



**Public Consultation on Reference  
Interconnection Offer proposed by PNG DataCo  
Ltd in relation to various wholesale access  
services**

**RESPONSE TO COMMENTS REPORT**

24 December 2021

## **1. Purpose of this Report**

This Response Report sets out NICTA's responses to the main comments that interested parties have included in their submissions on the Reference Interconnection Offer ("RIO") proposed by PNG DataCo Limited ("DataCo") and published by NICTA on 5 November 2021 in relation to certain wholesale access services.

NICTA has considered carefully all submissions and comments received before determining whether to accept or reject the proposed RIO or not pursuant to Section 142(4) of the *National Information and Communications Technology Act, 2009* ("the Act"). NICTA has decided to accept the proposed RIO for the reasons set out in NICTA's separate Statement of Reasons.

Submissions received from interested parties have been posted on NICTA's website, redacted where appropriate at the request of the authors to protect from disclosure information claimed to be confidential.

The Annex to this Report only considers main comments in submissions. However, all comments have been welcomed and considered carefully by NICTA.

## **2. Consultation Process**

NICTA commenced a public consultation on the proposed RIO on 5 November 2021 and provided for an initial period of 4 weeks and 2 days (to 5 December 2021) for receipt of submissions from interested parties. At the request of the industry this period was extended to 10 December 2021. The content of the proposed RIO was in substantial measure the same as the previous RIO proposed by DataCo and which was subject of a formal consultation earlier in 2021.

The result is that interested parties have had ample opportunity to make submissions, well in excess of the minimum requirement of 4 weeks in Section 142(5)(a)(ii) of the Act, and a number of them have done so. In line with normal practice, NICTA has posted copies of all submissions on its website.

Submissions were received from:

- Digicel (PNG) Limited ("Digicel")
- Independent Competition and Consumer Commission ("ICCC")
- Telikom Limited ("Telikom")

NICTA thanks all of the organisations who made submissions. Their contribution to the process and to improving ICT regulation in PNG is appreciated.

## Annex: Summary of Key Comments received in Submissions

| Item              | Issue / subject reference  | Summary of comment    | Summary of NICTA response   |   |
|-------------------|--|-----------------------|---|---|
| <b>A: Digicel</b> |  |                       |   |   |
| 1                 | Bona fides of RIO proposal by DataCo                               | Page 2, para 4        | Digicel refers to drafting and typographical errors in the proposed RIO and notes: “These errors cast a shadow over the Proposed RIO and calls into question whether it is in fact a bona fide proposal by DataCo or whether it is some sort of ongoing regulatory gaming process.” | This comment on the bona fides of the proposal is surprising. NICTA has accepted the proposed RIO as a genuine attempt by DataCo to meet the requirements for a RIO in the Act and would only be prepared to consider it on that basis. The engagement of NICTA and the industry on the issue of a DataCo RIO during the current consultation and earlier consultations do not afford any grounds for the comment by Digicel, in NICTA’s opinion. |
| 2                 | Predetermination of the outcome of the consultation process        | Page 3, para 5        | Digicel refers to the statement by NICTA in its Public Notice on the consultation, that NICTA is “now inclined to accept the latest draft RIO”, and considers this “in effect, predetermining the outcome of this consultation process”.  | NICTA strongly rejects this conclusion. It is important for NICTA to indicate its preliminary views, but without any predetermination of the issue. The full text of the Public Notice makes this perfectly clear: “NICTA is now inclined to accept the latest draft RIO, subject to the comments received as part of the public consultation which will commence on 5th November 2021”.  |
| 3                 | Assessment of the requirements for a RIO in Section 142 of the Act | Page 3, paras 6 and 7 | Digicel comments that it does not appear that an analysis has been undertaken as to whether the proposed RIO meets the requirements of Section 142(5)(b)(iv) of the Act regarding consistency with the general pricing principles and any service-specific pricing principles.      | In its Statement of Reasons of December 2020 for rejecting the earlier proposed RIO submitted by DataCo in August 2020 NICTA made clear its assessment of that draft against the requirements. The current draft RIO is substantially the same in many key respects and therefore it is appropriate to concentrate on the variations that NICTA indicated at  |

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|      |                                |                                |  | <p>that time would need to be made for compliance and acceptance. It is appropriate to recognise that the current proposal and consultation process has occurred in a context in which previous assessments are carried forward, where there is no change in the draft text. The Statement of Reasons that has been prepared in relation to the decision to accept the latest proposed RIO makes that clear, and also makes clear that previous assessments remain relevant where the provisions of the RIO have not been changed.</p>   |
| 4    | RIO Clause 3.2 - Term          | Page 4, paras 16 - 21          | <p>Digicel is concerned that the annual review arrangements might result in a review not being undertaken until January 2023 or even January 2024.</p> <p>Digicel is also concerned about the meaning of “review” and how it might be undertaken, and of the consequence if not concluded before 1 January of each year.</p> | <p>The concern about the rates remaining unreviewed for these periods is hypothetical. It is incumbent on all parties to ensure that the RIO works to the benefit of the industry.</p> <p>It is not necessary to spell out a review process in detail in the RIO. Clearly, to be effective, review outcomes need to be accepted by NICTA following industry consultation. The wording of Clause 3.2(a) makes it clear that the prices remain in effect until the 1<sup>st</sup> January of each year and if a review is incomplete it is open for any access seeker to create a dispute on appropriate prices for arbitration by NICTA. This is clearly a last resort and NICTA and the industry should seek to avoid recourse to this process. However, its existence offers a basic level of comfort for access seekers.</p> |
| 5    | RIO Clause 3.4 – 12-month term | Pages 4 and 5, paras 22 and 23 | <p>Digicel regards the new clause 3.4 as an unnecessary constraint given that long-term certainty is required for the services covered by the RIO.</p>   | <p>The purpose of the new clause was to enable wholesale customers to have guaranteed access to a 12-month term, following complaints made to NICTA about DataCo practices of seeking longer</p>   |

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|      |   |                              |   | <p>commitments. Apart from that, the parties are at liberty to agree any term that they wish on a fully commercial basis. In addition, DataCo cannot discriminate in the terms and conditions under which it offers services. It is important to recognise that both access seekers and access providers have an interest in certainty and in making longer term commitments for the use of longer-term facilities and services, such as those covered by the RIO.</p> |
| 6    | RIO Clause 7.3 – Service Bond           | Page 5, paras 24 - 27        | Digicel states that the amended provision in Clause 7.3 does not include objective criteria and leaves it to DataCo’s discretion whether to require a service bond. | NICTA disagrees. It is not necessary that the RIO set out in great detail the basis on which a service bond might be calculated. However, the amended provision makes it clear that the bond needs to be related to creditworthiness and have regard to the maximum liability relating to the services in question at any time. Maximum liability is an objective measure, dependent on the precise services that have been ordered by the customer.                   |
| 7    | RIO Clause 7.6(c) – Amendments to Price | Page 5, paras 28 - 30        | Digicel is concerned that clause 7.6(c) of the MSA gives DataCo discretion to increase prices and do not provide any certainty for access seekers.                  | The changes to Clause have addressed the issue of discretion and make it clear that price and other changes can only be made following regulatory approval. The certainty for access seekers is in the process.  |
| 8    | RIO Clause 7.6(d) - Billing disputes    | Pages 5 and 6, paras 31 - 34 | Digicel considers that the extension of the period in which a billing dispute may be lodged from 5 days to 15 days is short and should be 90 days.                  | NICTA disagrees. Access seekers have some responsibilities in this regard and should have systems in place to quickly assess invoices to ensure that they cover the services agreed and contain relevant deductions allowed for in the service agreements. Clause 7.6(d) requires only the notification of the   |

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|      |   |                       |   | dispute within the period. It does not require more than this.  |
| 9    | RIO Clause 10 - Termination             | Page 6, paras 35 - 38 | Digicel remains concerned that the changes to Clause 10 “have not improved the clause and have only further served to further entrench the right which DataCo has previously sought to terminate the provision of service to a customer immediately and without notice”. Amongst the concerns expressed by Digicel is that termination for breach of the MSA or Service Agreement must be based on the materiality of the breach. | Clause 10 makes it clear that DataCo must have a reasonable justification for termination. This is critical, since it imports an objective standard and does not leave the matter to DataCo’s unfettered discretion. Reasonable justification means that issues of materiality of any breach are relevant. It is not appropriate to expect the RIO to set out in an exhaustive way the various circumstances that might or might not arise and whether termination might follow or not in each case. In NICTA’s view the current wording is adequate for the purpose.   |
| 10   | RIO Annexure C – Service Availability - | Page 7, paras 39 - 43 | Digicel remains concerned that the promised service availability is “well short of international standards”, and considers that the offering does not meet the reasonableness standard in Section 126 of the Act.   | NICTA disagrees in relation to Section 126 of the Act. DataCo has pointed out in a prior consultation on an earlier proposed RIO that the 98.9% figure for availability takes account of gaps that are currently being plugged in its national network, especially in relation to services delivered to customers’ premises. However, DataCo notes that higher standards are achievable where a service is terminated at (or delivered to) a DataCo PoP. 98.9% availability has been accepted as a minimum service availability standard for now, having regard to the network circumstances that are involved. |

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| 11             | RIO Price Terms           | Page 7, paras 44 - 48             | <p>Digicel contends that the amended price terms in the RIO have not been supported by explanation or justification, including the prices for lower volumes that have been excluded in the RIO compared to the previous proposed RIO.</p> <p>Based on the contended lack of analysis and failure to meet the requirements of Section 229 of the Act, Digicel contends that NICTA is prohibited by law from accepting the RIO.</p>                                | <p>NICTA disagrees.</p> <p>The basic analysis on pricing and NICTA's conclusions were set out in relation to previous versions of the RIO when they were separately assessed. That analysis still applies given that the continuation of the same levels of demand, in effect, and the need to recover large and continuing fixed costs. The continued relevance of that analysis will be stressed in the Statement of reasons accompanying NICTA's acceptance of the current RIO.</p> <p>The removal of some lower volume categories in the price schedule has the effect of enabling access seekers with smaller requirements to have the benefit of lower unit prices, without any negative impact on other unit prices being offered.</p> <p>The requirements of Section 229 dealing with public consultation procedure have been met in NICTA's opinion.</p> |
| <b>B: ICCC</b> |                           |                                   |  |   |
| 12             | Acceptance recommended    | Letter of 6 December 2021, page 1 | <p>ICCC notes that there has been a reduction in the price of Wholesale Internet Service (WIS) across all volume categories, and welcomes this.</p> <p>"This is indeed great news for the sector in terms of wider accessibility and cheaper rates for end users. In addition, from a consumer perspective, the ICCC considers that it is equally important for this reduction to be passed down to the end users. Therefore, the ICCC encourages NICTA as a</p> | <p>As ICCC appreciates the role of the Wholesale Access Policy in the Act is to regulate where market forces are weak or are likely to fail. That is the basis of the original Ministerial Declaration of the wholesale services subject to the RIO.</p> <p>NICTA is, as a separate matter, reviewing prices for retail voice and data services. The reductions in the WIS prices in the proposed RIO are expected to be passed on, via competition in the retail sector of the</p>   |

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|                   |   |        | <p>responsible regulator for the Information Communication Technology industry to ensure that the respective Information Service Providers are passing on these reductions to the retail segment of the market.”</p> <p>“Nonetheless, NICTA should proceed to accept DataCo’s revised submission as it is now consistent with the requirements of Section 142 of the NICT Act.”</p> | <p>internet access market, to retail customers. If they are not passed on, then NICTA will consider further regulatory measures.</p> <p>Noted.</p>   |
| <b>C: Telikom</b> |   |        |   |  |
| 13                | Telikom’s submission - overall                                    |        | Telikom has commented in its submission on each of the clauses that were amended in the current proposed RIO compared to the previous version.  | In relation to many of the changes, Telikom has indicated its agreement. With one or two exceptions, this Response Report only addresses those changes in relation to which Telikom has expressed disagreement or has offered comments that call for a NICTA response.   |
| 14                | RIO Clause 10.2 – Customer’s right to terminate service agreement | Page 3 | Telikom believes that the Customer must have the right to terminate in circumstances other than those listed in Clause 10.2(a)(i) to (iv), and, further, that an early termination fee should not be charged if an early termination is triggered by the circumstances listed.  | The circumstances covered by Clause 10.2(a)(i) to (iv) are extensive. Telikom has not offered examples of situations that should be covered, but are not. Whether it would be reasonable or not for an early termination fee to be applied would depend on the precise circumstances leading to the early termination.   |
| 15                | RIO Annexure A – WIS and P2P Metro price reductions               | Page 4 | Telikom is concerned “whether the RIO pricing of the Wholesale Declared Services will promote long term interests of the end-users and balance the competing business interests of DataCo as the access provider with its access seekers”.  | Under its current licences DataCo is able to provide both wholesale and retail services, but has non-discrimination obligations that must be observed if it conducts business in both sectors. These obligations are not part of RIO administration however, and are not affected by the actual price levels in the RIO. |

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|      |   |               | Telikom is also concerned “whether the pricing will promote effective competition with its access seekers in particular telecommunications providers to provide direct internet access (DIA) under non-discrimination obligations (Section 136, Act)”.  | Reduced wholesale prices are beneficial to both wholesale and retail customers, and also to DataCo as access provider, as long as the reductions are sustainable.  |
| 16   | RIO Annexure A – Metro services                 | Page 5        | Telikom considers that “metro services should be eliminated in the wholesale market” and that DataCo should be confined to national domestic trunk routes.  | NICTA disagrees. The Act defines wholesale services, and under that definition the provision of a service with metro areas is allowed. It is not for NICTA to amend the Act through the regulatory means suggested by Telikom. In any case, many retail service providers rely on wholesale operators such as DataCo to deliver a wholesale service beyond the trunk network to their retail customer’s premises allowing their involvement on a reseller basis.   |
| 17   | RIO Annexure A – Domestic P2P Longhaul (DP2PLH) | Pages 5 and 6 | <p>Telikom proposes:</p> <ul style="list-style-type: none"> <li>(a) A separate service classification for transmission between mobile base stations and nearest available point on the access seekers network;</li> <li>(b) A separate service classification for transmission services according to commonly acquired speed tiers;</li> <li>(c) Online ordering and fault monitoring as basic features of the services; and</li> <li>(d) Clarification of the meaning of ‘point of interconnect’.</li> </ul> | <p>The proposals are noted but this RIO assessment is not the place to resolve any issues related to them. It is open for an access provider to submit a RIO for approval and to determine the content and coverage of the RIO. In the first instance Telikom should be raising the services and their features - proposals (a), (b) and (c) – with DataCo and to put the case.</p> <p>Regarding proposal (d), Section 4 of the Act defines “interconnection” between networks and NICTA considers that it is widely understood in the sector that the point of interconnect is a point at which two interworking or interconnected networks link. If the definition is unclear and is causing operational issues to arise then NICTA is prepared to consider a separate case if Telikom or other stakeholder wishes to make it.</p> |

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| 18   | RIO Annexure A – International P2P (IP2P) | Page 6        | Telikom maintains an earlier proposal that DataCo should provide international service only to Cable Landing Stations (CLS). Telikom considers that the IP2P service to be one delivered using only international submarine cable facilities.  | <p>NICTA strongly disagrees with this comment.</p> <p>IP2P service is actually defined in Annexure A as to the CLS for the prices shown. However, the service can be extended to other termination points for a fee. Telikom’s proposal seems designed to limit competition and that is not part of the policy of the Act. DataCo has operator licences that enable it to provide international and domestic services and NICTA has no intention of curbing the provision of services by those who can provide them. If Telikom or others are seeking further transmission service sales they will need to achieve them through the merits of their commercial offerings, not through regulatory constraints on competitors.</p> |
| 19   | Other comments on Service Pricing Offer   | Pages 6 and 7 | <p>Telikom raises the issues of acquisition of services by a licensed operator for its own use, and expresses concern that “licensed operators who purchase ... wholesale services ... from DataCo for their own use will benefit from the proposed service pricing offer.”</p> <p>Telikom proposes that DataCo should “review its service pricing offer and offer different price ranges in different markets”.</p> | <p>NICTA disagrees. These issues which concern wholesale-retail demarcations are dealt with by NICTA in a separate public consultation on the draft Guideline. In any case, licensed operators are not purchasing wholesale services if those services are for their own use and not for inclusion as part of a retail offer to retail customers of their own.</p> <p>NICTA notes the proposal but and leaves this, for now, as a matter for DataCo to consider. The current prices in Annexure A to the RIO are wholesale service prices relating to declared wholesale access services. Retail prices are not the subject of the current RIO assessment.</p>   |