Decision on acceptance or rejection of DataCo's Proposes Reference Interconnection Offer of 13 August 2020 in relation to various wholesale access services

STATEMENT OF REASONS FOR NICTA'S DECISION

15 December 2020

A. Purpose of this Statement

1. The purpose of this Statement is to set out the reasons for NICTA's decision to reject the Reference Interconnection Offer ("RIO") proposed by PNG DataCo Limited ("DataCo") on 13 August 2020.

B. Background

2. On 19 February 2019 the Minister declared certain wholesale access services pursuant to Section 130 of the *National Information and Communications Technology Act 2009* (the "Act"), including international submarine cable capacity services, and national fibre-based broadband capacity services. These services are provided to the PNG market by DataCo on what is, de facto, a monopoly basis because of DataCo's control and operation of the underlying facilities used for their provision.
3. On 13 August 2020, pursuant to Section 142 of the Act, DataCo provided NICTA with a RIO in relation to certain wholesale services which it proposed that NICTA should formally accept under Section 142(4) of the Act.
4. The proposed RIO contained terms and conditions, including prices, which DataCo intended should be the basis on which it provides the following wholesale access services:
    a. Wholesale Internet Service (WIS);
    b. Domestic P2P Metro (up to 1 Km) over Fibre delivered to Customer Premises;
    c. Domestic P2P Metro (over 1 Km) over Fibre delivered to Customer Premises;
    d. Domestic P2P Longhaul (DP2P-LH) over Fibre delivered to Customer Premises; and
    e. International P2P (IP2P) over Subsea Fibre delivered to / at the CLS.
5. The above descriptions are for the services as they appear in the RIO. 'P2P' means point to point, that is, a dedicated capacity service between two nominated points served by DataCo's network. 'CLS' means Cable Landing Station. DataCo has two such facilities currently in operation, in Port Moresby and Madang, but will have more in future at the landing points for the Kumul National Cable system that will link many island groups, and which is still under construction.
6. Each of the services covered by the RIO comprise constituent elements some of which are national or international capacity services declared by the Minister in February 2019.

C. Requirements in the Act relating to RIOs

7. The Act deals with RIOs in Section 141 and subsequent sections. A RIO is a written undertaking given by an access provider to NICTA which contains a written statement of the prices (with price-related terms), or standard non-price terms and conditions, or both. The access provider undertakes to comply with the RIO terms when it provides the declared services covered by the RIO and to do so on a non-discriminatory basis.

8. Once a RIO is accepted any access dispute that arises will be settled in accordance with the terms and conditions set out in the RIO. This provides a degree of regulatory and contractual certainty for both the access provider and potential access seekers.

9. Under Section 142(4) NICTA must either accept or reject the proposed RIO. This means that NICTA cannot accept some of the terms and conditions but reject others. Nor can it vary proposed terms on its own initiative.

10. The procedure that NICTA must follow before it can accept a RIO is set out in Section 142(5) of the Act. NICTA must engage in public consultation of at least 4 weeks duration along the lines of a public inquiry in Section 229, and it must consider any submissions received.

11. Section 142(5)(b) requires that, before NICTA can accept a proposed RIO or variation, it must be satisfied that the RIO:

    (i) is consistent with the requirements of section 141; and

    (ii) is consistent with any non-discrimination obligations that are applicable to the access provider; and

    (iii) contains terms and conditions that are reasonable in accordance with Section 126; and

    (iv) is consistent with the general principles and any service-specific pricing principles.

D. Public consultation process

12. NICTA commenced a public consultation on the proposed RIO on 19 August 2020 and provided for an initial period of 4 weeks and 2 days (to 18 September 2020) for receipt of submissions from interested parties.

13. At the request of the industry this period was extended to 5 October 2020. During that period DataCo planned to conduct a workshop for other operators at which DataCo's retained expert consultants would present and explain the network cost models and the demand forecasts that supported the prices set out in the Schedule to the RIO. In the event, the workshop could not be held until 6 October 2020, so NICTA further extended the deadline for submissions until 16 October.

14. In order for interested stakeholders to make further comments, especially in relation to each other's' first round submissions, NICTA provided an additional opportunity for a second round of submissions, with a deadline of 13 November 2020.

15. The result is that interested parties have had an opportunity well in excess of the minimum requirement of 4 weeks in the Act to make submissions, and a number of them have done so. In line with normal practice, NICTA has posted copies of all submissions on its website.

16. NICTA has carefully considered all submissions received within the time limits specified (none were received outside these limits). NICTA has therefore complied with the requirements in Sections 142(5)(a)(i) and (ii) of the Act.

E. NICTA's assessment

17. Section 142(5)(b) of the Act requires that NICTA shall not accept a proposed RIO unless it is satisfied that four requirements have been met, namely, that the RIO:

    "(i) is consistent with the requirements of section 141; and

    "(ii) is consistent with any non-discrimination obligations that are applicable to the access provider; and

    "(iii) contains terms and conditions that are reasonable in accordance with Section 126; and

    "(iv) is consistent with the general principles and any service-specific pricing principles."

    Each of these requirements is dealt with in turn.

The requirements of Section 141

18. Section 141(1) that a RIO be written undertaking. The RIO proposed by DataCo is such an undertaking, in the form of a standard contract, or Master Service Agreement.

19. Section 141(1)(a) requires that the RIO must contain a written statement of the prices (with price-related terms), or standard non-price terms and conditions, or both. These are contained in DataCo's proposed RIO.

20. Section 141(1)(b) requires that RIO to include an undertaking by the access seeker (DataCo in this case) to comply with the RIO terms and to comply with non-discrimination and related access obligations. NICTA is satisfied that such an undertaking has been given in the RIO by DataCo.

21. Section 141(1)(c) requires that the RIO must be clearly written, organised in a logical and consistent manner, and in any form specified by NICTA in rules made for the purposes of the section. NICTA has not made any rules relating to specified form for a RIO. NICTA is satisfied that the RIO meets this requirement.

22. Section 141(2)(a) requires that the RIO must be expressed to come into effect immediately after the RIO is accepted by NICTA. NICTA concludes that it does so.

23. Section 141(2)(b) requires that the RIO must specify an expiry date that is no later than the earlier of (i) the expiry date for the declared service to which the Rio relates; or (ii) three years after the date of acceptance of the RIO by NICTA. The expiry date for the declared service is 19 February 2024. DataCo has repeated the formula in the Act in the RIO at Clause 3.

24. Section 141(3) requires that in covering standard prices with price-related terms or non-price terms and conditions, or both, for a declared service, the RIO must provide sufficient information for access seekers to determine the basis on which the access provider will supply the relevant declared service. Taking account of a number of comments in stakeholder submissions and its own assessment, NICTA has concluded that, in relation to a number of non-price terms and conditions, the basis on which DataCo will or might supply the services covered by the RIO is unclear and insufficient information has been provided. These matters sometimes relate to the reservation of discretions to DataCo with insufficient information on how they will be exercised, and they

draw into question whether the terms and conditions concerned meet the requirements of reasonableness referred to in Sections 142(5) and 126. Other cases involve reasonableness also, but without reservation of a broad or undefined discretion to DataCo. All cases are specifically dealt with below under the requirement for reasonableness and need not be enumerated here as well.

25. For the reason in the preceding paragraph, NICTA considers that the proposed RIO does not satisfy the requirements of Section 141(3).

Consistency with any non-discrimination obligations that are applicable to the access provider

26. The non-discrimination obligations to which DataCo is subject in relation to the provision of the declared services covered by the RIO are set out in Section 137 of the Act and need not be repeated in full here.

27. Section 137(3)(a) requires that an access provider shall, if requested to do so by an access seeker, supply an active declared service to the access seeker in order that the access seeker can provide retail services. NICTA understands that this is DataCo's intention. However, the extent of the discretion that DataCo has reserved to itself in the RIO, may have the potential effect of inappropriately or unfairly undermining the access obligation. Two examples are the discretion about service bonds in clause 7.3 of the RIO and around suspension of service in clause 9.2 of the RIO. This is not to say that under appropriate conditions service bonds may not be imposed or that a service may not be suspended.

28. NICTA has concluded that there is nothing in the proposed RIO that is inconsistent with the obligation to provide services on a non-discriminatory basis, or that could be a basis on which DataCo might give preferential treatment to itself or its associates and related licensed operators in the Kumul group.

Terms and conditions that are reasonable in accordance with Section 126 of the Act

29. Section 126 sets out matters which, without limitation, need to be considered in determining whether terms and conditions are reasonable. They include the extent to which the terms and conditions are likely to further the objectives in Section 124, relating to competition and efficiency; the legitimate business interests of the operator licensees concerned; the access provider's investment in facilities used to supply the declared services; the interests of any persons who have rights to use the declared services; the extent to which the terms and conditions are consistent with general pricing principles and any relevant service-specific pricing principles; and operational and technical requirements necessary for the safe and reliable operation of an ICT service or facility.

30. A number of the non-price terms and conditions are not reasonable, in NICTA's assessment, within the extended meaning of the term in Section 126. Without being necessarily comprehensive, following is a list of the clauses of the RIO that have been foremost in causing NICTA to come to this view:

(a) Clause 3 – Term

Clause 3 sets the term of the RIO at the earlier of 3 years from acceptance or the expiry date of the declaration for the services involved. For the sake of argument, this could result in a term of three years. There is no separate provision for review of the RIO. The price terms relate to current unit costs and these would be expected to be amended as they change (likely decline) with cost and demand changes. The expectation is that they

would be reviewed at least annually to remain appropriate having regard to the cost recovery principles which apply in the Act to declared access service pricing. Under the RIO as it is currently drafted it would be a matter for DataCo to initiate changes within the term, and it may not have an incentive to do so if the result of a review was to reduce prices. This is not in the interests of all licensed operators concerned, nor would it promote the competition and efficiency objectives of the Act. In particular, it would be potentially inconsistent not only with the general pricing principles in Section 134 of the Act but the service-specific pricing principles that contemplate annual or other periodic reviews of the amounts covered by price regulation.

(b) Clause 7.3 – Service Bond

There is no objection in principle to the imposition of a service bond, but there is nothing in the RIO that sets the limits of the bond having regard to the value of the service, the newness of the customer, the creditworthiness of the customer, or other objective criteria. The result is a discretion on the part of DataCo and may result in service being denied in a manner that is at odds with the obligation to supply in Section 136. For this clause to be reasonable it needs the inclusion of objective criteria that DataCo will apply when setting such bonds.

(c) Clause 7.5(a) - Taxes

The description of taxes includes a range of types of taxes including levies. One respondent was concerned that the generality of the term, 'levy', could potentially include Universal Access and Service Levies under the Act. UAS levy charges are imposed on the net revenue of eligible licensees rather than on specific service transactions, and would seem not to be intended to be included here. DataCo has confirmed that it did not intend UAS levy charges to be covered in this clause. However, the term 'levy' is general and therefore potentially would undermine attempts by access seekers to calculate their liabilities for services ordered from DataCo.

(d) Clause 7.6(c) – Amendments to price

This clause provides that "subject to any change in law, regulatory or Licence condition, DataCo reserves the right to vary the charges for a Service provided under a Service Agreement at any time to reflect any increased costs to DataCo in providing the Service to Customer." Clearly the variations in contemplation are increases. The term as stated is unreasonable. It adversely impacts the interests of Customers and other persons with rights to access the Service, and is not qualified in any useful way. The introductory phrase refers to regulation but it is a matter for doubt whether a service specific pricing principle that results in a review to regulated prices after the acceptance of such a RIO would stand and would be a constraint on the discretion that DataCo is claiming for itself. The uncertainty that would result from this clause for investments and commitments elsewhere in the sector are inconsistent with the development objectives in the Act and with the efficiency and competition objectives in Section 124.

(e) Clause 7.6(e) – Billing disputes

The RIO requires invoices to be settled in full notwithstanding that all or part of the invoice might be the subject of a bona fide dispute by the customer. DataCo has explained in its second-round submission that if it transpires that the customer is shown to be right or that the invoice needs to be adjusted, that can be implemented through recrediting the amounts involved through the next invoice. That might be acceptable, but only in a narrow range of circumstances. For example, for the re-crediting adjustment process to be adequate would depend on the time taken to resolve the dispute (not necessarily by the next invoice), the periodicity of invoicing, and so on. On the other hand, it is not uncommon for billing disputes to be a source of gaming for additional time to pay. However, late payments attract a penalty under the RIO and these are potentially

applicable when a dispute is dismissed. In NICTA's assessment, the current wording is unfair and unreasonable and would need to be modified for the RIO to be accepted.

(f) Clause 9 – Suspension of Service

Under certain circumstances it is certainly appropriate for DataCo as the provider of a service to suspend the service. However, the circumstances that might justify suspension in the case of any commercial situation would not necessarily justify suspension of a declared service. For the suspension clause to be reasonable, especially having regard to the rights of users, it would need to provide a comprehensive list of the objective criteria that would need to have occurred and adequate notice that reflects the interests of users who depend on the continuation of the service. There can be no question of declared services being suspended at the discretion of access providers – the power to do so needs to be carefully qualified.

(g) Clause 10 – Termination

The comments above in relation to suspension also apply to termination. In addition, the references to a single day's notice and DataCo's "sole discretion" in Clause 9.2(b) are not considered to be reasonable as they stand. Other modifications are also necessary, including a listing of the complete set of objective criteria upon which DataCo may rely for termination.

(h) Clause 15 – Personal Data

Clause 15 purports to require the wholesale customer to allow access to personal data, including the personal data of end users. The purposes for which such data will be used are unclear. Leaving aside the question whether wholesale customers have any right to agree to pass end-user personal and other data to a third party such as DataCo without approval, the term certainly impacts on the rights of users in such as way as to be unreasonable. The whole clause would need substantial revision to be considered acceptable at all, and it would be more appropriate to remove all reference to the data of end users, who are not relevant to the provision of wholesale services (by definition in the Act).

(i) Attachment B – Service Availability

The Telecommunication Service Order form at Attachment B to the RIO provides for a service availability commitment of 98.9%. In its second-round submission DataCo explained that this level was appropriate given that DataCo was still "filling gaps" in its national network, and that the commitment was appropriate especially in circumstances where services were being delivered to customer premises. DataCo conceded that different standards, involving higher availability commitments, might be appropriate for services that terminate at DataCo points of presence. The RIO makes no provision for review and therefore for progressively increasing the level of service availability to which DataCo should commit. This leaves the figure of 98.9% as potentially the contractual commitment under the RIO for three years. 98.9% service availability is unreasonable as standard or as a target for a carrier grade service, even though it is understood that interim lower standards might be accepted in some circumstances. For the lowest figure of 98.9% service availability to be accepted for all circumstances would therefore be unreasonable and contrary to the reasonable expectations and interests of customers and those with a right to use the services. Options available to DataCo include differentiating the commitment with different standards for different services, and also for additional commitments for improvement to the standard during the term of a proposed RIO.

(j) Review mechanism

There is no review mechanism in the RIO to ensure that annual changes to regulatory prices are reflected in the price terms of the RIO from the time those regulatory changes

take effect. One way of ensuring this would be for the term of the RIO to be limited to 12 months from acceptance.

F. Decision

31. Having regard to the considerations set out above, NICTA has rejected the RIO proposed by DataCo on 13 August 2020.
32. This statement is the written statement of reasons for rejection required to be given by NICTA under Section 142(8)(a) of the Act.

Port Moresby

15th December 2020