

# Digicel

## **Digicel's Comments on Cable & Wireless Jamaica's Application for Reconsideration of the Determination Notice on Cost Model for Fixed Termination Rates**

12 July 2017

Digicel welcomes the opportunity to comment on Cable & Wireless Jamaica's (C&WJ) request for a review of the recent OUR Determination on Fixed Termination Rates (FTRs). 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 application 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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## **Introduction**

Prior to addressing the substance of the request for review Digicel makes the following observations. C&WJ has limited its request for a review of this Determination to the matter of glidepaths. It has not challenged, either in this Determination or previously, the legal standing of the OUR to set the FTR or the discretion of the OUR to specify a Bottom Up modelling technique as being the standard to be used in the Jamaican telecoms market. It has not sought a review of the model itself, the decisions regarding model parameters, the output of the model or the Determined price. What is therefore at issue is the proportionality of the OUR granting C&WJ a six month transition period to comply with a lawfully determined price control and whether it is proportionate that C&WJ is granted a partial waiver (by way of delayed implementation) from the Determination that the appropriate cost standard for derived fixed interconnect rates in the Jamaican market is Pure LRIC.

## **Basis for the review**

Digicel believes that the C&WJ basis for seeking an extended glidepath can be summarised as follows:

1. The OUR created a legitimate expectation on the part of C&WJ that the glidepath would be of at least two years duration.
2. The implementation of the glidepath as proposed is not a proportionate exercise of the powers of the OUR to set rates.
3. A truncated glidepath would impact on C&WJ's Wholesale Carrier Services Business

Digicel will now address each of the above listed matters.

### **1. Legitimate expectation**

C&WJ has no credible basis to assert that the OUR, as an administrative body, set a legitimate expectation that the glidepath would be two years. In fact, the opposite it is true. The passages quoted by C&WJ clearly set out that the OUR was initially minded that any transition period would be a "maximum" of two years and that it would consider the actual glidepath when the output of the modelling exercise was available.

C&WJ conflates the legitimate expectation that the OUR would consider the glidepath with its own view of what C&WJ would consider to be a "reasonable" glidepath. Clearly, as an entity facing revenue reductions C&WJ's view of reasonable will be subjective and unsurprisingly tilted towards a longer timeframe.

It is uncontested by C&WJ that the OUR considered the glidepath once the output of the modelling exercise was available. What C&WJ asserts at paragraph 15 of its submission is that "*the OUR has failed to properly conduct the balancing exercise*".

C&WJ asserts that *"there is no provision in the Determination on Rates which indicates that the OUR moved...to taking into account the impact of its determination on a business"*. However this assertion is directly contradicted by the passage from the Determination which C&WJ itself quotes at the top of page 8 of its submission where the OUR sets out that *"15.5 In its deliberations regarding the implementation of the glidepath, the OUR took account of ... the impact that the immediate reduction of the rate to the Pure LRIC level would have on the C&WJ revenues."* The fact that the OUR balancing exercise did not produce a result to the liking of C&WJ does not invalidate the procedure.

## **2. Proportionality and reasonableness of the OUR decision**

Expert decision making bodies have wide discretion as to the basis on which they weigh the various inputs to their decisions. This translates into a wide range of potentially legitimate outcomes on a particular issue that might all fall within the definition of "reasonable". Digicel believes that in the specific circumstances of fixed termination rates in Jamaica, the OUR's Determination falls within the range of reasonable.

In its request for review at paragraph 9 C&WJ reproduces its original submission in respect of a glidepath. This proposal proposed three step down price changes. The first was to TLRIC from the existing levels, the second to halfway between TLRIC and Pure LRIC and the third, a move to Pure LRIC.

Following the modelling exercise, the output of which C&WJ does not dispute, the OUR found that the existing FTRs were in fact *"...much lower than the TLRIC model results"* (paragraph 15.4, reproduced by C&WJ on page 7 of its application for review). Based on this the first two step down price changes which C&WJ had proposed had in effect already been implemented by C&WJ of its own volition. C&WJ has already benefitted from an extended period at rates above Pure LRIC during the time in which the OUR conducted its modelling exercise. This period is far in excess of the period proposed by C&WJ itself for the final step down price transition. One can only assume that C&WJ considered the timing and stepdown increments in its own proposal as being reasonable and has the benefit of timelines which are in excess of this. It can hardly complain if market pricing is already significantly along its own proposed glidepath. In these circumstances Digicel believes that C&WJ seeking a longer glidepath is unreasonable.

Digicel notes that in implementing Mobile Termination Rate (MTR) price controls in 2013 the OUR mandated a 78% reduction in MTRs with 30 days' notice. This is almost double the interim reduction mandated for FTRs with equivalent notice. Therefore, by comparison to the level and speed of reduction in MTRs in Jamaica, the determined FTR glidepath is not unreasonably short and is

proportionate. In these circumstances Digicel believes that a longer glidepath would be unreasonable.

The OUR implemented Pure LRIC MTRs in 2013. There has been a 4 year lag in the application of the same legislation to the fixed market. In fact, the OUR's determined glidepath provides an additional six month long regulatory holiday to C&WJ as the basis for fixed market price regulation and mobile market price regulation will not be aligned until 1 Jan 2018. Given the large time delay in aligning the basis for regulating the fixed and mobile sectors, requiring a significant immediate adjustment followed by a complete alignment within six months is not unreasonable and is proportionate. In these circumstances Digicel believes that a longer glidepath would be unreasonable.

### **3. Wholesale Carrier Services Impact**

While Digicel notes Flow's concerns regarding the arbitrage gap between the Pure LRIC FTR and the corresponding International Settlement Rate, Digicel points out that this gap exists for MTRs and that there has been no form of regulatory intervention to mitigate its effect. The provision by the OUR of a regulatory support for Flow's fixed carrier services business while failing to provide an equivalent support to the mobile carrier services business of Digicel would amount to a discriminatory and competitively distortive regulatory intervention in the market. Digicel believes that extension of the fixed glidepath based on such considerations would be unlawful in the circumstances where the OUR has not also allowed the mobile operators to maintain their prices above the Pure LRIC level for the purposes of shielding their wholesale carrier services businesses.

#### **Summary**

C&WJ has sought two reliefs, the first being a glidepath of between two and three years. As Digicel has set out above not only is the proposed six month timeframe reasonable but a longer timeframe would be unreasonable. Secondly, C&WJ has sought a stay on the initial price adjustment on the glidepath. It has obtained this together with the financial benefits that flow from the delayed implementation of the price reductions on 1<sup>st</sup> July 2017. Digicel can see no valid basis for the OUR to extend the transition to Pure LRIC pricing for fixed termination beyond 1<sup>st</sup> January 2018. In these circumstances Digicel believes that the initial price reduction should be effective as soon as possible but in any event Pure LRIC based FTRs should apply in Jamaica from 1<sup>st</sup> January 2018 so as to align the regulatory frameworks for the fixed and mobile sectors.

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