occur in a competitive market. But regulators have already concluded that the competitive market leads to sub-optimal MTRs, so it is of little relevance what a "*competitive market*" would deliver. Further, CEP provides no evidence that, even if there was no dominance in the mobile termination market, a LRIC+ rate would obtain.

- CEP criticizes the approach to the definition of pure LRIC in terms of comparing costs with and without the termination services as being unrealistic because every network has to provide interconnection service or it would not exist. This, however, is exactly the same approach that regulators have taken to measuring increments in the LRIC plus methodology. There is nothing arbitrary or unusual about it. The only difference is what treatment is given to common costs.

16. Thus, the CEP document does not bolster Digicel's case. One would have hoped that after this attempt, which was even weaker than that first time Digicel gave it in the Mobile Cost Model proceeding, we would have been spared more on the moot topic of "*Why pure LRIC is Bad*". Unfortunately, Digicel returns to it again in paragraph 9--this time rehashing the investment argument. LIME declines at this time to address this argument again as we extensively addressed the impact of lower termination rates on investment and competition in the previous proceeding. Suffice it to say that, contrary to Digicel's argument, lower domestic termination rates will increase, not decrease, investment and decrease, not increase, anti-competitive subsidy.
17. As indicated above, the reason why Digicel is re-introducing these arguments is apparently to justify the relaunching of the Mobile Cost Model proceeding and the OUR opting for different modelling methodologies and assumptions, e.g., with respect to the top-down vs. bottom-up approach, level of traffic, yearly approach to network dimensioning, defining common costs, etc. in order to "make up" for cost "lost" in adopting the pure LRIC approach. As we have indicated above, we believe this would be very ill-advised. The OUR has taken no decision yet on these other aspects of modelling and consultation participants have had ample opportunity to comment on them.
18. Finally, LIME notes that Digicel's comments on page 13 provides an additional reason why the OUR should avoid a top-down approach to modelling relevant costs. Digicel appears to already be considering how they might manipulate their accounting to increase termination costs under the guise of maximising efficiency.

V. Issues of discriminatory treatment and reconsideration of first round issues are simply intended to delay the implementation of pure LRIC based MTRs

19. Many of Digicel's comments appear to be motivated simply by the desire to delay the implementation of pure LRIC. Its comments in paragraphs 6 and 7 are disingenuous at best. Digicel states (at paragraph 6):

"There is also the crucial issue of how pure LRIC is to be applied to fixed interconnect rates in order to avoid discrimination by the Authority in rushing through a consultation that deals only with a glide path on mobile termination. As noted by the Authority section 33 (1) (g) of the act pertains to "wholesale termination charges" and not just 'wholesale mobile termination charges'. Furthermore, section 30 (1) (a) (i) of the act requires that interconnection "shall" be provided on a "non-discriminatory basis".
20. This reasoning is as shallow as it is biased. To be clear, section 30 (1) (a) (i) is not new to the Act. The requirement that interconnection "shall" be provided on a non-discriminatory basis has been in place for over a decade. That is why LIME has consistently maintained that in

the same way that wholesale fixed termination rates are regulated at cost, MTRs should also be. It is Digicel that has consistently opposed this notion over the years. If Digicel's arguments are to be accepted that the phrase "non-discriminatory basis" precludes the pure LRIC methodology being applied to MTRs before it is applied FTRs, then it would follow that LIME's regulated fixed business has been discriminated against for almost a decade. Since 2003 LIME's fixed wholesale termination rates have been regulated at cost, whereas Digicel's MTRs have not been regulated.

21. How ironic it is that, as the OUR now seeks to regulate its MTRs, Digicel is claiming discrimination! In other words, Digicel's position appears to be, if a network operator is going to be the "victim" of discriminatory practice as it relates to interconnection, let it be LIME's fixed network.
22. Digicel has conveniently failed to point out that LIME's Fixed Reference Interconnection Offer (RIO) is now under review (which includes the applicable tariffs) and will be finalized, no doubt in tandem with the Industry Mobile RIO. Digicel is also fully aware that the OUR has the power to also set appropriate interim rates in relation to LIME's fixed wholesale rates if it deems this appropriate.
23. In paragraph 6, page 4, Digicel continues;

"The OUR must logically take the same approach in this aspect as in section 1.8 of the consultation document, "The OUR is obliged to apply the principles stipulated in the Act, as amended, in determining the charges for interconnection".

24. Digicel once more fails to acknowledge that LIME does not oppose LRIC rates being set for its fixed wholesale termination rates. As stated before, the OUR has the power to ensure that LIME's FTRs are consistent with what is reasonable and fair. In fact, the OUR has indicated in its published Corporate Work Plan, its intention to consult on LRIC for Fixed Networks next year. Even more significantly, Digicel does not point out that it now sets a discriminatory interconnection rate for LIME's Mobile network to interconnect with its Fixed Network, when compared to the interconnection rate it charges its own Mobile network for the same service.

25. In paragraph 7, page 4 Digicel states;

"As it is clear that fixed interconnection rates must also now be part of the 'pure LRIC' agenda it is imperative that the OUR consult on how fixed termination services model will be developed. For example, in order to avoid discrimination the process needs to ensure consistency in relation to the principles adopted in developing models for both services. As such Digicel strongly recommends that the fixed and mobile pure LRIC consultation process is carried out in tandem as part of one consultation process. This would also be a more efficient use of resources, something the OUR should be seeking to promote."

26. Digicel's cry about discrimination is a "red herring", intended to distract from the real subject of this consultation. Digicel is so bold as to suggest that it is more efficient for the OUR to "park" all the tremendous work done to progress the development of a pure LRIC cost based MTR, and start from "scratch" and complete a consultation devoted to the

development of pure fixed LRIC termination rates, before pure LRIC MTRs are implemented. This is quite an irrational idea. Digicel was always aware of the OUR's intention to produce a cost based MTR in September 2012 and never objected to it. Further, Digicel has strenuously argued in another proceeding that the OUR's \$5.00 interim MTR must be stayed, as it is unnecessary, given that the OUR has promised to deliver an actual cost based MTR in September 2012! This demonstrates that Digicel's arguments are not so much based on principle but on expediency.

27. Digicel is merely trying to further delay the implementation of a pure LRIC MTR, by seeking to "tie" its implementation to that of a pure LRIC fixed termination rate(s) exercise. It is nothing other than an effort to maintain the status quo for as long as possible. Its agenda is clear: block the implementation of the OUR's determined interim MTR and tie the implementation of the MTR produced by TERA's Cost Model, to the availability another Cost Model that produces a pure LRIC FTR, which FTR has been programmed by the OUR to be consulted on, around November 2013. Notwithstanding its agenda for delay, Digicel is bold enough to float the notion that at the center of its concern, is the "efficient use" of the OUR's resources.

28. In paragraph 8, page 5 Digicel states;

"Indeed, it is the OUR's own position that its references to 'pure LRIC' issues in the previous consultation were purely for "theoretical edification". The theory has now become a reality and so can no longer be dealt with in such a light manner given its actual implications for the country and the industry. "

LIME is not clear what Digicel means by suggesting that the OUR dealt with pure LRIC in a "light manner". LIME recalls that the OUR discussed pure LRIC quite extensively and indicated its preference for same but for the limitation that the Act did not allow it at the time. In its response, LIME took the OUR's discussion quite seriously and commented accordingly.

Notwithstanding, as indicated before, the Act prescribes that the pure LRIC Methodology is used to calculate interconnection rates and as such the OUR does not have discretion in the matter. Hence, Digicel's suggestion to "re-open" that phase of the consultation process will serve no useful purpose. Indeed, all the mobile operators will have the opportunity to provide feedback with respect to the design of the Cost Model.

29. These arguments serve the same purpose as those in paragraphs 3, 11 and 12 that the first cost methodologies consider in the first round of this consultation be reconsidered.¹ LIME's considered view is that Digicel's suggestion to delay the implementation of pure LRIC on MTRs until pure LRIC is available for LIME's fixed termination rates or reconsideration of issues previously consulted on should be strongly rejected.

¹ LIME is of the view that Digicel's actions, for example its challenging the OUR's Interim Mobile Rate Determination in Court, demonstrates as well that its primary aim is to oppose or delay any reduction to its MTR.

VI. Suggested glide path an attempt to prolong the status quo

30. In its response, LIME has made it quite clear that it is not of the view that a glide path should be applied in the Jamaican scenario. The market failure is so stark that the remedy required is immediate.

Simply referencing examples of glide paths implemented in other countries whose mobile market conditions bear no resemblance to that prevailing in Jamaica is not useful in addressing the consultation question.

31. In paragraph 17, page 8, Digicel states;

*“The rationale for glide paths is summed up well by the New Zealand Commerce Commission³:
“Glide paths allow time for operators and customers to adjust to new price levels and structures, and allow operators sufficient time to unwind business decisions made in reliance on a previous regulatory approach. It is unusual for regulators to impose new pricing without a glide-path.””*

LIME does not disagree that in a properly functioning market the implementation of a glide path has its place. However, given the massive transfers to Digicel that has already been allowed (due to inadequate regulation) it is time to “pull the plug” on such subsidies.

The need for establishing sustainable competition and eliminating huge, unfair subsidies far outweighs Digicel’s trepidation about its own operations. What of smaller competing operators whose investments and business decision(s) are being significantly compromised? What of their subscribers who face unreasonably high rates due to the above cost MTR? Why should these subscribers on the smaller network pay a subsidy to the larger network, such as Digicel, to in turn allow Digicel to subsidize the cost of on-net calling for its customers? Digicel’s CEO has already stated publicly, that the effective on-net retail rate being charged to a Digicel customer was ###, when the peak MTR was set at ###. This means that by a conservative estimate, the MTR charge could be no more than say, est. at ### retail, which would include a mark-up. The fact is that Digicel’s over 2 million subscribers are benefiting from low MTRs; the question is more about how soon will its competitors be allowed to benefit from having to pay those low rates for terminating a call? In light of the overwhelming evidence that the market is a failed market, what really prevents the immediate implementation of pure LRIC MTRs except that the operator that is yet to be “weaned” off subsidy, will have the inconvenience of perhaps reducing its margin, to give value to its customers instead of relying on, subsidies from LIME’s fixed network to do so.

Digicel’s suggestion that a glide path of 5 to 6 years be implemented should be rejected.

End