



Digicel Response to the Consultation by The Utility Regulation and Competition Office of The Cayman Islands on the proposed Information and Communications Technology Section 23(2) (Regulatory Notice) and ICT Licensing Template Updates

16th August 2019

We thank you for inviting Digicel to provide its comments on the proposed Information and Communications Technology Section 23(2) (Regulatory Notice) and ICT Licensing Template Updates. 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 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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General Observations

Digicel welcomes the opportunity to comment on the proposed Regulatory Notice and the proposed License Template.

While we have provided our comments below we believe that the approach adopted by the Office on this occasion may result in sub-optimal outcomes for operators, the Office itself and ultimately end users in Cayman.

The Office has clearly applied significant effort into developing two draft documents which are sufficiently well defined as to be capable of being directly published as final text.

However these documents contain a number of proposals which encapsulate deep fundamental approaches to the structure and direction of regulation within the Caymanian market. A number of these would ordinarily merit standalone consultation on the underlying principles before a proposed detailed text was drafted.

The Office's approach, while moving forward on a broad front, runs the risk that absent consideration of the underlying issues the proposed text is based on embedded structural approaches which are not appropriate for the Cayman Islands.

QUESTION 1: Provide your views on the proposed changes set out in the draft Regulatory Notice.

Service Based Operators

Digicel notes that the functional definition of the range of ICT Services would also encompass service providers which provide services to Caymanian end-users but who are not Caymanian based. However the definition of Service Based Operators (SBOs) is far more narrow and is in effect limited to those who lease facilities from Facilities Based Operators.

This creates a situation where SBOs who offer comparable services to overseas on-line platforms are subject to a stringent set of obligations, regulatory fees and administrative overheads that their competitors do not face.

If it is the case that the Office feels it is impossible to regulate such overseas service providers then it should consider removing or reducing the regulatory burden on those local providers who are providing service which as a class are effectively beyond the scope of the regulatory regime.

Digicel urges the Office to revisit both the definition and its consideration of whether regulation of some of these services is desirable or possible at a market wide level when all effective substitutes are taken into account.

License Duration

Digicel has significant concerns regarding the proposal to limit Facilities Based licenses to a term of 10 year. By their very nature such the provision of facilities under such licenses requires a significant level of investment both in the network itself and in the wider business including brand and marketing. This investment must be recovered.

The asset lives of duct, cables, towers etc. are in excess of the 10 years proposed in the draft notice. Brand equity takes a long time to build and the recovery period is similarly long.

Typical License durations in the region are 15 or 20 years and when considering where to invest the regulatory certainty that these longer duration licenses give is an important factor. A move to shorter term licenses (coupled with a trend towards increased regulatory burden) runs the risk that Cayman becomes a less attractive investment option.

The Office appears to have recognised this dynamic in its proposals for Special Zone Licenses for which it has proposed longer licence terms to encourage investment.

Special Zone Licenses

Digicel welcomes the fact that the Office has recognised that regulatory incentives can play a part on encouraging investment in underserved areas. Rather than commit to a specific licensing regime on foot of this consultation Digicel suggests that the Office defers finalising this scheme until it conducts a

separate consultation on what regulatory supports might be most effective in achieving the desired rollout. This is an important initiative and Digicel believes that affording Operators more substantive opportunity to business case the Office's proposals will be more likely to result in the desired outcome.

QUESTION 2: Provide your views on the proposed changes to the ICT licence template.

Condition 5 Compliance

There is a need for companies in all sectors, but in particular in the telecoms sector, to deal with the cost pressures wrought by the move to the digital economy, the reductions in revenues caused by competition and the investment load required to keep pace with reducing technology lifecycles. To achieve this outsourcing of services to specialist providers, use of cloud based solutions, strategic commercial agreements, innovative vendor financing models are commonplace.

Condition 5.3 contains a prohibition on relying on third parties for the provision of resources and systems. As outlined above this runs counter to overall market trends. In a market the size of Cayman it will also force un-necessary costs onto Licensees where resources and systems must be internalised and localised at below the efficient economic scale. It also reduces the resilience of licensees as they can no longer rely on the redundancy and flexibility afforded by cloud based services or outsourced commoditised resources.

This proposed Condition is not proportionate and will have adverse consumer outcomes in terms of an increased cost base for Licensees.

Condition 5.4 would appear to act as a blanket prohibition on licensees entering into agreements with associated Group companies or affiliates without the written consent of the Office. The Office has set out no reasoning for this material constraint on the commercial freedom of a licensee. Digicel can discern no justification for such a constraint.

The Office sets out no criteria for why such consent might be granted or withheld, the timelines for decisions or the status of existing agreements.

It is notable that such limitation would not apply to Licensees who happen not to have Group affiliates nor to transactions which do not involve the "Ultimate Controller".

Such a fundamental limitation to the commercial freedoms of licensees will adversely affect the investment choices of licensees and represents an unwarranted intrusion into the normal operation of the market. The fact that it will affect Licensees differently based solely of their corporate structure would also appear to render it discriminatory.

Condition 12 Assignment

Condition 12 removes an existing provision which allows for the assignment or transfer of the license on notification rather than approval where such assignment arises from an internal reorganisation and where there is no change in beneficial ownership. This is an important right under the existing license which facilitates Licensees planning and carrying out corporate rearrangements.

Digicel can identify no adverse market impacts or diminution of obligation or regulatory oversight attaching to the current License provision. Digicel would therefore ask that the Office does not excise the current facility from the future license template.

Condition 22 Outage Reporting

To the extent at the proposed revisions are solely the consolidation of other existing obligations into the License then Digicel agrees that there is an operational and administrative benefit to be derived from having all of the current obligations set out in one document. These additional existing obligations were in general imposed following a consultation process which afforded respondents to engage in a meaningful way with the detail of the Offices proposals.

Condition 23 Cyber Vulnerabilities and Threat Reporting

In addition to the consolidation of existing reporting obligations into Condition 22 the Office is also proposing to impose a range of new reporting obligations under this condition with only limited reasoning set out as to why the Office has proposed the specific parameters of the reporting. Digicel believes that this is not good procedural practice and runs the risk of the imposition of unworkable or un-necessarily expensive regulatory overhead on the Industry.

In Digicel's view the proposed reporting requirements are excessive. For example as formulated they would require reporting within 90 minutes of discovery of all vulnerabilities and threats whether or not they had actually resulted in a cyber incident.

There is no materiality threshold assessment for the likelihood of a threat or vulnerability actually being exploited.

The Office has not set out a rationale for why this level of regulatory burden has been proposed nor has it referenced whether similar reporting requirements on potential threats also apply in other critical sectors of the Caymanian economy such as banking, water supply, hospitals or airports.

Digicel notes that there is an overlap between the very wide catchment of cyber threat or vulnerability and an actual cyber-exploit that would result in a breach of personal. It is striking that in this second case of **actual** harm Digicel would have up to 5 days to report the matter to the Ombudsman under the provisions of the Data Protection Law.

Elsewhere the reporting obligations are considerably less onerous than the Office has proposed. In the EU under the Network and Information Systems Directive in a number of European jurisdictions (for example the UK and Ireland) Operators of Essential Services have up to 72 hours to report an *"incident which has a significant impact on the continuity of the essential service"*¹

¹ Section 11(1) of the UK Network and Information Systems Regulations 2018

Both the international and local comparators throw the Office's proposals into sharp relief and the proposal that licensees provide notifications about potential rather than actual cyber incidents in a truncated timescale would appear to be excessive and disproportionate.

Condition 24 Net Neutrality

Digicel is both surprised and disappointed with OfReg's proposals. Elsewhere across the region regulators have recognised that the issue of the Open Internet is one which requires fulsome consideration. Because of this they have commenced standalone consultation processes on the subject the open internet and the extent to which, if at all, Net Neutrality principles should be codified in regulation. Consultation processes are underway in Bermuda, Trinidad and ECTEL and have concluded in Bahamas.

Regulators in other jurisdictions have not incorporated consideration of Net Neutrality issues in their work programs presumably because they do not see a market requirement for intervention on this matter.

The only regional process to have concluded is in the Bahamas where the Regulator (URCA) has decided not to impose ex ante obligations but to adopt an ex post approach to assessing market and consumer harm as new commercial models and initiatives arise. Indeed it stated that *"URCA is concerned that ex ante regulation may adversely impact the sustainability of the ECS [Electronic Communications Sector] in The Bahamas"*.

At the recent CANTO 2019 Annual Conference Matthew Berry, Chief of Staff of the US Federal Communications Commission (FCC), outlined that in the 2 years during which the US Open Internet Order was in place there was a decline in telecoms infrastructure investment compared to previous years where it had not been in place. He further outlined that in the two years since its removal there has been an increase in investment. This is strong empirical evidence that the concerns expressed by the Bahamian regulator are well founded.

Digicel notes that the EU and the US did not impose regimes as restrictive as that now proposed by OfReg. Trinidad is also proposing an ex-post approach to market supervision and the ECTEL consultation on its proposal has as a starting point the explicit permission to use zero-rating.

While the Bermudian Regulator has consulted on the basis of a preliminary position closer to that of OfReg its consultation is about the issues which might inform any final market intervention rather than a consultation on a draft instrument.

The Office has grounded its proposal to impose strict net neutrality obligations in a previous Decision which is almost 10 years old and which the Office states it considers this to be still relevant. Digicel submits that much has changed in the last 10 years and that to proceed without a full consideration of the issues runs the risk of adversely affecting the market, damaging the case for ongoing investment in

telecommunications Infrastructure and potentially denying Caymanian citizens the opportunity to fully benefit from innovations which will be available in other less restrictive jurisdictions.

In order to encourage a wider discussion on net neutrality Digicel is providing its views on some of the issues which it believes are relevant to a proper consideration of the matter.

General

Since the height of public and media interest in the topic of net neutrality much has changed. Most strikingly there is now a widespread acceptance that all data is not equal.

Consider the categories of misinformation, disinformation, inappropriate content, hate speech, live streaming of the aftermath of crime scenes and natural disasters and information on self-harm, most of these are legal but have become unacceptable to distribute freely. The UK is introducing an age-verification system for online pornography in approximately 6 months time. Countries such as Germany have laws which require the prompt takedown of hate speech. The recently passed European Copyright Directive will distinguish between the use of “snippets” in search results compared to longer results which may trigger copyright.

The ad funded commercial model which in part drove the demands to ensure unfettered access to “free” services has come under scrutiny with data breaches and claims of inappropriate use of personal data calling into question whether such “free” services should be subject to strong regulation.

In the region operators, including Digicel, have signed up to the Canto Code of Practice on the Open Internet committing not to block or throttle legal content. Digicel has zero rated access to government websites to encourage internet adoption and the uptake of e-Gov services. In addition Operators are facing declining volumes and revenues from traditional services such as voice. They have been urged by Ministers to adapt and change their business model and find new and innovate ways of monetising their network investments.

The absolutism that characterised earlier net neutrality debates in the US and Europe where access to all on-line information was to be treated equally has waned. The recognition that all data is not equal facilitates a more nuanced and sophisticated consideration of the issues.

It is against this backdrop that the issue of net neutrality raised by the Office in this consultation must be considered.

Cayman is a small economy with a limited capacity to internally support indigenous digital sectors. Simply approaching the issue of the open internet without a detailed examination of whether it is appropriate is likely to lead to adverse outcomes for the telecommunications sector in Cayman, the overall Caymanian economy and its citizens.

Digicel is of the view that the Office’s analysis of the issues in respect of the topic of the “Net Neutrality” does not adequately take account of the specific requirements of the Caymanian economy. Digicel urges the Office to take account of the conclusions reached by Professors Greenstein, Peitz and Valletti in their 2016 paper “Net Neutrality: A Fast Lane to Understanding the Trade-offs”². In concluding their paper the authors set out that *“It should come as no surprise, therefore, that the thrust of the conclusions from economic analysis tilt against simplistic declarations in favor or against net neutrality. This suggests that bold and sweeping recommendations and interventions, given the current state of empirical knowledge, have a substantial chance of being misguided.”*

In July 2018 the Telecommunications Office of Trinidad and Tobago (TATT) issued a Discussion Paper on Net Neutrality and OTT Services in Trinidad and Tobago.³ Having considered the specific market conditions in Trinidad and Tobago TATT’s preliminary position is to adopt a light touch approach to net neutrality. In particular it is proposing an ex post approach to the issues of zero rating and paid prioritization where there is no absolute ban and regulatory intervention in cases only where there is actual harm. Digicel believes that a more in depth analysis of the specific of the Caymanian market would lead the Office to reach similar conclusions to TATT.

Market Dynamics

In terms of content neither of the main local network operators in Cayman have significant content portfolios and therefore the extent of their vertical integration is limited. Where there is original content this is locally or regionally focussed of the type that is often under pressure from large global content providers which have extensive original content portfolios but which is not reflective of smaller markets such as Cayman.

Telecoms operators in Cayman have made significant investment in their networks and now face the challenge of recovering this network investment.

Promoting Local Innovation

Digicel believes that there is value in shaping policies that ensure a level playing field for all, including emerging local content providers. However this is something that requires careful analysis.

For example will any emerging content provider realistically be able to compete with the likes of Google Maps which can rely on the data from phones which are powered by the Android App?

² <http://www.nber.org/papers/w21950.pdf>

³

https://tatt.org.tt/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=1125&PortalId=0&TabId=222

As Greenstein, Peitz and Valletti outlined in their 2016 paper⁴:

“One often hears the concern that strict net neutrality rules would help small innovative firms because large content providers are better able to pay for prioritization. However, as large content providers have other means to deal with the congestion issue, it may instead be the small innovative firms which need the possibility of prioritized access, because it does not require larger forms of up-front investments which they can ill afford.”

For example large well established video content providers may have enough customers and sufficient cash flow to be able to invest in local content caches. These mean that their services are not exposed to off-island capacity constraints and so can consistently offer high levels of Quality of Service. To be able to compete smaller market entrants may be willing and able to pay for prioritised access on an “opex” basis which allows spend to be matched to uptake until such time as they reach sufficient scale to be able to afford the capital intensive course of implementing caches.

In addition the market for local content providers is likely to be too small to foster commercial success if the local market of broadband users does not expand. Therefore policies which encourage network investment and broadband adoption also promote local innovation by content providers.

In promoting local innovation the Office should be realistic as to the extent to which local App developers are likely to be hindered by an overly strict approach to net neutrality. The likely initial users for such local apps are likely to be in the local market. Therefore policies and regulation which foster network investment and coverage are going to increase the addressable base for such Apps to a far greater extent than overly strict net neutrality rules which will have limited effect on uptake.

Consideration of Market Forces

It is notable that the Australian regulatory has opted against imposing net neutrality rules in part on the basis that market forces obviate the need for intervention. The Office has not assessed the extent to which attempts by a Licensee holder to stifle or restrict access to content desired by consumers is a commercially viable course of action in the light of competitive pressure.

Digicel strongly believes that market forces act as a powerful constraint on operators. If there is consumer demand for services attempts to place constraints on them are almost always circumvented. While network operators initially fought against OTT voice services these are now often a zero rated feature network operators’ data plans. This type of commercial offering is valued by customers and is seen by operators as a commercial differentiator. This shift has not come about through regulatory intervention but rather through competitive pressure. It is notable that while net neutrality rules might have prevented network operators blocking OTT voice they would also have prevented them offering packages which have

⁴ <http://www.nber.org/papers/w21950.pdf>

zero rated elements. These services are popular with consumers and encourage uptake and engagement with digital services.

It would appear therefore that many of the concerns which the Office might have would be addressed in the normal course by market forces and that the wide ranging ex ante intervention proposed by the Office is far in excess of what is required or desirable.

Section 6(4)(b) of the Utility Regulation and Competition Law sets out that the Office shall “*rely on self-regulation and co-regulation, where appropriate*”. In this context Digicel points out to the Office that operators across the region including Digicel have committed to abiding by the CANTO “Code of Practice on Safeguarding the Open Internet”⁵. This commits operators to not throttling or blocking legal content. Since the adoption of this code in 2016 Digicel is unaware of any suggestion that Operators have not fully respected its provisions. In light of this evidence of self-regulation the Office’s proposals for market intervention to address the same issues would appear to be in excess of what is permitted by virtue of Section 6(4)(b) of the Utility Regulation and Competition Law .

Is Market Intervention Necessary?

Digicel points out that net neutrality rules were only in place for some 2 years in the US before they were revoked. There is no indication that the lack of net neutrality rules for the entire period up to 2015 nor their absence in the period since their revocation has impacted the development of the internet ecosystem or inhibited the ability of end users to take advantage of it.

Similarly the lighter touch net neutrality rules in the EU than were in place in the US and the absence of net neutrality rules in Australia have not raised concerns about the potential harms relied by the Office as the justification for its intervention actually crystallising. Across the Caribbean region there are countries of similar scale and economic structure as Cayman which do not have net neutrality regulation in place and again there is no indication that the potential harms relied by the Office as the justification for its intervention have any meaningful prospect of materialising.

The ex post approach proposed by TATT would meet the “*necessity*” threshold as it means that there is intervention only where the specifics of a particular issue require it.

Effects of Net Neutrality

The difficulty with assessing evidence for the investment impacts of net neutrality rules is that each jurisdiction has different market conditions and therefore direct comparisons between countries with and without net neutrality rules are not readily made.

⁵ (<https://www.canto.org/wp-content/uploads/2014/12/20160523-Code-of-Practice-on-Safeguarding-the-Open-Internet-002-1.pdf>)

The most high profile country with “before and after” data from the introduction of net neutrality rules is the United States of America. The FCC found that the introduction of such rules had inhibited investment by network operators. While some have questioned the basis of the calculation it remains the fact that the statutory regulator made this finding. On the counterfactual Digicel is unaware of any situations where it is claimed that the introduction of net neutrality rules spurred network investment. We have on one hand contested data arguing that net neutrality rules adversely impact investment against no data which supports the proposition it does not. Indeed as outlined earlier in the this submission the FCC reports an increase in investment in telecoms infrastructure since the rescinding of the Open Internet Order.

It should be remembered that the US only had Net Neutrality rules in place for some 18 months before they were removed again. The fact that largest internet companies in the world are based in the US demonstrates that the lack of net neutrality rules has not been a limitation on innovation and growth of on-line companies.

The EUs approach to the issue has been lighter touch than the US with commercial practices such as zero rating being permitted provided they do not cause market harm. It is striking that the EU’s approach has not considered net neutrality issues in isolation. Rather its intervention is part of a wider framework dealing with the digital economy. This framework includes strong and generally applicable data protection rules, strong enforcement of competition law against on-line providers, equal application of consumer protection rules to online platforms, holding online platforms to similar standards for hosted content as traditional media and moves to ensure that on line players pay their fair share of tax. Digicel believes that until Cayman is in a position to also follow such a holistic approach an overly restrictive implementation of net neutrality principles is likely to lead to adverse outcomes for the Cayman economy and society as the digital divide widens as a result.

In the region the Telecommunications Office of Trinidad and Tobago (TATT) has consulted on the issue of net neutrality⁶. It is proposing to adopt a light touch approach. This will not have blanket prohibitions on most practices but instead will permit them unless they cause either competition or consumer harm. It has based its views on a reasoned assessment of the conditions of the local market. Digicel submits that these market conditions are not dissimilar to those that pertain in Cayman. A similarly reasoned examination of the ECTEL evidence should lead to similar conclusions

Zero Rating

While proponents of a prohibition on zero rating can construct scenarios with negative outcomes. It is equally possible to construct positive scenarios. For example a bank wishing to launch and promote on-line banking may be prepared to “sponsor” the data associated with their App so it is free to the end user.

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https://tatt.org.tt/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=1125&PortalId=0&TabId=222

As the ability to conduct on-line purchasing is a key enabler for participation in the digital economy there is arguably an overall consumer welfare benefit as it promotes the adoption of on-line banking.

ISP initiated zero rating of messaging apps (which arguably compete with the ISPs traditional voice and SMS services) would be justified as it promotes the penetration of smartphones which in turn facilitates the use of other data services.

Operator initiated zero rating of educational sites such as Wikipedia and the zero rating of government websites act as a method to facilitate the adoption of e-Government services.

The inclusion of Caymanian websites, applications or content within data bundle allowances could help offset scale disadvantages that indigenous businesses face when attempting to compete with global content providers.

Digicel notes that zero rating in the form of “loss leaders” or inclusive offers are common in other sectors such as supermarkets, branded beverages included in “combo meals” in fast food chains etc. These are not harmful to either competition or consumers in principle only where they are accompanied by some type of exclusionary mechanism.

In the on-line environment the “ad funded” model for many social media platforms “zero rates” the platform access and use for the end user. If in principle it is an acceptable business model for the likes of Facebook and Google then Digicel cannot discern why it should be prohibited as a business model for ISPs.

The Office has a key role in representing the interests of Consumers. While exercising this function it must thread a fine line between protecting these interests and substituting its own preferences and requirements for those which would be selected by Consumers if they were presented with choice in a differentiated market.

Consumers may display either a preference for particular offerings or a low priority for issues such as voice QoS (as demonstrated by their increasing use of unregulated OTT voice services with no defined minimum quality standards). In representing Consumers the Office should give a high weighting to the empirical evidence of Consumer preferences as reflected in the uptake of data plans which display features such as zero rating.

Digicel believes there is merit in ensuring the possibility of the use of ‘sponsored data’ whereby a business could pay Digicel to make data available to customers for a lower/zero price. Digicel notes that this commercial model is not dissimilar to that used by on-line platforms where services are provided “free” to end users but paid for by advertisers.

The blanket approach proposed by the Office where the default position is that zero rating will not be permitted means that it would prohibit circumstances where zero rating would provide direct benefits to end users, facilitate investment recovery, lead to competitive differentiation by ISPs increasing consumer

choice, prompt innovation in other sectors of the Caymanian economy or allow local companies compete more effectively against global Content Delivery Networks.

In the absence of evidence that the loss of such potential benefits are clearly outweighed by the potential harms outlined by the Office then Digicel does not believe that the interests of Caymanian citizens, the Caymanian electronic communications sector or its wider economy are served by the Office's proposed approach.

Traffic Management.

Digicel believes that reasonable traffic management at the technical level is necessary for the proper operation of networks. To deny network operators the tools they need to ensure network and service integrity and continuity runs the risk of adverse outcomes for the users of networks.

Examples where traffic management was necessary to protect the network and wider service quality include the period immediately after the 911 attacks in the US where some non-US based network operators had to throttle traffic directed at US news outlet sites as the volume of traffic started to congest international links. Similarly facebook's turning on of its video autoplay feature resulted in a step-change in peak network utilization of over 10% for some network operators. Where this caused congestion throttling of traffic from the facebook domain address was a necessary measure to protect other services. This was required to protect both congestion on international links and on the mobile air interface. Finally Netflix's decision to make all episodes of an entire season on its series "House of Cards" available at the same time also resulted in a step change in peak network usage as viewers "binge-watched" the entire series over the release weekend. While all three of these examples are caused by external shocks two of them are due to commercial decisions of the content platforms to unilaterally change their service offering. It would not be equitable to allow the content providers the freedom to have material impacts on networks without giving network operators the flexibility to protect other content providers and customers where these unilateral decisions have adverse impacts on others.

Blocking, throttling or prioritisation of internet access traffic.

In relation to blocking and throttling Digicel has pointed out earlier in its response that Operators have already committed to a policy of not blocking or throttling legal content. Users may be willing and desire to pay for the blocking of certain lawful content. Examples might include network level ad-blocking, parental controls relating to content that they consider inappropriate but which is otherwise lawful. Where un-filtered versions are also available from network operators it is not clear that either competition or consumer harm arises from such user endorsed blocking. Similarly users may wish to restrict the proportion of their data allowance that is consumed by video content. In this scenario package plans which offer to throttle certain high usage content types to limit bundle consumption may be perfectly acceptable from a competition and consumer welfare perspective.

The Office should not place any restriction on consumer selected blocking or throttling provided there is no foreclosure or other clearly identifiable market harm.

Digicel does not unilaterally block any content. It is our position that if we receive requests from either competent authorities or verified rights owners to block or restrict access to IP addresses hosting unauthorised or illegal content we would deal with such requests on their merits. While we have not received requests in Cayman we have received requests from verified content rights owners in other markets to block IP addresses that were used to hosted unauthorised content. Digicel envisages that should market demand arise we would be willing to support offerings which allowed user specified restrictions on the range of accessible websites, such offerings might include parental controls, business accounts with access to white lists of sites, network supported ad blocking to compete with app enabled ad blocking and security products for IoT devices restricting access to sites hosting the service as a security feature.

Paid for Prioritization

In relation to paid for prioritisation for example a future internet of things subscription based application relating to home or personal security may wish to offer prioritized data for alarms etc. in such a case there would not necessarily be foreclosure nor cause consumer harm.

Content providers and end users may be willing to pay lower prices for deprioritized data. In the case of the alarm application outlined above for prioritized data the content has a time critical component. Similar monitoring devices could be used to capture non-time critical data. For example environmental data that is processed retrospectively to determine energy efficiency. In this scenario the application provider may be prepared to accept de-prioritised data in exchange for a lower data price. As the number of connected devices grows this type of commercial incentive may prove important in offering non-technical mechanisms for shifting network traffic spikes to alleviate congestion.

The flexibility to offer this commercial service could potentially spur innovation rather than inhibit it.

Differential Quality of Service

As regards differential quality of service it is already widely accepted that fixed ISPs are permitted to charge differently for different speeds of access. For example a 25Mbit/s connection may be cheaper than a 50Mbit/s connection. If the end user only requires the higher speed for certain content (for example streaming a UHD sports subscription) it may be that forcing them to pay for the higher speed for all content places the preferred content outside of their ability to pay.

Similarly low latency required for on-line gaming or other applications may be too expensive to apply ubiquitously at a network level. In this scenario the inability of end users to selectively pay for the enhanced capability might prevent the facility being offered at all.

Given the nascent nature of 5G deployment it is likely that new commercial models for 5G based services will emerge. Some of these may rely on prioritisation or de-prioritisation. It has been said that ISP shouldn't pick winners this also holds true for regulators. The Office should be careful not to prejudge the market and restrict potential avenues of innovation by introducing rules which embed and reinforce current market structures.

Access to information and content

Much of the argument in favour of Net Neutrality talks about access to information or services and the ability of an ISP to limit or restrict such access. These arguments are couched in a way which implies there is a single ISP unconstrained by competitive pressures from other ISPs. In reality in Cayman this is not the case and operators face constraints from market competitors.

Such arguments often set out a number of hypothetical situations regarding the restriction of access to information by ISPs with few examples of where this occurs. On the other hand these arguments rarely if ever set out an analysis of the actual role that social media platforms play in providing access to information. Some 4 in 10 Americans get their news via facebook (<http://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/>). Issues with the editorial policies of such platforms have been the subject of media reports and their acceptable use policies and so called "community rules" represent greater actual constraints on end-users' access to content than the hypothetical scenarios set out in respect of ISP. Further as such on-line platforms have high penetration across users of all ISPs in a market the impact of such constraints is higher than any potential restrictions introduced by a single ISP.

By way of another example, following the introduction of Data Protection legislation in the EU we have seen many examples of US based content providers restricting access to their content for European consumers rather than give these end users the privacy rights they have been afforded under the law.

In assessing the proportionality of imposing ex ante restrictions on operators in the form of net neutrality obligations the Office must weigh any evidence that such behaviour is not only possible but probably and must also consider whether such behaviour is likely to be effective given the plurality of information sources on the internet and also whether any such behaviour is in fact reflective of the behaviours of content platforms as a whole and is therefore a typical part of the internet ecosystem. If it is then unduly restricting ISPs from following the norms of the wider internet would appear to be unjustified.

Conclusion

The concept of net neutrality is just that, a concept. It is not an immutable law of nature. The Office should take an evidence based approach to considering the issues and must also take account of the specific circumstances of the Caymanian market.

In this context The Office should adopt a cautious approach to net neutrality and not intervene until there has been a full and careful consideration of what is appropriate for the specific circumstances of the Caymanian economy.

Annex 5 Subscriber Protection and Privacy

There is a substantial overlap between Section 4 of this Annex (Protection of Customer Information) and Licensees obligations under the provisions of the Caymanian Data Protection Law which is horizontal legislation with general effect.

Given this fact Digicel does not believe that it is any longer necessary or appropriate to include these provisions in the license.

QUESTION 3: Provide your views on any other matters you consider relevant to this Consultation.

Digicel has concerns that the Office continues to focus on the local ICT sector when considering the utility or proportionality of proposed obligations.

While the Office has recognised the impact of on-line (and usually offshore) services in its proposals on net neutrality it does not take into account the disparity between the lack of regulation on on-line service providers compared to local licensees. Licensees must now compete with messaging, voice and video content platforms such as WhatsApp, Netflix and YouTube. These are subject to no quality standards, no content control and no reporting obligations.

The Office's proposals in effect penalise Licensees for choosing to maintain a presence in Cayman. They impose increasing levels of regulatory burden and cost and constrain Licensees' commercial and operational freedom compared to their on-line competitors.

There is a need for a fundamental reset of the regulatory approach. The proposed licensing regime makes the distinction between facilities based ICT providers and ICT service providers. As an initial activity the Office should reduce the level of regulatory burden on local ICT Service Providers to the levels that off-shore platform currently enjoy. Either an obligation is intrinsic to the correct supervision and operation of the market or it is not. If WhatsApp does not report on outages such as the one in July 2019⁷ then why should local voice and messaging service providers have the operational overhead and cost of such reporting.

In the alternative if such regulatory supervision is required then the definition of ICT services should be expanded to include such on-line providers.

⁷ <http://www.iphonehacks.com/2019/07/whatsapp-facebook-instagram-global-outage.html>

QUESTION 4: Do you agree that the Office should offer the ICT licence template to applicants for new ICT licences, and applicants for the renewal of existing ICT Licences only? Please provide a detailed explanation of your reasoning. See paragraph 86

In general Digicel would not support the early termination of licenses as a means to align licensee's obligations under a new framework. However the new template contains material and adverse conditions on licensees as compared to the current licensing scheme. This will give rise to discriminatory regulatory treatment as between those licensees subject to the new template as compared to those on the current framework.

Imposing these differential conditions would appear to be incompatible with the Office's own obligations under Section 6(4)(f) of the Utility Regulation and Competition Law.

Digicel also notes the Office's indication at paragraph 85 of the Consultation Document that *"most of the ICT Licences would be replaced in the normal course over a relatively short period of time"*. Therefore Digicel suggests that where the new template imposes new or additional obligations that these would not become effective until a date which corresponds to the *"short period of time" referenced by the Office*.

Such an approach would ensure equity in the market while at the same time allowing an orderly transition to the new template.