



**Digicel's Comments to Submissions on
the Notice of Proposed Rule Making
on Infrastructure Sharing**

12 June 2017

We thank you for providing this opportunity for Digicel to share its views on the responses to the Notice of Proposed Rule Making on Infrastructure Sharing. Digicel is of course available, and would be happy, to discuss our submission further.

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

Please do not hesitate to refer any questions or remarks that may arise as a result of these comments by Digicel to: -

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DIGICEL'S COMMENTS

Comments on Verge Communications submission

Digicel notes that Verge's response to the proposed rule making is predicated on the view that *"the OUR needs a different type of competitor"*. However it is not the role of the OUR to set policy or define the types of services that should be offered in the market by way of a rulemaking as these matters are covered by the licensing regime. If there is retail demand for services that can be served at economically viable prices then normal commercial incentives will mean that they will be provided. If these services cannot be profitably provided but there is some social or policy need for the service then the issue is more properly addressed by the Universal Service Fund.

Verge's thesis that infrastructure sharing allows unserved customers *"situated outside major population centres"* to be served is fatally flawed. The very fact that infrastructure exists to be shared means that these areas are served.

Section 7.3.3. of the proposed rulemaking contains an important test as to whether it is proper to mandate the offering of infrastructure access. The OUR has proposed an approach which would mean that where infrastructure is replicable it's owner should not be forced to share it. Verge objects to this measure. Digicel believes that the assessment proposed is entirely proper and avoids market distortion caused by regulation. If an asset is capable of being replicated on reasonable terms (either time or cost) then there is no basis for regulatory intervention as there is no market failure. Absent this test, licensees seeking obligatory access could avoid costs and operational activities which they could and should bear in the normal course of network deployment. Forcing infrastructure sharing for replicable assets amounts to an inappropriate regulatory support for those licensees benefitting from it.

In particular Digicel believes that masts and towers are replicable assets and should not be subject to mandatory sharing. The fact that Digicel entered the market in Jamaica and deployed towers and masts to do so is direct evidence that these assets do not form a bottleneck in the deployment of new networks nor is the need to build them a barrier to entry.

On the other hand assets such as fixed inter-urban transmission systems are not practically replicable and do represent bottleneck control by a monopolistic operator in this market segment. In this case the test under Section 7.3.3 of the proposed rulemaking would indicate that this asset class should be subject to mandatory sharing.

Verge makes much of the fact that Digicel and Flow have a reciprocal tower sharing agreement, inferring that this in some way is indicative of collusive or exclusionary tactics. Digicel fundamentally disagrees. The limited extent of the sharing under this agreement is a further demonstration that for the most part towers and masts can be built at reasonable costs and in reasonable timelines. The reciprocal agreements are in fact a mechanism for co-investment in providing coverage in areas which are marginally viable from an economic point of view. The volume matching approach avoids the need for complicated agreements relating to joint ownership, maintenance and network deployment planning. It reduces the scope for collusive behaviour as the parties make independent decisions as to where they deploy their networks. This form of arrangement provides all parties to it with incentives to invest in new sites as without such investment they have no pool of sites to "swap". The agreements are non-exclusive and should Verge or any other operator wish to discuss entering such an arrangement Digicel is willing to negotiate in good faith.

Comments on 5G Americas submission

Digicel notes that 5G Americas is an organisation focussed on the mobile sector and that its comments must therefore be read in the context of the sharing of mobile network infrastructure. In this context Digicel agrees with the broad thrust of the 5G Americas submission that sharing arrangements for mobile infrastructure should be *"negotiated freely between telecommunications providers ... within a framework of open market negotiations"*.

Digicel reiterates that mobile infrastructure is distinguishable from certain classes of fixed infrastructure due to its replicability, the lack of overall bottleneck control and competition in the downstream retail markets.

Comments on CACU submission

Digicel agrees with CACU that mast /tower sharing and trench/duct/pole sharing are appropriate forms. We note however that mast/tower sharing is in place already and that non-telecoms providers such as JPS allow pole sharing. Therefore the form of sharing that requires to be considered in the context of mandated access is duct sharing or pole sharing in geographic locations where there is bottleneck control by a dominant operator.

Digicel disagrees with CACU that there should be a prohibition on core network sharing. Digicel believes that there are adequate competition law safeguards in place. Digicel notes also that such a prohibition could potentially prevent Licensees in common ownership from sharing core network assets (e.g Cable and Wireless and Columbus would potentially be precluded from using shared assets).

Digicel notes that CACU in response to Question 8 has reached the same conclusion as Digicel in that it does not consider MVNO to be economically viable in Jamaica.

Digicel does not agree with CACU that infrastructure sharing would not result in faster broadband roll-out. Some forms of sharing, such as inter-urban transmission, address the specific capacity bottleneck that CACU identifies in its response to Chapter 4 Question 1.

Digicel believes that any of the potential competition problems identified by CACU can be adequately dealt with by way of existing legislation.

Digicel believes there is merit in the CACU's suggestions for incentivisation of voluntary sharing.

Digicel disagrees with the CACU's suggestion that tower sharing should be mandated on the basis of "*...environmental, health and aesthetic reasons.*" Planning authorities are the competent public bodies to consider environmental and aesthetic issues. If they see fit to grant permission for multiple structures it is not for CACU or OUR to substitute their views into policy areas for which they have no oversight. In respect of health issues sharing of infrastructure will not result in fewer radio systems in fact it will concentrate the RF environment. In addition, provided the installations comply with World Health Organisation guidelines on emissions, there is no health issue to be addressed.

We note that in response to Chapter 6 Question 1 CACU correctly identifies the need for access to additional backhaul (i.e. inter urban) capacity. This proposed rulemaking would directly address this issue. CACU also correctly identifies the high cost of spectrum as a key bottleneck. Digicel agrees with the CACU's response to Chapter 7 Question 2 Bullet 2. Dominant operators should be mandated to share infrastructure.

The CACU's response to Chapter 7 Question 3 seems to imply that the OUR does not have the technical expertise at its disposal to properly supervise the telecommunications sector. Digicel disagrees with this and believes that it is appropriate that the OUR oversees the assessment of physical and technical viability of sharing. CACU's call for the use of an independent engineer also seems to impugn the Office's impartiality. Digicel affirms its confidence in the competence and the independence of the Office in relation to issues relating to infrastructure sharing.

Comments on Flow submission

Digicel disagrees with the FLOW assertion that the OUR does not have jurisdiction to mandate infrastructure sharing. The proposed rulemaking requires that an entity obliged to offer sharing will have been designated as "Dominant". In making such a designation for a relevant market, i.e. one relating to the infrastructure to which access will be mandated, the Office will have assessed matters relating to economic inefficiency and physical and technical impracticability. Therefore, any obligation to provide access will be on a sound legislative basis and will be squarely within the Office's legal ambit.

Digicel disagrees with Flow that there is a need for a further consultation. The current process meets all of the requirements of administrative law that are necessary to lawfully adopt the proposed rules.

Chapter 3

Question 1

Digicel notes that a number of the facilities enumerated by Flow are in fact ancillary services (power, cooling, ventilation etc.). While access to them should not be mandated on a standalone basis, to the extent that they are necessary to avail of mandated access then they should fall within the scope of the access obligation.

Digicel strongly disagrees with the assertion that simply because cables have active equipment connected to them they are not passive infrastructure. In making this statement Flow actually sets out the very essence of passive infrastructure – it must be associated with something else to make it functional. Towers which are not used to support radio systems and their associated antennae have no function. Pole routes which do not support cables have no function. To this end the list of mandated passive infrastructure to which Flow refers should be amended to include cables.

Question 3

Digicel notes this question does not ask what forms of mandated sharing are the most suitable. In this regard we agree with Flow that commercial sharing of passive mobile infrastructure is suitable. However we are also strongly of the view that given bottleneck control exerted over duct and pole access in the Jamaican market this too is a highly relevant and suitable form of passive sharing.

Question 5

Digicel agrees that core network sharing should be allowed on a commercial basis. Provided installations comply with relevant standards (including WHO standards on RF emissions) there are no public health matters which are relevant to be considered as these will already have been dealt with in the setting of the standards.

Question 6

Digicel agrees that active network sharing should not be mandated but should be left to commercial negotiation.

Question 8

Digicel notes that Flow and CACU agree with its assessment that the major constraint on MVNO entry in the Jamaican market is the intense level of competition in the mobile sector.

Digicel further notes that the intensity of competition at the retail level for mobile services indicates that there is no bottleneck in the upstream mobile infrastructure market and that mandated access to towers and/or sites is an unwarranted regulatory intervention.

Chapter 4

Question 1

Digicel disagrees with Flow's generalised position on the inability of mandated infrastructure to speed up broadband deployment. To the extent that the infrastructure bottleneck is in the access network then mandating sharing of access infrastructure may not in all cases speed the extension of the current geographic coverage. However where the bottleneck is upstream, there are facilities available at the access layer and there is retail demand then mandating sharing in the upstream market clearly has potential to accelerate the deployment of high speed broadband services.

Question 2

Flow's dismissal of "different retail options" misses the point. Such "retail options" are service based competition. The closer the mandated access is to the infrastructure layer then greater the scope for competitive differentiation as alternative providers are not tied to the active network characteristics of their host.

Question 3

Digicel notes that Flow did not respond to the question as posed. The response appears to be a restatement and combination of responses to Questions 1 and 2. Please see Digicel's comments above.

Question 4

Digicel disagrees that any form of sharing should be prohibited. Flow's comments regarding the commercial viability (or lack thereof) of various sharing models underscores Digicel position that there is no need to explicitly prohibit them.

Chapter 5

Question 1

Digicel agrees with the initial part of Flow's response as regards the challenges faced by traditional network operators from Over-The-Top providers, however, there is a fundamental difference between mandating access on all network operators and regulatory intervention designed to specifically address the leveraging of bottleneck control. Such leveraging allows for more than a reasonable rate of return and in fact enables market foreclosure.

Digicel believes there is some merit in Flow's suggestions for making available of public sector infrastructure and the mandating of access to non-telecom's infrastructure such as power distribution (poles etc.).

Question 2

Digicel does not agree with Flow's position and believes that access to bottleneck infrastructure should be mandated.

Question 3

Digicel agrees that mandatory provision of information is inappropriate. We disagree that further consultation is required before establishing these rules.

Chapter 6

Question 1

Digicel notes that Flow's response in effect sets out that due to the geography of the country infrastructure bottlenecks exist. This accords with Digicel's view that there is a significant competition issue in the provision of the inter-urban transmission. This is required for the backhaul necessary to support the deployment of high speed broadband services outside of Kingston.

Chapter 7

Question 1

Flow's response appears to conflate the principles which will apply after an obligation has been imposed with those which will lead to its imposition in the first place. In particular Flow glosses over the fact that in order to be susceptible to these principles a licensee will already have been found to be dominant. These principles further restrict the scope of any access obligation and rather than over-reach by the OUR, are in fact a narrowing of the focus of any intervention to those specific instances where the imposition of an obligation is proportionate, reasonable and justified. This approach to evidence based regulation is in keeping with regulatory best practice.

As stated previously, it is Digicel's view that a dominance assessment of a relevant infrastructure market must of necessity encompass consideration of market efficiencies and inefficiencies and of physical and technical impracticality (or replicability). Properly conducted, a dominance assessment and finding are more than sufficient to meet the requirements of Sections 29A(1)(a) (ii) and (iii) of the Act.

Flow highlights at page 16 of its response that the OUR has set out that rulemaking which relies on Section 29A(1)(a) (i) would require consultation with other stakeholders. While this may be correct it in no way invalidates an approach which grounds the rulemaking in Sections 29A(1)(a) (ii) and (iii).

Question 2

In its response to subsection 7.3.2 Flow sets out that *"the Act only intends to impose infrastructure sharing in the exceptional circumstances specified under the Act"*. Flow again glosses over the fact that any such obligation will only be imposed in the exceptional circumstances where an operator has been found to be dominant in a relevant market and that both sets of exceptional circumstances overlap.

Flow also reminds the OUR *"...that dominance itself is not prohibited by any statute or policy"*. Digicel agrees but would take this opportunity to remind Flow that while dominance is not prohibited it does have consequences. One of these is that public bodies may take a view that regulatory intervention is necessary on dominant operators in order to ensure economically efficient outcomes.

Question 3

Section 7.3.3

Digicel notes that Flow mis-states the test to be applied to physical or technical considerations under Section 29A(1). Flow argues that a standard of “impossibility” should apply before an obligation be imposed. This is simply wrong. The test is that the OUR considers such a measure “...to be justified ...having regard to...physical or technical impracticability”.

Section 7.3.4

Digicel notes that the OUR's commitment to consult prior to issuing a Directive under Section 29A(1) fully addresses Flow's procedural concerns regarding the basis on which any obligation will be imposed.

Questions 4 and 5

Digicel disagrees with Flow's position on costing principles and methodology and believes that such access must be on a cost oriented basis based on Historic Cost Accounting.

Flow's closing remarks

To the extent that there is a functioning relevant downstream market then infrastructure sharing should not be mandated but should be on a commercial basis. Where there is bottleneck then regulatory intervention is appropriate, necessary and has a legal basis under Section 29A of the Act.

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