



**Decision on acceptance or rejection of DataCo's  
Proposes Reference Interconnection Offer of  
22 October 2021 in relation to various wholesale  
access services**

**STATEMENT OF REASONS FOR NICTA'S  
DECISION**

24 December 2021

## **A. Purpose of this Statement**

1. The purpose of this Statement is to set out the reasons for NICTA's decision to accept the Reference Interconnection Offer ("RIO") proposed by PNG DataCo Limited ("DataCo") on 22 October 2021.

## **B. Background and Previous RIOs submitted by DataCo**

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 that RIO, and in subsequent RIOs proposed for acceptance by DataCo. '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.
7. Following the public consultation and other processes mandated by the Act, NICTA determined to reject the RIO submitted by DataCo on 13 August 2020, and did so in December 2020. NICTA published a statement of reasons (referred to in this document as the 2020 Statement of Reasons) on 29 December 2020 and that statement remains posted on NICTA's website ([www.nicta.gov.pg/2020/08/cp-0-14/](http://www.nicta.gov.pg/2020/08/cp-0-14/)). Although the decision was to reject the RIO proposed on 13 August 2020, the reasons were because specific provisions were unacceptable and these are set out in the 2020 Statement of Reasons. In other respects, where subsequent proposed RIOs have retained provisions that were then

considered to be acceptable in the 2020 Statement of Reasons they still remain acceptable to NICTA in terms of the criteria in the Act that must be met.

8. DataCo considered the reasons for rejection set out in the 2020 Statement of Reasons, and attempted to address those matters in its revised RIO submitted for NICTA's acceptance on 9 April 2021 (Revised RIO).
9. The Revised RIO was published for public comments on 21 May 2021 with an initial deadline of 21 June 2021. The deadline was subsequently extended to 30 June 2021 at the request of the industry.
10. A further period of consultation was allowed to enable comments on comments and, in particular, any further submissions from DataCo.
11. NICTA determined that the revised RIO did not adequately meet the problems identified with the initial proposed RIO in the 2020 Statement of Reasons, and formally rejected the Revised RIO to meet the strict requirements of the Act that permit NICTA to accept or reject, but not to amend, a proposed RIO. NICTA rejected the Revised RIO in a notice posted on its website and, at the same time, notified interested parties of a public consultation on a further amended RIO submitted by DataCo on 22 October 2021 ([www.nicta.gov.pg/2021/05/cp-0-15/](http://www.nicta.gov.pg/2021/05/cp-0-15/)).
12. The further revised RIO of 22 October 2021 was subjected to public consultation from 5 November 2021 to 5 December 2021. The deadline was subsequently extended to 10 December 2021 at the request of the industry.

### **C. Requirements in the Act relating to RIOS**

13. 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.
14. 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.
15. 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.
16. 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.
17. 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 processes**

18. As indicated above the further revised RIO of 22 October 2021 and its predecessor RIO proposals were subject to extended public consultations on a number of occasions. The consultations for the revised RIO of 9 April 2021 and the further revised RIO of 22 October 2021 concentrated, but were not limited to, the changes made by DataCo to address the reasons in the 2020 Statement of Reasons for the rejection of the initial RIO. The changes relate to important matters, but these are only a small proportion of the total content of the RIO. As noted in paragraph 7, above, the assessment of the continuing content that was made in the 2020 Statement of Reasons remains in effect.
19. Section 142(5)(a)(i) and (ii) of the Act require that a minimum of 4 weeks be allowed for submissions and that NICTA carefully consider all submissions received within the time limits specified.
20. Taking into account the extension of the deadline, 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.
21. 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**

22. 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**

23. 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.

24. 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.
25. 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.
26. 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.
27. 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.
28. 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.
29. 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 the revised RIO of 22 October 2021 meets this requirement. These matters relate, in part, to the manner in which DataCo will exercise judgments on matters such as termination of a service agreement or the imposition of service bonds associated with creditworthiness and contractual payments. These matters are discussed in detail in the accompanying report, which sets out NICTA's response to the comments raised by stakeholders in their submissions (the NICTA Response to Comments Report), which has also been posted on NICTA's website.
30. For the reason in the preceding paragraph, NICTA considers that the proposed RIO satisfies the requirements of Section 141(3).

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

31. 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.
32. 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. These clauses have been further amended by DataCo in the RIO of 22 October 2021.

33. 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, including related licensed operators which are State Owned Enterprises.

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

34. 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.
35. A number of the non-price terms and conditions were assessed in the 2020 Statement of Reasons as not reasonable, in NICTA's view, within the extended meaning of the term in Section 126. These included Clause 3 (Term), Clause 7.3 (Service Bond), Clause 7.6 (Amendments to Price and Notification of Billing Disputes), Clause 10 (Termination), Clause 15 (Personal Data) and Attachment C (Service Availability). These clauses have been removed or amended in the proposed RIO of 22 October 2021, and NICTA now assesses them as reasonable within the meaning of Section 126 of the Act.

### **F. Decision**

36. Having regard to the considerations set out above, NICTA has accepted the RIO that was proposed by DataCo on 22 October 2021.

**Port Moresby**

**24 December 2021**