



**FLOW's COMMENTS ON COMMENTS TO
EASTERN CARIBBEAN
TELECOMMUNICATIONS AUTHORITY'S
(ECTEL's)**

**Draft Mobile Electronic Communications
(Roaming Services) Bill and
Draft Mobile Electronic Communications
(Roaming Services) Regulations in ECTEL
Member States**

January 16, 2017

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1. Introduction

- 1.1. Flow agrees with Digicel regarding ECTEL's failure to observe best practice in carrying out this consultation. The lack of interrogatories designed to unearth useful facts about the Roaming Market(s) and failure to subject its background research for Public scrutiny has materially undermined this consultation process. As a consequence, there is an appearance that ECTEL has approached the issue involving roaming services with a strong bias.
- 1.2. As stated in our initial response, and in support of Digicel's comments, ECTEL's referenced analysis which compares a roaming call to an in country on-net call is materially flawed. Given its reliance on such a comparison (and absent supporting data), ECTEL's conclusion about the existence of "large premiums" in the market for roaming services is unsubstantiated. Although ECTEL's analysis found that large premiums only existed "*in some cases*", it felt obliged to conclude that fair pricing and competition were not being promoted (states that roaming costs are prohibitive) in the market for roaming services.
- 1.3. The more procedurally appropriate approach would have been for ECTEL to consult on the markets for retail and wholesale roaming services in an open and transparent manner. This approach would yield more and better information resulting in better Policy and Rulemaking. For example the European Commission closely analyzed and consulted on its market(s) for roaming services prior to proposing specific regulatory remedies. The result was a measured and timely implementation based on market dynamics and facts. ECTEL's seemingly shorthanded approach is disturbing and could lead to inappropriate regulations. It is important that the Regulator be seen as transparent and that its decisions be based on evidence.
- 1.4. In this document FLOW's responds to Industry comments on a clause by clause basis. However, we also highlight critical issues that may not have yet been raised due to the failure of ECTEL to grant the request of Industry members to extend the deadline to respond. FLOW considers that it is the interest of consumers that this transparent approach be taken, since they will be directly or indirectly impacted by any regulations promulgated.
- 1.5. Please refer all questions or comments to Charles Douglas at charles.douglas@cwc.com.

2. FLOW's Clause by Clause Comments on Comments regarding the proposed Roaming Services Bill

2.1. Clause 3 – Application

2.1.1. FLOW agrees with Digicel's concerns regarding this clause.

2.1.2. The application of this Bill needs to be spelt out more clearly in this proposed Bill. Section 3(1) should be reworded to read, ***"This Act applies to a licensee within the ECTEL Member States who provides access to a public mobile electronic communications network for outbound roaming services to another license within the ECTEL Member States."***

2.1.3. It should be made clear that this Bill does not seek to regulate inbound roaming services. To be clear, such inbound roaming services include the receipt of all calls, SMS/MMS messages or data packets by an ECTEL licensee's subscriber outside of her home market, but within an ECTEL Member State.

2.1.4. On the other hand, it should make clear that the Bill applies only to a subset of outbound roaming services: calls/sms/mms and data services initiated by an ECTEL licensee's subscriber outside of his home market, but within an ECTEL Member State y, and terminating to any ECTEL destination. Any other understanding is problematic, as it with involve ECTEL's seeking to regulate areas outside of its jurisdiction or in an unreasonable manner..

2.1.5. FLOW maintains that commercial roaming agreements entered into with international partners are outside the jurisdiction of ECTEL. As such, ECTEL should not seek to regulate such arrangements or mandate rates relating to any associated services.

2.1.6. The operational implications of the proposals outlined within this Bill are significant. We agree with Digicel that six months is insufficient time to allow for licensees to modify their billing platforms, customer information systems, commercial plans, enter into contractual agreements and the like. Furthermore, there are a number of proposals that require Rulemaking that must properly be the subject of Industry consultation. These include a transparent dispute resolution mechanism, a determination of an appropriate pricing methodology, if

warranted, and a consultation on how the proposed price cap proposal is best implemented, if at all. These and other considerations must first be critically evaluated and resolved. Therefore, first, the Bill must be passed; second, issues on the Act's implementation must be properly vetted and resolved; and third, once the terms are final, all ECTEL licensees must be provided a glide path of 24-36 months for implementation.

2.2. Clause 4 – Roaming Notification

2.2.1. FLOW notes Digicel's comments on clause 4.

2.2.2. FLOW accepts the provision of this clause and supports the need for a licensee to properly to notify its subscribers when they are roaming. We do not object to the notification being free of charge. For the record it is already a practice of FLOW to give such notification to its customers.

2.2.3. However, as demonstrably acknowledged by the European Commission there is a corresponding obligation on the part of subscribers to understand how roaming works and how to effectively deactivate the relevant roaming features on their mobile devices. They also have an obligation to understand their roaming contract with their service provider, including the applicable roaming rates for the international zone(s) that they will visit. To the extent that subscribers consume the service they are also responsible. We propose that the Bill introduces wording to this effect.

2.3. Clause 5 – Roaming Charges

2.3.1. FLOW notes Digicel's comments on clause 5. We do not believe that postpaid customers should be subject to different roaming rules than those applied to prepaid customers. The requirements should be sufficiently simple and helpful to satisfy the reasonable needs of both groups.

2.3.2. The condition that the licensee is required to charge a customer roaming charges no less favourable than the charges specified in the Regulations needs to be curtailed. Additional language requiring that such rates should be the subject of Industry consultation needs to be added.

2.3.3. In section 5(2) the language proposes that "*A customer and a licensee may agree on a billing cycle cap...*" However, it is not clear what ECTEL means by "*billing cycle cap*", as it is not

defined. Typically a billing cycle refers to the intervals at which a customer is billed and not a cap on the charges that are allowed to be incurred on the customer's account before the service is terminated. At present based on the needs of customers, licensees already place a commercially agreed cap on the charges that are allowed to be incurred when a given subscriber roams. This prevents bill shock. It is to be noted the cap place on charges incurred is not tied to or constrained by the customer's billing cycle. We propose that ECTEL explains its intension for this clause. However, our recommendation is that it is removed. ECTEL should not be prescriptive in this matter.

2.3.4. To the extent that a billing cap (not a billing cycle cap) is agreed, FLOW agrees that it is appropriate to notify a customer when he has reached a *“prescribed percentage of the billing cap”* and also agrees that the Licensee ought to reserve the right to suspend or not suspend the service when the billing cap is exceeded (section 5(4)).

2.4. Clause 6 - Emergency calling

2.4.1. FLOW notes Digicel's comments on clause 6. We agree that this clause is unsatisfactory and should be reworded.

2.4.2. Current practice by the GSMA and conformed to by the mobile Industry is that mobile handsets that **are roaming** should be allowed to access emergency services free of charge. This applies whether the roamer has credit or not. This provision is already in place and we do not object to its inclusion in the draft Bill.

2.4.3. We recommend that ECTEL implement a policy which standardizes the dialed number(s) for emergency service access across ALL the ECTEL Member States. This is a quick win and will reduce the administrative burden to ensure that customers are informed.

2.4.4. Section 6(4) states *“A licensee shall make its network available for emergency calling to a customer's provider, notwithstanding a wholesale roaming agreement.”* FLOW strongly disagrees with this provision on several counts. Such as;

2.4.4.1. As a general rule, licensees within the ECTEL Member States, should require a roaming agreement to roam on each other's network period. Roaming requires that the network in the country being visited identifies the

home network of the subscriber and validate its legitimacy. Typically, once validation occurs, the visited network facilitates roaming. Such validation should properly be the subject of an agreement.

2.4.4.2. The extent to which a subscriber can roam on the network in the visited country is not exclusively dependent on the licensee of the visited network but also on the licensee of the home network. This clause effectively creates an onerous obligation on the licensee of the visited network. As such it should be removed.

2.4.5. FLOW objects to the proposal at section 6(5) which states; “*A licensee shall make its network available to another licensee through national roaming for emergency calling.*” Though seemingly innocuous, this provision fails to take into account current practice and also has the potential to fundamentally impact how mobile handsets are made available to subscribers within the ECTEL Member States.

2.4.6. In the first instance, the requirement to facilitate access to emergency services via national roaming is not based on what happens in reality. As far as we are aware, spearheaded by the GSMA community, of which we are apart, **mobile networks by design and implementation ensure that once a mobile handset is powered on, it can successfully dial the emergency number of the country in which it is located, with or without a SIM card inserted.** In other words, a mobile phone does not need to have a service from a designated carrier or be on the network of another carrier to make an emergency call. This reality, renders this clause unnecessary. The need for imposing a national roaming requirement does not arise in our view.

2.4.7. However, clause 6(5) as proposed is not harmless. In effect, mandating national roaming for emergency services would require networks to no longer be able to lock their SIMs and subsidized handsets to their mobile network(s). Given the high costs of handsets, Telco’s materially subsidize such cost(s) to their customers in order to facilitate their access to the service. In return Telco’s lock the handsets to their network, since the usage of the handset on the network is required to recover the cost over time. If handsets cannot be locked to the network, the subsidies would be removed, leaving customers facing high handset costs and for some an inability to access mobile service.

2.4.8. Should heavily subsidized mobile handsets and SIMs be unlocked, a customer could purchase a subsidized handset from one service provider (motivated by a sale or promotional deal) and easily switch its use to that of a competing network. Even worse, an entity could purchase low cost phones within the ECTEL Member States and ship them elsewhere for use. This kind of arbitrage would hurt service providers and by extension consumers. For national roaming to be facilitated, all mobile phones would need to be unlocked and the roaming service be the subject of a commercially agreed roaming agreement. Seeking to impose a national roaming requirement in this manner is problematic. However, we remain convinced that the requirement is unnecessary. More in-depth consultation is required by ECTEL on this issue should it conclude otherwise.

2.5. Clause 7 – Inadvertent roaming

2.5.1. FLOW considers that Digicel’s failure to comment on clause 7 requires it to point out deficiencies that need to be addressed.

2.5.2. FLOW agrees with clause 7, with the exception of section 7(3), which states; *“A licensee shall take reasonable steps to protect a customer from paying roaming charges for inadvertent roaming.”*

2.5.3. We believe that this requirement is vague and is likely to make unclear what is required of the licensee.. To the extent that the licensee takes all reasonable steps to; protect the customer from inadvertent roaming, provide information on how to avoid it and not engage in traffic steering techniques **“to cause it to occur”**, it has properly discharged its responsibility. In such circumstances, should inadvertent roaming still occur and the usage is billed for, it seems very unreasonable to impose a further threshold which seeks to hold the licensee to **“take reasonable steps to protect a customer from paying roaming charges for inadvertent roaming”**. How will the Licensee know that this has occurred if a complaint is not made? It cannot be reasonable to expect that it will create some system to detect this occurrence (should it be even possible) such that it can “protect” the affected customer from paying for the service received.. It is fundamental that services consumed are paid for when due. If there is a bill query (before or after payment) each licensee already has a duty to promptly investigate the issue and make restitution or not, based on their findings. This requirement is onerous and unwarranted and should be removed.

2.5.4. Section 7(3) cannot be properly assessed by objective means and merely sets up a licensee to be fined for non-compliance to the Bill, should it collect payments for inadvertent roaming.

2.6. Clause 8 - Wholesale roaming agreements and charges

2.6.1. FLOW agrees with concerns raised by Digicel.

2.6.2. FLOW is unclear of the intent of section 8(2). It states; ***“Where a wholesale roaming agreement exists a licensee shall grant the other licensee or provider access to all network elements and associated facilities, relevant services, software and information systems, necessary for the provision of roaming services to its customer.”***

2.6.3. Subject to a wholesale roaming agreement, when the ‘home network’ from say St. Lucia, requires a service on behalf of its subscriber that is visiting Dominica, , the ‘visiting network’ in Dominica allows the subscriber to be temporarily setup on its network ‘as a visitor’ and the relevant inbound or outbound service(s) are provided. The customer receiving the service is subsequently billed by his home network in St. Lucia. The network in St. Lucia then pays the wholesale fee charged by the network in Dominica for providing the service.

2.6.4. In the scenario above, it should be clear that the network in St. Lucia effectively buys a service for its subscriber from the network in Dominica. Further, the network in Dominica, provides the service (as contracted) completely independently of the network in St. Lucia. As such, why is section 8(2) entitling the licensee that is seeking the roaming services ***“access to all network elements and associated facilities, relevant services, software and information systems, necessary for the provision of roaming services to its customer”***.

2.6.5. This seems excessively intrusive and unnecessary. Especially since such a licensee it is not contacting for unbundled elements but the service that is subject to contract. The service is either provided as contracted or not. If it is not provided or properly provided then the remedy would be available under the contract. ECTEL’s proposal seeks to provide a licensee seeking roaming service(s) an unfettered access to the network elements, information systems etc. for no apparent reason. It does not outline the purpose of such access or the conditions under which such access is justified. This vague and open ended provision is likely to be problematic and result in unintended outcomes. It

needs to be reworded to require that roaming service providers take steps to ensure that its roaming service to any other provider is of no less quality than similar services provided to its own subscribers and/or that provided to its sister company, subsidiary or affiliate..

2.6.6. The Bill needs to make clear that any *“prescribed charges”* for wholesale roaming services need to be the subject of consultation. FLOW is of the view that wholesale roaming charges should not be regulated at this time. The current status of the market for roaming services does not warrant such regulation since a proper consultation is yet to be done on the markets. It is inappropriate to impose a regulatory remedy to a “problem” that has not been established based on evidence. Section 8(4) proposed that *“A licensee shall reduce retail roaming charges to reflect a reduction in wholesale roaming charges.”* FLOW asks that before ECTEL seeks to reduce retail roaming rates it should share its research and analysis with the Industry for further consultation. We recommend that this proposal be worded to give the relevant Regulatory Bodies the flexibility to require the complete pass through of any reduction in wholesale roaming charges or not. An analysis of the differential in the costs for services to a suite of destinations may require rate balancing going forward. Furthermore, the ECTEL Member States do not have the economies of scale or market dynamics comparable to Europe such that a reduction in roaming retail rates will see a corresponding increase in the use of roaming services, and thus offset any revenue loss.

2.6.7. Of necessity, the Bill should also include a provision for the use of a glide path to reduce retail roaming rates should such a reduction be warranted after a robust consultation process. This allows companies to adjust their operating model to account for the procedural and system changes, as well as the loss of revenues that is likely to result from any such rate reduction.

2.6.8. FLOW agrees that Public Policy should not have the detriment of customers as its aim. However FLOW finds the proposal at section 8(5) to be flawed and manifestly biased against service providers. Section 8(5) states; *“A licensee shall not use traffic steering techniques as a result of a wholesale roaming agreement to the detriment of a customer.”*

2.6.9. It is unclear what is meant by the *“detriment of a customer”*. Would it include their paying a higher rate? Clearly, that in and of itself does not mean the customer has been harmed, since there

are non-price attributes that may make the customer better off. There are reasonable and legitimate business reasons for a service provider to use “*steering techniques*” to leverage the value of its commercial partnership throughout the ECTEL Member States. The extent to which the Bill intends to fine service providers for acting to the detriment of customers, the specific areas of concern should be listed, otherwise this proposal should be removed.

2.7. Clause 9 – Fair use

2.7.1. FLOW agrees with Digicel and supports the inclusion of a fair use provisions.

2.8. Clause 10 – Functions of Commission

2.8.1. We agree with Digicel that there is no need for the Commission to intervene and be the final arbiter in commercial roaming contracts between parties. ECTEL has not demonstrated that this issue is a problem and what needs to be fixed.

2.8.2. Section 10(b) should be reworded to read “*advise the Minister on regulated charges for roaming services after public consultation.*” It is critical that ECTEL and the NTRCs have a duty to consult.

2.8.3. Section 10(f) should be reworded to read “*provide guidelines, on the recommendation of ECTEL, as to the costing and pricing methodology to be used for the regulation of roaming charges after public consultation.*”

2.8.4. Section 10(g) should be reworded to read “*refer to ECTEL any dispute arising under this Act between licensees and providers subject to following a prescribed dispute resolution procedure, which was arrived at after public consultation*”

2.9. Clause 12 – Offence

2.9.1. We agree with Digicel’s comments regarding the inappropriateness of the proposed penalty.

2.9.2. Clause 12 states “*A licensee who fails to comply with this Act commits an offence and is liable on summary conviction to a fine not exceeding 3% of its annual gross revenue for the previous year.*”

2.9.3. FLOW agrees with Digicel’s comments that this proposal is excessively punitive. We also agree with its suggestion to include similar provisions to that found in the EU regulations.

2.9.4. Furthermore, FLOW recommends that offences under the Roaming Regulations should be handled on a case by case basis, based on the nature of the offence and its impact on consumers. If fines are to be administered they should be reasonable and tiered. Any penalties should be consulted on.

2.10. Clause 14 –Regulations

2.10.1. FLOW agrees with Digicel that section 14(1) should be amended to read “*The Minister may on the recommendation of ECTEL following public consultation, make regulations as necessary or expedient to give effect to this Act.*”

3. Conclusion re draft Roaming Services Bill

3.1. FLOW considers that there are a number of issues to be understood and resolve prior to the approval of a Roaming Services Act.

3.2. FLOW urges ECTEL not to rush the process or take short cuts but to have a timely open discussion of all the issues.

4. Comments on Comments to Proposed Roaming Services Regulations

4.1. FLOW shares a number of the concerns that Digicel have raised regarding the suitability of these Regulations. These concerns are expanded on below.

4.2. Roaming charges as per clause 3 in draft Bill

4.2.1. Roaming charges should be based on all of the related costs and applied only after it is first determined there is a need for such regulatory intervention. In terms of need, it must first be determined in a transparent process with input from all stakeholders that there is a significant market failure in the roaming markets in the ECTEL Member States that regulation is capable of addressing and improving upon. Any process that decides to impose a regulatory solution before first determining whether such a solution is (1) needed and (2) capable of effectively addressing/improving the problem (e.g., will not make matters worse), is premature and out of process.

4.2.2. With regard to the issue of costs, ECTEL has not provided sufficient information in schedule 2 to assess how it plans to develop and implement its wholesale roaming pricing model. It says only that *“the wholesale roaming prices be set using a price cap which reflects a multiplier of the national mobile termination rates of the ECTEL Contracting States.”* Effectively, it has not proposed a pricing model, but merely shared an idea. For instance, the service in question is an end-to-end service. Thus, a cap based only on the cost of termination is incomplete. Furthermore, the proposal appears to assume the roaming service will necessarily terminate to a mobile subscriber, which may be appropriate for some roaming services (such as those terminating to a mobile) but is not for all (such as data and those terminating to a fixed line).

4.2.3. In the explanatory notes ECTEL states *“Price cap regulations typically entail adjusting the prices of an operator against a price cap index which represents the overall inflation rate, the production efficiencies of the operator relative to the average operator and the relative inflation on the operator’s input prices.”* Does ECTEL anticipate that the NTRCs will create and administer a price cap plan for each Licensee under its jurisdiction? What other wholesale services does it intend to include to derive a price cap index? Certainly based on the production efficiencies of each licensee are likely to be assigned different price caps. Will this help or harm competition? And what basis would ECTEL have to impose a price cap on a licensee(s)? ECTEL has not addressed these issue and these Regulations ought not to be progressed before it properly consults to the relevant issues.

4.3. Wholesale roaming agreements as per clause 4 in draft Bill

4.3.1. These Regulations should acknowledge that the Roaming Agreements that fall under the jurisdiction of ECTEL and are those entered into between licensees within the ECTEL Member States. Roaming agreements between an ECTEL Member State licensee and a non-ECTEL Member State licensee should be expressly exempt from these Regulations to remove all doubt.

4.3.2. FLOW objects to the notion that wholesale roaming agreements must include *“requirements and conditions of access to network elements and associated facilities, relevant services, software and information systems, necessary for the provision of roaming services”*. As stated in our comments on the draft Bill such a requirement is over-reaching and not

required. Instead this requirement need only specify that the wholesale service be comparable in quality to the service provider's retail service and not of significant lesser quality.

4.4. Notifications as per clause 5 in draft Bill

4.4.1. Section 5(c) proposes that notifications should *“remain available by the licensee for the customer to review when required”*. The full implications of this requirement needs to be thought through and customers should be required to shoulder some responsibility. Notifications will be sent by SMS, customers should be required to keep these records on their phone for their convenient reference. In the event that the message is lost for some reason, companies will be able and willing to retrieve messages sent to establish certain facts in the case of a dispute etc. This is normal. It seems however, unreasonable for the Regulations to seek to create and administrative burden to require service providers to make such notifications available for customers to *“review when required”*. The clause is sufficiently vague to be a source of dispute should it remain. FLOW proposes that it be reworded to read *“be made available by the licensee for the customer to review in the case of a dispute”*.

4.5. Billing cycle cap as per clause 6 in draft Bill

4.5.1. The provisions at section 6(1) though well intended may cause a level of complexity and administrative bureaucracy that is unhelpful to customers. See our related comments in section 2.3. The section appears to be proposing that service providers facilitate a billing cycle cap per service. This is not typically done for roaming and is not required by customers. Customers care far more about capping their total bill amount than individual billing cycle intervals. A cap based on the total amount of charges the customer wishes to be incurred before the service is terminated is far more helpful. We recommend that these regulations should be less prescriptive regarding how the cap should be structured. It should be left to commercial imitative as presently exists.

4.6. Information to be made available to customers

4.6.1. Section 7(2) states,

“A licensee shall make the information referred to in subregulation (1) available to a customer through —

- (a) ***a customer service location;***
- (b) ***telephonic customer service;***
- (c) ***the licensee’s website;***
- (d) ***SMS service; and***
- (e) ***the licensee’s social media sites.”***

4.6.2 This provision appears to make it mandatory for a licensee to inform customers using ALL the means listed in (a) through (e). Such a requirement would be burdensome. It would be far more reasonable to require that any two (2) of the above channels be used.

4.7 Conclusions re draft Roaming Services Regulation

4.7.2 We find ECTEL’s proposals poorly specified and premature. It makes statements that are unsubstantiated or based on a non-public analyses, and then seeks to propose Regulations to address them, without first consulting on the alleged problem or considering whether regulation will effectively address the alleged problem. The effect is a proposed regulatory solution that we believe is hasty, not demonstrably necessary, and ripe for confusion.

4.7.3 ECTEL’s regulation of both wholesale and retail roaming charges will impose unnecessary regulatory complexity in place of letting the market(s) determine rates, on the implied and unsupported claim that there is a market failure and the erroneous assumption that regulation will necessarily improve matters. By its own statements it acknowledges that the market has produced “Roam Like You Are Home” Plans! Why would it need to impose unnecessary Regulations to achieve what has already been achieved?

4.7.4 Why has ECTEL not consulted with the Industry to determine the best approach to pricing roaming services? In fact some service providers have arrived at effective/efficient pricing based on commercial negotiations. It is not sufficient for ECTEL to copy the European Commission or elsewhere, but it must adapt and consult to see what is most appropriate for the ECTEL Member

States, which is not the same as Europe, in terms of economic unification, population size, economic development, or geography.

- 4.7.5** Before proceeding, ECTEL is advised to take pause and to at least consult on the many issues addressed in our comments that we believe must first be resolved, before a regulatory solution is contemplated. In the event, after sufficient consultation, a regulatory solution is determined appropriate, then the process of determining a solution and an appropriate period to implement this solution can be considered based on a solid foundation.

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