

## BASIC DETAILS

Consultation title: **Consultation on the Annual Work Plan and Budget 2016/2017 and Introduction of the Industry Levy**

To: [consultations@trc.vg](mailto:consultations@trc.vg)

Name of respondent: **Digicel (BVI) Limited**

Address (if not received by email):

## CONFIDENTIALITY

Please tick below which part of your response you consider is confidential, giving your reasons why

Nothing	Name/contact details/job title
Whole response	Organisation
Part of the response <input checked="" type="checkbox"/>	Details of Confidential Information : <b>3<sup>rd</sup> and 4<sup>th</sup> paras. on 5 &amp; The Appendix</b>

If you want part of your response, your name or your organisation not to be published, we can still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)? **Yes. Redacted version attached.**

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Name: **Rob-Mayo Smith**

Signed (if hard copy)



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August 10, 2016

Mr. Guy Malone  
Chief Executive Officer  
Telecommunications Regulatory Commission  
27 Fish Lock Road  
Road Town 1110  
Tortola

Dear Mr. Malone,

**Re: Consultation on Commission Draft Annual Work Plan and Budget 2016/2017 and Introduction of the Industry Levy**

Digicel thanks the Commission for the opportunity to comment on its draft annual Work Plan and Budget 2016/2017 and the proposal for the introduction of an Industry Levy. Set out below are our comments to the Commission's proposals.

**General Comments**

Digicel's general position on the proposal for the introduction of an industry levy is that it is simply not justified at this time. Firstly, the Commission's Work Plan does not disclose a need for the generation of additional revenues to fund the Commission's operations, especially to the extent contemplated by the proposed calculation of the industry levy. Secondly, if the levy were to be introduced at this time, the heavy burden imposed on operators would serve as an absolute disincentive to investment in the BVI and would act as a barrier to entry. We can confirm that Digicel would not be in a position to rollout out its FTTH network in the BVI for the next fiscal year.

As it relates to the Work Plan, we note that there is a general lack of targets and timelines associated with the projects and activities identified by the Commission, which reasonably give rise to the concern that these activities could go on indefinitely year after year even as operators continue to payout large portions of their revenues to the Commission. The Work Plan makes numerous references to the Commission merely considering whether to implement some regulatory initiative or the other with no specific

indication as to whether a draft policy will be developed and put out for public consultation during the upcoming year. Without reasonable targets and timelines, the Work Plan does not serve to provide the regulatory certainty that operators require to properly budget and strategise for the period.

We also note that the Work Plan appears to focus heavily on compliance and enforcement. Although we appreciate the need for compliance and enforcement, we note that not a single suggestion has been made by the Commission throughout the whole Work Plan 2016/2017 of the equally important need to develop electronic communications infrastructure in the BVI and to increase access to electronic communications goods and services in all parts of the Territory. Has the Commission even given serious consideration to initiatives by which it can increase levels of access to residents and visitors of the outerlying islands? This, when considered alongside the unjustified proposal to impose an industry levy on operators at this time, can easily lead to the conclusion that the Commission's priority might lie more so in the generation of revenues for its own use and for use by the Government rather than in the development of telecommunications in the BVI for the greater good of the public. The Commission should be careful to avoid this perception.

## Specific Comments

### 1. Nature and Scope of Function

We note that the Commission has identified as its goal the need *to ensure that the interests of consumers and businesses in the Virgin Islands are promoted and protected with respect to price, choice, quality of service and innovation in telecommunications services*. Although we consider this to be a noble policy objective, as the regulator of telecommunications in the BVI, the Commission's goals must necessarily include, as set out in the Telecommunications Act, firstly, the regulation of operators and ensuring fair competition among operators and secondly, the promotion of the systematic development of telecommunications in the BVI. We consider it important for the Commission to expressly acknowledge these two very important objectives as these must be sufficiently reflected in the initiatives proposed in the Commission's Work Plan.

### 2. Strategic Aims and Objectives 2016/2017

Digicel has observed that the Commission's strategic aims and objectives for the 2016/2017 period do not specific proposals to amend the Spectrum Management Framework to ensure that to ensure that every operator has access to sufficient spectrum not only to operate efficiently but also to expand its network and services.

Section 10 of the Spectrum Management Framework, which sets out the Commission's policy objectives for meeting the demand for spectrum for the provision of public mobile and wireless broadband services, identifies the Commission's goals in this regard as *meeting future requirements for spectrum to support fixed and mobile broadband services to meet the goals of stimulating the deployment of affordable widely available fixed and mobile broadband services and in ensuring that every capable operator has access to enough spectrum to operate efficiently*.

The Spectrum Management Framework then proceeds to describe in paragraphs 10.2 – 10.6, the mobile telecommunications market as of 2009, as one in which *inter alia no 3G or other*

*broadband mobile systems have been installed in the Virgin Islands. The fastest data rates are from EDGE technology introduced into GSM systems and EVDO Rev.0 deployed at 850 MHz by the only current CDMA operator CCT.*

It is hardly disputable that the market has changed considerably since 2009. All operators in the BVI have launched 4G services with mobile broadband service offerings that are far superior to those enjoyed by consumers in the BVI in 2009. In addition, within the last couple years, due to the increased shipping activity into and out of the BVI and the unauthorised usage of spectrum by seafarers, very acute levels harmful interference have been experienced in the 1900 MHz band, which affects more than one third of one operator's spectrum holdings in the BVI and over 60% of the spectrum which that operator uses to provide 4G services to its customers. This is well documented.

Therefore, Digicel considers that there is an acute need for the Commission to, as a matter of priority, make the required amendments to the Spectrum management Framework and or Action Plan to include an initiative whereby unused and unoccupied spectrum can be freed up and made available for re-assignment by a process of refarming or otherwise.

### **3. Introduction of the Industry Levy**

#### Implementation of Industry Levy a Disincentive to Investment

The International Telecommunications Union has observed<sup>1</sup> that *the most notable trend in the ICT sector is the reduction of fees to make services more affordable.....When first introduced in the telecommunications sector, annual recurring revenue charges were quite high. Regulators have recognized, however, that a reduction in the level of revenue-percentage payable to the government is prudent to avoid imposing barriers to entry.*

The Commission appears to be moving far left of international best practice in this area. Rather than seeking to reduce costs to operators, the Commission is minded to now introduce an excessive industry levy with the rationale that, under the Act, the Commission is intended to have two revenue streams from licensees i.e. the industry levy and royalties. The Commission is also quick to note that, for the past nine years the Commission has been collecting and using royalties alone to carry out the functions of the Commission. However, the Commission has not demonstrated the extent to which its statutory functions have been affected as a result thereof and has not reasonably proven that the additional revenues are required for the proper fulfilment of all the initiatives which it has scheduled for completion over the next period.

Although provision is already made in law for the implementation of the industry levy, the mere fact that the Commission has decided not to implement the levy up to this time is indicative of the recognition of the fact that the revenues that would have otherwise been applied to the payment of an industry levy would be better applied towards further investment in the development of infrastructure in the Territory. The Commission has now announced its intention

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<sup>1</sup> Telecommunications Regulation Handbook, 10<sup>th</sup> Anniversary Edition, section 3.4.7

to implement the industry levy but has not managed to properly demonstrate the need for the introduction of this levy at this time. Rather, the approach seems to be to extract as much revenues as possible from operators and service providers and to unduly apply the proceeds generated by the electronic communications sector to finance other initiatives the expense for which should properly be borne by the Government or by other private sector participants.

It is unfortunate that the Commission should expressly state that operators have had *more than enough time to recoup their capital investment, pay their shareholders and other stakeholders in the industry*. We consider this to be indicative of a myopic and rearward view to regulation with little regard being had to the need for further investment to develop electronic communications infrastructure and to increase the levels of access to broadband by consumers in the BVI.

According to our own calculations [*the details of which are disclosed in the unredacted version of Digicel's response to this Consultation*], Digicel's total annual regulatory payout to the Commission would increase to 13% of its annual revenues. This 13% levy far exceeds the total levies payable by operators in the Eastern Caribbean states, which on average, do not exceed 5% of gross annual turnover, including universal service contributions. We do not consider that the cost of regulation in the BVI, especially when considering the Commission's Work Plan 2016-17, is significantly higher than costs incurred in the Eastern Caribbean states so as to justify such a marked increase in the total regulatory levies payable. Therefore, we consider the proposed industry levy to be not only unjustified at this time but also unduly excessive. The Commission's proposals in this regard cannot be in the best interest of consumers and does not advance the development of telecommunications in the BVI in any way.

[*Specific projections were made to the Commission in the redacted version of Digicel's response to this Consultation as to the total investment that would be required to roll out a full Fibre to the Home (FTTH) network in the Territory*]. With this proposal to introduce the industry levy, Digicel's plans to roll out an FTTH network in the BVI would be compromised. Therefore, if the industry levy is implemented, the BVI would lose its quickest and best opportunity for true competition in the fixed broadband and subscription television markets.

#### Unlawful to Remit to Government Revenues other than Surplus

According to **section 59(6)** of the Act, the industry levy should be retained by the Commission for its own use. The Commission notes that the royalties collected in the past were used to support the work of the Commission and that, in future, a portion will be paid to the Government of the Virgin Islands. **Section 65** of the Act makes provision for a surplus on the budget approved for the Commission's expenditure for any financial year to be paid into the Consolidated Fund. Therefore, the only monies which can be remitted to the Government are monies which can properly be identified as a surplus after the Commission has satisfied its expenditure in any given year. No provision is made for monies to be proactively collected from operators and reserved for remittance to the Government. To do so would be unlawful as the Act simply does not contemplate this.

#### **4. 2016/2017 Work Plan**

Digicel's comments on the specific objectives identified in the Commission's Work Plan 2016/2017 are set out below:

**a. Ensure optimal spectrum efficiency, so that this resource is used for the maximum benefit of consumers and enterprises**

- We note that the Commission has added to its Work Plan 2016/2017 work that would already be complete before the start of financial year 2016-2017 i.e. the current spectrum award process. According to the current timetable, this process should be completed long before the commencement of the Commission's next financial year in October 2016. Therefore, this activity should be removed from the Work Plan 2016/2017 and appropriate deductions be made from budgeted expenditures for this period.
- As set out in paragraph 1.2, the Commission has expressed the intention to implement fees for existing spectrum allocations. Digicel was granted spectrum under its Licence dated December 17, 2007 for a term of 15 years. The Licence makes provision for the payment of spectrum fees to the Commission in accordance with Regulations provided, however, that such fees shall be reasonable in comparison with international standards and will be applied in a fair and equitable manner to all Operators using the radio spectrum.

**Section 94(5)** of the Act provides that *apart from any prescribed fees for initial applications, any person applying for a licence or frequency authorisation pursuant to subsection (4) shall not be charged additional fees for use of spectrum for which he had been licensed under the Telecommunications Act*. This section makes provision for the non-payment of spectrum fees in relation to spectrum held by operators before the Act came into effect. Therefore, since Digicel is the only operator whose land mobile spectrum assignments were made after the Act came into effect, Digicel alone would be required to pay spectrum fees for spectrum other than spectrum to be assigned as part of the Commission Spectrum Award 2016. The effect of this would be discriminatory and contrary to the Commission's responsibilities to ensure that spectrum fees are applied in a fair and equitable manner to all operators in the BVI.

Therefore, before the Commission can proceed to charge spectrum fees for existing spectrum assignments, the Commission should note, firstly, that such fees can only be implemented in accordance with Regulations. Secondly, the Commission cannot properly address charges for existing spectrum assignments until s. 94(5) of the Act is addressed by amendment to make provision for the application of spectrum fees on an even playing field.

- In paragraph 1.5 the Commission makes a very vague reference to an intention to take action to re-farm spectrum as necessary in the interest of efficiency and develop a schedule for the award of future spectrum. As highlighted in previous

correspondence to and in meetings with the Commission, there is an acute need to refarm previously assigned spectrum which is currently underutilised. In particular, the Commission is well aware of the need to refarm spectrum holdings in the 1900 MHz band to address the occurrence of harmful interference affecting spectrum in specific parts of the band. There is an acute and immediate need to refarm 1900 MHz spectrum and the Work Plan 2016/2017 should be revised to specifically outline this in detail – identifying each step which the Commission propose to take to complete this process and target dates for completion of key milestones.

**b. Facilitate continued development of a first class integrated telecommunications infrastructure that delivers choice, value and quality of service for consumers, enterprises and visitors to the Virgin Islands**

- None of the activities proposed by the Commission to be undertaken pursuant to this objective, although lacking in scope and definition, can, even if set out in greater detail, reasonably fulfill the Commission's stated objective of "facilitating the continued development of a first class integrated telecommunications infrastructure". The initiatives in this part, although they might augur well for consumer protection, do not at all support the Commission's objectives to develop telecommunications infrastructure in the BVI.

It is our considered view that this objective can best be met by the provision of incentives for investment and by the implementation of measures to spur competition among operators to develop much needed infrastructure for the provision of electronic communications services in the BVI. As set set out earlier, the implementation of an industry levy at this time will necessarily run counter to this objective.

**c. Reviewing the legislative framework and proposing the introduction of new or revised Telecommunications Codes and replacing historic legislation**

- There is no indication as to what policy objectives will guide the Commission's review of the legislation. All legislation, including subsidiary legislation, cannot be reviewed in the dark without sight of the overall policy objectives which it seeks to fulfill upon such a review. There is no indication as to what are the Government's objectives in relation to the role of telecommunications and ICT's in the growth and development of the BVI. In the absence of such overriding objectives, it is no surprise then that the Commission does not seem to be guided by policies which would then be given the force of law in regulation either by the amendment of the existing legislation or by the enactment of new legislation.

Digicel does not consider this undefined approach to legislative review to be suitable for the Commission's Work Plan 2016/2017. Policies must first be set. We respectfully recommend that, at this stage of development of telecommunications in

the BVI, policy objectives should lean heavily in favour of the development of infrastructure throughout the Territory to enable access to quality services at competitive prices.

**d. Ensure that the Commission is adequately staffed and compensated and has the appropriate financing framework to fulfil its duties under the Act**

- The Commission makes reference to the need to hire additional staff. However, the Commission does not identify the specific responsibilities which these persons would be expected to fulfill and the need for the performance of these functions to fulfill the Commission's objectives, as set out in the Work Plan 2016/2017. The question of adequate staffing can only arise if the Commission has properly identified policy objectives which need to be fulfilled and proposed measures to fulfill these policy objectives, with definitive scope, targets and timeframes. It is only then that the Commission can properly identify its human resource requirements.
- The Commission refers to the need to lease additional premises to accommodate increased staffing and security requirements. However, it has not demonstrated the need for additional staff. Based on what is set out in the Consultation document, we find it difficult to appreciate the extent to which any of the proposed regulatory initiatives would require additional staff. Accordingly, without proper justification for additional staff, there is no need to lease additional premises to accommodate an increased headcount. The Commission has also not properly outlined the need for security or explained why new premises need to be leased to give effect to these security requirements.

**5. 2016/2017 Budget**

We note that the Commission has identified budgeted expenditure for the period 2016/2017. However, we do not believe that the Commission is in a position to properly quantify its expenditure until its Work Plan for the period is precise. As stated earlier, the Work Plan is devoid of the necessary detail required to give a reasonable assessment of the expenditure that the Commission is reasonably expected to incur to complete the stated initiatives. When considered alongside the notable absence of financial statements for past periods, it is difficult for the Commission's estimates to be viewed with any reasonable degree of credibility.

We consider that the credibility of the Commission's proposals can best be founded in its ability to demonstrate a reasonable value-for-money analysis of its performance. What has the Commission done in the past periods to exhaust the revenues which it has collected by way of royalties? If these revenues were properly applied towards the fulfilment of regulatory objectives in the past, then there should be no issue for the Commission to demonstrate the extent to which the Work Plan 2016/2017 necessarily requires additional revenues for the completion of its initiatives. Therefore, we call upon the Commission to produce its financial statements for at least the period 2015/2016 and to provide an appropriate report of its work for this period.



On a more granular level, Digicel requests clarification and further information as to the following:

- i. The Commission made reference in its Work Plan to the need to hire additional staff. However, we note that the proposed expenditure for professional services is more than 100% the budgeted costs for staff. Please provide an explanation as to what these professional services include and as to the reason why, even with a proposed increased in headcount at the Commission, why the expenditure towards professional services remains so high.
- ii. Office Services and General and Administration are identified as two different line items. However, based on what is generally understood to be involved in office services and administration, the activities should, in fact, be the same. Therefore, there appears to be some duplicity here. Please explain the distinction between the two line items and justify the separate allocation of costs.
- iii. What is involved in the items identified as:
  - a. Maintenance Expenses
  - b. Special Project
- iv. Please justify the need for a Contingency of 10%.

In conclusion, Digicel calls upon the Commission to reconsider the proposal to introduce an industry levy at this time. Now that operators in the BVI are poised to launch mobile LTE services and real competition in the fixed broadband and subscription television markets shall soon unfurl, it would indeed be a retrograde step to impose on operators and service providers such a significant increase in costs, which the Commission itself is hard-pressed to justify. Rather, the Commission should focus on the development of policies and on undertaking reasonable initiatives which would incentivise operators to compete effectively and, in so doing, to develop infrastructure to increase access to electronic communications services throughout the Territory.

Yours sincerely,

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**Rob Mayo-Smith**  
**CEO, Digicel BVI Ltd.**