

REVIEW OF SPECTRUM HOLDINGS POLICY

SMA'S RESPONSES TO COMMENTS RECEIVED

A. RESPONSES TO DIGICEL'S COMMENTS

Comment #1

Digicel believes that the competition analysis, which in effect, results in a reservation of approximately one third of the total available spectrum for future market entry, will adversely impact consumer welfare in the Jamaican market.

Response to Comment #1

The SMA notes Digicel's comment above but notes as well that Digicel did not offer any explanation or rationale for its comment. Notwithstanding, in response, the SMA wishes to reiterate the FTC's findings regarding the fragility of the telecoms market's competitiveness "given that only two operators serve the market". In addition, it is the considered view of both the FTC and the SMA that facilitating increased competition in a market does not adversely impact consumer welfare. As such, the SMA in its capacity as the spectrum manager, must position itself and manage the spectrum in a manner that will enable competitive entry into the market. Further, the SMA is also cognizant of the needs of the incumbent operators to meet increased demands for mobile telecommunication services, a point underscored in the FTC's report. It is with this in mind that the SMA has proposed to remove the spectrum cap and to replace it instead with a spectrum screen, allowing for the access to additional spectrum by incumbents given the right circumstances. Additionally, it should be noted that based on the agreements reached at the World Radiocommunications Conferences in 2015 and again in 2019, there are additional allocations for Mobile services, which can be accessed.

Comment #2

While the Authority has proposed the use of a "screen" above certain thresholds it has not set out for comment the criteria to be applied to any such assessment. The lack of clarity in this regard is surprising given the procedural issues that have arisen following previous spectrum awards.

Response to Comment #2

The SMA acknowledges that the details of the spectrum screen were not outlined in the document. Essentially, the aim of the SMA in conducting an assessment at the point whereby an operator would exceed the screen is to ensure that these acquisitions are pro-competitive and in the public's interest. Further, the acquisition of additional spectrum would facilitate the buildout of networks, improve service to customers and put unused spectrum to use. The SMA will however have further consultation on the details of this matter.

Comment #3

Digicel notes that none of the four policy objectives specified by the Minister call for the facilitation of market entry.

In summary these policy objectives call for the promotion of competition, the encouragement of investment, the efficient use of spectrum and expanded coverage for advanced services. With carefully designed regulatory incentives all of these imperatives can be met within the existing market structure. In fact, it is Digicel's view that these can be best and most quickly met by directly regulating within the existing market structure rather than relying on indirect benefits arising from new market entry which could take an extended period to deliver.

Response to Comment #3

It should be noted that in directing the SMA to review the spectrum cap, the then Minister indicated that having considered the state of affairs of the ICT sector, which included “the need to attract new players to the ICT sector...” (page 4 of Consultation document), the SMA should also give thought to the other policy considerations. Further, even if this was not stated, as the regulator, it is the responsibility of the SMA to determine and advise the Minister/Ministry with regards to mechanisms and strategies for the implementation of policies. Additionally, the SMA also recognises, guided by the FTC, that the benefits of increased competition in the market may be realised even before actual entry by a new entrant, which dispels the extended period being mooted.

Comment #4

Digicel notes the proposal to move from a “spectrum cap” to a “spectrum screen”. The Authority outlines that “The screen as proposed by the SMA considers the total spectrum suitable and available for commercial mobile services and establishes a trigger point at which the SMA will conduct a more detailed competitive analysis for assignment.”

While Digicel welcomes the removal of the current “hard” cap we believe that the threshold for the trigger point review is set too low.

Response to Comment #4

In arriving at the threshold for the trigger point, the SMA considered the availability and suitability of spectrum within the related frequency bands, (700MHz, 850MHz, 900MHz, 1800MHz, 1900MHz, and 1700/2100 MHz (AWS Band)), this, assuming the comment is in relation to these bands. Based on the analysis of the current spectrum holdings in these bands, it is the measured view of the SMA that the proposed trigger is at the optimal level, again considering availability and the overarching policy positions.

Comments #5

The Authority cites a number of international comparators. In particular the Authority references the UK's use of overall cap of 37% of mobile spectrum...In addition, in absolute terms the cap proposed by the UK regulator is more than double the cut-off for the screen proposed by the Authority. The Authority does not highlight the high level of asymmetry in UK spectrum holdings. There is no suggestion that this level of asymmetry has in any way impaired competition in the UK mobile market. In fact, Ofcom explicitly states that the opposite is the case "Operators have always held varying amounts of spectrum in the UK, more so than in many other European countries. However, the mobile market is still among the most competitive in Europe and has been serving consumers well".

While ComReg proposed caps for the award competition referenced this date from 2012. ComReg has reaffirmed its use of completion caps in more recent awards but only as a means to avoid "excessive asymmetries" in overall holdings...Digicel believes that the Spectrum Caps in Trinidad and Tobago cited by the Authority are also potentially under review.

Response to Comment #5

The SMA notes Digicel's comments with regards to the countries/regulators mentioned in the document under International Trends. It should however be noted that the purpose of the section and in particular the references to these administrations were to illustrate trends globally, whereby regulators intervened in their respective markets and have implemented mechanisms such as spectrum caps and spectrum screens so as to either promote or maintain competition in the market. Notwithstanding, it is not the desire or goal of any spectrum regulatory body to have very asymmetrical shares of spectrum among operators, hence, the position taken by Ofcom in 2019 to impose a cap.

Comment #6

While the Commission has identified a potential structural issue that this level of competition might be susceptible to anticompetitive conduct in the future, it makes no analysis of whether constraints such as regulatory overhang from its own enforcement of the Fair Competition Act provide sufficient safeguards.

Response to Comment #6

Structural remedies when compared to enforcement actions are guaranteed to be a more efficient and effective means of safeguarding competition because it serves as the benchmark for incentivising players/incumbents in the competitive domain and allow for potential market entry. On the other hand, enforcement actions through the Fair Competition Act are far more time consuming and more so of a resource pull factor for industry monitoring, documenting and implementing measures to maintain competition.

Comment #7

However, the FTC is not a specialized body dealing with spectrum matters. Based on the analysis set out in its report it appears to have based its recommendation of a 37% cut-off for screening on a figure used by Ofcom in the UK. As set out previously the UK spectrum cap was set in the context of a four player market and in absolute terms is more than double the screening trigger proposed.

In proposing this figure, the FTC has not taken account of the use of existing spectrum allocations to provide service to customers using legacy services (such as 3G). The Commission has not considered that a new entrant would most likely not provide legacy 3G services on market entry. It has not taken account of the fact that too low a spectrum holding cut-off would mean that in order to compete on an equitable basis with a new entrant, existing operators would have to discontinue these services. As these legacy services tend to be used by those consumers who least afford device upgrades to newer technology this would result in consumer welfare harm.

Response to Comment #7

Of importance are the proposals as presented by the SMA, which are as follows:

- **Removing the spectrum cap and utilizing a spectrum screen for assignments above 120 MHz of spectrum in the listed frequency bands: 700MHz, 850MHz, 900MHz, 1800MHz, 1900MHz, and 1700/2100 MHz (AWS Band);**
- **A 30% in-band Screen on all other suitable and available bands allocated for mobile services, (1500 MHz, 25 GHz, 37 GHz, 43 GHz, and 66 GHz, ...etc.) and,**

These recommendations are based primarily on, *inter alia*, the SMA's consideration of the availability and suitability of the spectrum, its efficient use and the policy positions as articulated by the Ministry, guided by the FTC's assessment of the competitive state of the market.

Comment #8

Digicel agrees that the Authority has an important role in the management of spectrum. But ultimately this should be focussed on maximising consumer welfare benefit.

Response to Comment #8

Mindful of the comment above, it should be noted that facilitating or preserving competition within the market, is aimed at conserving consumer welfare benefit. The two are not mutually exclusive, one facilitates the other.

Comment #9

The FTC recognises that “policy must be flexible enough to accommodate situations where the assignment of additional spectrum to incumbent operators is indispensable to the preservation of competition “Digicel agrees with this statement and believes that in order to achieve this a higher trigger point for the screening must be set.

Response to Comment #9

In arriving at the threshold for the trigger point, the SMA considered the availability and suitability/compatibility of spectrum for mobile services within the related frequency bands, (700MHz, 850MHz, 900MHz, 1800MHz, 1900MHz, and 1700/2100 MHz (AWS Band)). Based on the analysis of the current spectrum holdings in these bands, it is the measured view of the SMA that the proposed trigger is at the optimal level, again considering availability and overall policies.

Comment #10

Digicel agrees that the Authority has an important role in the management of spectrum. Ultimately this should be focussed on maximising consumer welfare benefit. The FTC’s proposals are overly narrow focussing on market entry as a cure for a hypothetical future competition issue. They do not address the wider operation of the market nor the constraints faced by existing operators using spectrum to provide legacy services.

Response to Comment #10

It is based on considerations of the constraints faced by the incumbent operators that the SMA has sought to propose a screen as oppose to the cap as well as making available additional spectrum. However, the SMA’s responsibility extends further in that, based on policy directives, consideration must be given towards preserving and promoting competition in the market.

Comment #11

Neither the Authority nor the Commission has taken account of the phasing of the spectrum requirements of a potential third operator. It will not require the full complement of spectrum necessary to support its long term customer base and service set in the short to medium term. The Authority’s proposals appear to embed an assumption that there must be a near equal split of spectrum holdings across all tiers of the spectrum bands based on the bands which have been released in the short term. This gives rise to unnecessary and damaging constraints in network and service deployment today.

Response to Comment #11

The SMA as the regulatory body for managing the spectrum has to consider, all possibilities in relation to the market and then place itself in a position to regulate fairly, consistently and predictably. The SMA must be in a position to facilitate competition so as to maximise consumer benefits irrespective of the business model and technology chosen by an operator to implement. Therefore, it would not be prudent of the SMA to seek to predict the business model of any operator and then manage the spectrum according to those predictions. It is with this in mind that the screen is being proposed, with the intention of having the flexibility to manage the spectrum effectively and meeting the needs of all players.

Comment #12

Digicel notes the authority's summary of the current allocations. We note also the Authority's references to the overlaps between the 850MHz and 900MHz bands and the 1800MHz and 1700/2100MHz bands.

As the Authority is aware the current assignments have given rise to a situation where there is some interference between the 850MHz and 900MHz bands rendering some spectrum unusable. Digicel and the other spectrum user have made a joint proposal to the Authority to resolve this. We would request that this be addressed in the near term so as to maximise the available spectrum

Response to Comment #12

While this is not a matter for discussion in this consultation, the SMA wishes to state that said matter was referred to the Minister/Ministry for consideration.

Comment #13

Digicel welcomes the proposal to remove the "hard" spectrum cap for the existing mobile spectrum bands. However, the Authority now proposes to screen at a trigger set less than one third of the total available spectrum in what is foreseen to be a three player market. This trigger point below an equal market share cannot serve to protect competition and will give rise to unnecessary administrative burden both on operators and on the Authority itself.

Digicel is strongly of the view that the trigger point could be safely set significantly above the level proposed by the FTC while still meeting the objective to facilitate market entry. The evidence from the international comparators the Authority itself has chosen demonstrates that asymmetry in holdings does not adversely affect either market entry or completion... When the following factors are taken into account in Digicel's opinion a trigger point in excess of 40% and potentially up to 50% could safely be set while meeting all of the policy objectives that the Authority was directed to take into account.

Response to Comment #13

Digicel in its comment did not indicate which of the screens is being referred to here, so in responding to this comment, the SMA is assuming that it is in reference to the 30% in-band Screen on all other suitable and available bands allocated for mobile services, (1500 MHz, 25 GHz, 37 GHz, 43 GHz, and 66 GHz, ...etc.). In arriving at the threshold for the trigger point, the SMA considered the availability and suitability of spectrum within the related frequency bands. Based on the analysis of the current spectrum holdings in these bands, it is the measured view of the SMA that the proposed trigger should suffice at this juncture, bearing in mind, that there are several thousand MHz of spectrum available in most of these bands, and considering as well overarching policy positions.

B. RESPONSES TO FLOW'S COMMENTS

Comment #1

In the context that “The SMA’s aim is to ensure that all operators are given equal opportunity to compete”, the Authority must give itself the flexibility to correct the current situation where Flow is placed at a competitive disadvantage. Flow only has access to 10MHz of the 700 MHz frequency, as compared to 20MHz to its competitor and the 24MHz reserved for a new entrant. As explained by the FTC this results in Flow incurring much higher costs to build out its network and by extension deliver its services. The use of the spectrum screen must necessarily seek to offset this disadvantage.

Response to Comment #1

The SMA must first clarify the abovementioned comment made by FLOW as follows:

- **The SMA does not reserve spectrum. Mobile allocated spectrum, which is the prerogative of the Minister with responsibility for Telecommunication, is made available for assignment by said Minister.**
- **Whilst FLOW only has access to 10 MHz of 700 MHz it should be noted that FLOW has access to other low band spectrum.**
- **In addition, the SMA gives due consideration to the following as stated by FLOW:** *“However, regulatory certainty is required by the industry to effectively plan and implement a business model to deliver fast broadband speeds and innovative services. As such, reviews of the holdings should seek to avoid reducing holdings already assigned.”.*

Comment #2

Flow does not object in principle to the SMA’s in-band screen proposal. However, in the interest of transparency and objectivity, it would be very useful for the SMA to more clearly outline the criteria that it would consider assigning spectrum that exceeds the 120MHz screen

Response to Comment #2

The SMA acknowledges that the details of the spectrum screen were not discussed in the document. Essentially the aim of the SMA in conducting an assessment at the point whereby an operator would exceed the screen is to ensure that these acquisitions are pro-competitive and in the public interest where the spectrum would facilitate the buildout of networks, improve service to customers and put unused spectrum to use. The SMA will however have further consultation on the details of this matter.

Comment #3

It is prudent to review the spectrum holdings policy from time to time. However, regulatory certainty is required by the industry to effectively plan and implement a business model to deliver fast broadband speeds and innovative services. As such, reviews of the holdings should seek to avoid reducing holdings already assigned. It should also avoid including additional frequencies under the current cap/screen at short notice, and since this approach is likely to derail well laid plans to the detriment of customers. Flow considers that a period of half yearly reviews with the intent to change the policy is too frequent.

Response to Comment #3

Please note as stated in the document that reviews are proposed for 6 months after World Radiocommunication Conferences (WRCs) that are held every 3 – 4 years to allocate spectrum for use by different services.

Comment #4

The proposals put forward by the SMA are meaningful. We note however, that lower bands such as the 400MHz and 600MHz that have the potential for mobile developments were not mentioned. As such we would like the SMA to clearly indicate how it plans to assign these bands going forward and to confirm that any assignment of these frequencies will be excluded from the proposed spectrum holdings screen

Response to Comment #4

It should be noted that the 400MHz and 600MHz at this point are not available as they are occupied with services not compatible with International Mobile Telecommunications (IMT) service. The SMA at this juncture is not in a position to speak to the availability of same at this time.

Comment #5

Transparency requires that the SMA provides further insights into how the spectrum screen process will work. And indicate if service providers will be allowed to participate by sharing their views on the potential competitive effects that any such assignment above the screen is likely to have on the market.

Response to Comment #5

The SMA acknowledges that the details of the spectrum screen were not discussed in the document. Essentially the aim of the SMA in conducting an assessment at the point whereby an operator would exceed the screen is to ensure that these acquisitions are pro-competitive and in the public interest where the spectrum would facilitate the buildout of next generation networks, improve service to customers and put unused spectrum to use. The SMA will however have further consultation on the details of this matter.

C. RESPONSES TO ROCK MOBILE'S COMMENTS

Comment #1

Rock's considered view is that policies and regulations affecting the Telecommunications industry must support ease of entry by new operators. Accordingly, Rock wishes to also urge a policy of transparency as regards spectrum holdings and allocations. This is essential for effective and fair operations of the policy

Response to Comment #1

As it relates to spectrum holdings and assignments, the SMA is guided by the Telecommunications Act, 2000 Section 7 that it should hold its obligation to the commercial nature of the business in ensuring that all operations (holdings) remain undisclosed. Allocation of bands to the different services are however disclosed on the SMA's website, and further clarification may be obtained as is necessary.