



Response

to

OUR's Consultative Paper

"Telecommunications Markets: information Requirements"

10th October 2003

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1 Introduction

1. Digicel welcomes the opportunity to comment on the Office of Utilities Regulation ("OUR") Consultation Document on *Telecommunications Markets: Information Requirements*, of 16 September 2003. As this Consultation Document follows immediately after the OUR's consultation on financial information in the *Accounting Rules for Regulatory Purposes* document, Digicel would welcome clarification of the extent to which the OUR is considering such information-related issues on a global basis.
2. Digicel's comments follow the structure of the OUR's Consultation Document. Digicel's failure to respond to any issue raised by the OUR in its Consultation Document does not necessarily represent agreement in whole or in part with the OUR's position on that or those issues.

2 Legislative Framework

3. Under the Office of Utilities Regulation Act 1995 ("OURA 1995"), the OUR may require approved organisations to furnish information or submit such returns at intervals as the OUR may require in relation to its operations (section 10(1)). As an "approved organisation" is an organisation or body which, by virtue of an enabling instrument, or the OURA, is made subject; and an "enabling instrument" includes any licence issued pursuant to a statutory power by which the approved organisation is authorised to operate a utility undertaking, Digicel appears to be an "approved organisation".
4. However, Digicel submits that the broad power afforded to the OUR under section 10(1), in relation to telecommunications, must be interpreted in the light of the OUR's functions and objectives as set out under the Telecommunications Act 2000 ("TA 2000") and justified in accordance with these. Without these limiting factors, the OUR's data collection powers could be abused. For example, without these constraints, the OUR could demand details of a particular employee's salary, which, without justification for such demand, would appear to

be ultra vires and possibly unconstitutional. On the other hand, if such details were requested for the purposes of discharging a specific regulatory function, then it is possible that this might be a legitimate request.

5. Digicel agrees that the objects of the TA 2000 include the promotion and protection of the interest of the public by, amongst other things:
 1. promoting fair and open competition in the provision of specified services and telecommunications equipment;
 2. providing for the protection of customers; and
 3. promoting the interests of customers, purchasers and other users (including, in particular, persons who are disabled or the elderly) in respect of the quality and variety of telecommunications services and equipment supplied.¹

These are the means by which the OUR must achieve the end of promoting and protecting the public interest. Under section 4(1)(c) of the TA 2000, the OUR's functions and/or duties include promoting the interests of consumers while having due regard to the interests of carriers and service providers; making available to the public information concerning matters relating to the telecommunications industry; promoting competition among carriers and service providers and advising the Minister on matters relating to the provision of telecommunications services as it thinks fit or as requested by the Minister.²

6. Digicel considers that this means that, with the ultimate aim of protecting and promoting the public interest, the OUR must promote competition, protect consumers and promote their interests (while having regard to the interests of carriers and service providers) and make certain information available to the public.
7. However, this in no way gives the OUR "*carte blanche*" to require information from operators on the Jamaican telecommunications market. Rather, the OUR must relate the carrying out of its functions and the exercise of its powers back to

¹ Section 3(a)(i), (iv) and (v) and paragraph 1.1 of the Consultation Document.

² Section 4(1)(e) to (g).

the aims of the TA 2000. In other words, it must define and explain the public interest which it considers will be promoted and protected by its activities, in this case, by a formalised data collection system. It must explain the purpose of the exercise, the definitions and measurement methods to be used, how operators' interests are to be taken into account, the use to which the information will be put and the actual target audience of any publication. It must further explain how and where markets are operating imperfectly, and, in particular, where there is a lack of information or transparency and how this affects consumers and the market more generally. The OUR refers only vaguely to reporting being an essential part of the overall programme for regulating telecommunications licensees, to agreeing procedures for the collection and publication of results, and to using information for the assessment of dominance or other investigative purposes.³ Without further information on the purposes behind the exercise (identification of the relevant public interest and specific regulatory needs) and the use to which information will be put, Digicel considers that it has been inadequately consulted as it does not know the precise implications for its business of the information-gathering exercise.

8. As the OUR recognises in paragraph 1.3, the OUR is under certain constraints: in making decisions in the exercise of its functions, it must observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice. If the purpose of the data collection exercise is not made clear and the use to which the information supplied will be put is not set out, the OUR will have violated the constraints imposed on it under the TA 2000. However, while Digicel accepts that for the purposes of its objective of promoting and protecting the interest of the public through protecting consumers and promoting fair and open competition, the OUR must have certain information in order to make appropriate decisions, this does not mean that the OUR has blanket jurisdiction to require information.

³ Paragraphs 4.0, 4.1, 5.0 and 5.1.

9. As the OUR has noted in paragraph 1.2, where the OUR has "*reasonable grounds for so doing, it may for the purposes of its functions under this Act, ... require a licensee to furnish, at such intervals as it may determine, such information or documents as it may specify in relation to that licensee's operations*".⁴
10. Digicel submits that the OUR, in order to comply with its duty to observe reasonable standards of procedural fairness and rules of natural justice, must ensure that the reasonableness or otherwise of any requirement to provide information can be tested. The OUR has not provided adequate explanations about the public interest that the OUR expects to promote or protect; the necessity for the types of information it intends to request; the necessity for such information to be made available to the public (in other words, the needs of customers and others)⁵ and in what form (and how effective) this will be, in promoting competition or protecting consumers. This means that the reasonableness of the proposal cannot be tested. As the OUR has not fully reasoned its proposal, the OUR has breached its duty to observe reasonable standards of procedural fairness and rules of natural justice.
11. Digicel disputes the OUR's general assertion that a "*prerequisite*" for competitive markets is the supply of relevant data to facilitate informed decisions by market participants, including consumers.⁶ Digicel recognises that enabling consumers to make informed choices is a valuable aim, however, while the dissemination of certain limited types of information may be used to stimulate operators' and a market's efficiency, the dissemination of other types of information may lead to a stifling of competition through increasing homogeneity in pricing, terms and conditions offered and product standardisation. The fact that certain limited information may assist consumers and others in making informed decisions does not provide a justification for sponsoring the emergence of large quantities of

⁴ Section 4(4).

⁵ Section 4(3)(a).

⁶ Paragraph 1.1.

strategic, confidential and often (share) price and competition sensitive information into the public domain. Furthermore, it will be recalled that high degrees of transparency in a concentrated market can be dangerous.

12. Under the TA 2000, the OUR's officials and employees must regard and deal with as "*secret and confidential*", all confidential information relating to licensees and their management and operation and (generally) may not communicate such information to any person.⁷ Exceptions to this general rule arise where, amongst other things, the confidential information is disclosed with the licensee's written consent or where, in the opinion of the OUR or the Minister, disclosure is necessary in the public interest.

13. In this regard, it is not sufficient for the OUR to state, without further elaboration, that it will disclose confidential information if it considers that the publication is in the public interest and in doing so, will observe reasonable standards of procedural fairness.⁸ The OUR is obliged to observe these standards in taking decisions in the exercise of its functions. Although there is a safeguard in the TA 2000 that ensures licensees can take action to protect their interests in respect of the disclosure of information under section 7(4), namely that the OUR is required, if it intends to disclose confidential information, to give not less than fourteen days' notice of the proposed disclosure, thereby enabling a licensee to apply for a court order prohibiting such disclosure, it is unclear whether the opportunity for providing "*reasoned corrections*" to the documents that the OUR intends to publish, as described in Chapter 2, paragraph 2.0 and Chapter 4, paragraph 4.1, is intended to be in part satisfaction of this statutory safeguard. If so, this is inadequate. In order to comply with the requirements of the TA 2000, the OUR must give licensees not less than fourteen days' notice of the confidential information it intends to publish. Therefore, if Digicel has provided reasoned corrections within the two week period described in Chapter 4, paragraph 4.1,

⁷ Section 7(1).

⁸ Paragraph 1.3.

then the OUR must give Digicel a further two weeks, from notification of the OUR's *revised* draft publication, to consider its position, and if necessary, avail itself of its statutory right to apply for an order prohibiting the publication.

14. Furthermore, Digicel considers that further safeguards should be in place to ensure that information provided, which is strictly confidential and competition-sensitive, does not fall into the wrong hands, whether inadvertently or otherwise. Indeed, the OUR has failed to provide adequate assurance that the confidentiality of information will be maintained, as Digicel would have expected, at a minimum, that the OUR provide details of how it intends to preserve the confidentiality of information provided to it, apart from merely general references to using its "*best endeavours*" to ensure that the publication of sensitive information is minimised or that, where possible, information will be averaged or aggregated.⁹ This might include, amongst other things, safeguards to ensure that only those members of staff specifically assigned to this project have access to the data submitted by individual companies; destruction of data supplied upon its incorporation in statistical form where its retention is no-longer necessary to ensure the accuracy of the statistics; limits on the amount and type of comment that may accompany its incorporation in statistical form in order not to prejudice or influence the interpretation of findings by those who are the target audience of the publication (whether consumers or others).

3 Type of information and statements required

15. In paragraphs 1.4 and 1.5, the OUR states that it requires information on prices, quantities supplied, and revenue from specified services, as well as on interconnection, directory enquiry and other services, including joining, termination and transit services. In addition it requires financial statements and details of prices and non-transitory price changes.
16. As stated above, the OUR has failed to set out the purposes for which all or part of this information is required. It has also failed to address the issue of

⁹ Paragraphs 5.0 and 5.1.

proportionality between the discovery and compilation of such information and the value and effectiveness of the outcome of the OUR's dissemination programme. Furthermore, Digicel considers that it should have the opportunity to comment on the way in which such information is intended to be published (in the sense of the interpretation of the data) and the effectiveness of such means in promoting and protecting the public interest.

17. Digicel submits that it is a principle of procedural fairness and/or natural justice that information is used for the purpose for which it is collected, and yet such a purpose has not be set out. General references only, to an overall programme for regulating telecommunications licensees and to using information for the assessment of dominance or other investigative purposes, are insufficient. If this were not the case, public authorities would have high levels of visibility of the details of an undertaking's business and have the jurisdiction to carry out "fishing" expeditions. This is clearly not permitted in Jamaica where the OUR must have reasonable grounds for requiring the production of information.
18. Moreover, Digicel is confused by the OUR's reference to "best practice" relevant to the provision and publication and information supplied by licensees and to OfTel. The OUR should clarify whether it intends to use the UK system as a model for its own data collecting activities and, in doing so, should reconcile how the UK's system of information gathering in a mature telecommunications market is applicable to a liberalising market such as that in Jamaica.
19. Finally, the OUR should also explain why the current reporting structure for Cable and Wireless Jamaica is "*not considered adequate*" and for what purposes it has been deemed inadequate.

4 Purpose of the Consultation Document

20. The Consultation Document states that the OUR's intention is to formalise the collection, use and distribution of relevant information on the telecommunications industry, markets and the performance of licensees. While Digicel could understand a wish to streamline data collection activities, the reasons given for

requiring such vast quantities of information and the use to which such information will be put have not been adequately explained. It is not clear to *what* the information must be "*relevant*".

5 Principles

21. Digicel submits that prior to, or at least simultaneously with, consulting on the substance and principles of a programme for obtaining and using information on the telecommunications industry, markets and performance of the Licensed Operators, the OUR should also have consulted or consult on, the practical objectives of such a programme, the purposes to which such information will be put and the effectiveness of such a programme. Nevertheless, Digicel welcomes the opportunity to comment on the principles set out.
22. While Digicel welcomes the OUR's commitment to minimising the burden on operators in paragraph 2.0, Digicel notes that the OUR has not considered or asked for information concerning the licensees' existing information-gathering tools and record-keeping systems; nor has it provided the parameters or measurement methods which it will seek to apply; nor has it addressed the proportionality of the information required, to the value to the target audience of any data published. The OUR does not appear to have considered the human, financial and technical resources that will require diversion to manage and service the OUR's proposal and therefore, cannot be considered to have had "*due regard to the interests of carriers and service providers*".¹⁰ This means that licensees may find themselves in a position of having to retrieve, compile or collect information, which they may not have retained or which may be in a different form, and all for purposes which are unclear and which may be of dubious value to consumers.¹¹
23. The OUR refers to the relation of information to the "*regulatory needs*" of the OUR in respect of the requirements of the TA 2000 and the "*public's interest*".

¹⁰ Section 4(1)(c) TA 2000.

¹¹ Bullet point 1.

While Digicel accepts that the OUR has a duty to, and indeed should make information available to the public to enable consumers to make informed choices, it is unclear what the regulatory needs and the public interest in issue are, which the OUR is seeking to address.¹²

24. While Digicel considers that enabling consumers to make informed choices is a positive step, the OUR has not provided any information on the specific matters that it intends consumers to be able to compare, nor does it appear to have "market-tested" whether such comparisons are the appropriate means of empowering Jamaican consumers, nor how effective these are likely to be. This means that Digicel has been inadequately consulted. Moreover, although Digicel welcomes the OUR's commitment to ensuring confidentiality is preserved through the publication of aggregated data, it is not clear whether this will, on its own, constitute an adequate safeguard. Digicel refers to the suggestions it has made above for strengthening these safeguards.¹³
25. In relation to measuring licensees' effectiveness in keeping promises to customers against licensees' terms and conditions and quality of service standards, Digicel would welcome further information on how the OUR intends to ensure that competition on terms and conditions will be maintained, and in particular, the heterogeneity in terms and conditions, which may benefit consumers. In addition, it is unclear to what extent the OUR proposes to make operators accountable in respect of marketing campaigns and other promotions. Digicel would caution against duplicating the role of the Fair Trade Commission.¹⁴
26. The OUR states that data and other information received by it for "*specific regulatory purposes*" will not be considered as satisfying the "*needs*" identified in the Consultation Document unless agreed by the carrier/service provider and the OUR. Digicel submits that no "*needs*" have in fact been identified in the

¹² Bullet point 1.

¹³ Bullet point 4.

¹⁴ Bullet point 5.

Consultation Document and therefore that the distinction between these and specific regulatory objectives is meaningless in the absence of further information. Digicel would welcome further clarification of this. In addition, although it seems that the OUR intends to standardise information-gathering for all operators on the Jamaican market, the possibility of different arrangements being entered into on an ad hoc basis between carriers/service providers and the OUR, suggests that not all operators will be treated in the same manner. Digicel submits that the justification for such different treatment should be set out.¹⁵

27. Finally, while Digicel welcomes the opportunity to review and propose "*reasoned corrections*" to results prior to publication, the OUR does not quite commit to have regard to these submissions and/or to give written reasons for any rejection of them. Digicel considers that this falls short of the requirements set out in section 4(2) of the TA 2000. In addition, Digicel invites the OUR to confirm that the OUR will give licensees a further two weeks, from notification of the OUR's *revised* draft publication following the receipt of reasoned corrections, to consider its position, and if necessary, avail itself of its statutory right to apply for an order prohibiting the publication.¹⁶

6 Types of operators

28. As mentioned above, Digicel welcomes the OUR's commitment to minimising the burden on licensees in paragraph 3.0, however, Digicel maintains that the OUR has not explored the licensees' existing information-gathering tools and record-keeping systems; nor has it explained the parameters or measurement methods which it will seek to apply, nor the proportional relationship of the information required, to the value to consumers of any data published. This is aggravated by the possibility that licensees will find themselves subject, not only to existing regulatory data-provision requirements and those possibly resulting from this Consultation Document, but also to those relating to dominant undertakings.

¹⁵ Bullet point 6.

¹⁶ Bullet point 7.

7 Mandatory reporting

29. Digicel repeats that it is unclear for what purposes, and to address which needs, information on revenues from directly connected customers, call volumes, other service volumes, transactions with other carriers or service providers and revenues from carriers or service providers is required. In view of this, Digicel is concerned that the OUR has not complied with its duty to observe reasonable standards of procedural fairness and rules of natural justice. First, the "reasonableness" or otherwise of its grounds for requiring the information and the scope of the information cannot be tested adequately, and second, the full implications of what the OUR is consulting upon are not clear.

8 Reporting and auditing

30. As mentioned above, Digicel considers the OUR's vague references to reporting being an essential part of the overall programme for regulating telecommunications licensees and to agreeing a procedure for the collection and publication of results to be inadequate as the OUR has not explained precisely the use to which the information will be put. In addition, the OUR has failed to meet the requirements set out in section 4(2) of the TA 2000 by not committing to have regard to the reasoned corrections and/or to give written reasons for any rejection of them.

8.1 Conclusion

31. For the reasons set out above, Digicel considers that the OUR has failed to demonstrate that it intends to exercise its information-gathering powers in relation to telecommunications under the OURA 1995 and/or TA 2000, in accordance with the objectives of, and its functions and objectives under, the TA 2000, or indeed, even in accordance with the rules of procedural fairness and natural justice.
32. The OUR's duty to protect and promote the public interest, promote competition and protect consumers does not give the OUR "*carte blanche*" to require information, to manipulate data and to publish it, as it pleases. The OUR must

have reasonable grounds for its requests for information, and to this end, Digicel invites the OUR to define and explain the public interest targeted by this Consultation Document; to clarify the purpose of the exercise, the definitions and measurement methods to be used; and to explain how operators' interests are to be taken into account, and the use to which information will be put, and how the proportionality of the information to the value to the target audience of data actually published will be ensured. In addition, Digicel invites the OUR to explore licensees' existing information-gathering tools and record-keeping systems; and to ensure that the statutory protection for licensees for the protection of their interests in respect of disclosure of information is maintained and that safeguards are in place to ensure that information provided does not fall into the wrong hands, whether inadvertently or otherwise. Finally, Digicel invites the OUR to clarify how and where markets are operating imperfectly through a lack of information or transparency and why the existing system is inadequate; how such perceived imperfections or inadequacies affect consumers and the market more generally; and to discuss appropriate means of tackling such problems, should they exist.