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LAWYERS

5 February 2009

By email

David Cranston
Communications Group
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3000

Email: digitalradio@acc.gov.au

Dear Mr. Cranston,

Access seeker right of termination

We act on behalf of Commercial Radio Australia Limited (**CRA**), which represents the eligible joint venture companies (**EJVCs**) that have lodged the digital radio access undertakings with the Australian Competition & Consumer Commission (**Commission**).

We refer to the telephone conversation between Ara Margossian and David Cranston on 30 January 2009, in which the Commission asked whether CRA would, on behalf of the EJVCs, support the introduction of a provision in the access agreement that would allow an access seeker to terminate the access agreement on reasonable notice for convenience.

CRA is amenable to revising the access agreement to provide access seekers with the following:

- a right to terminate the access agreement for convenience on 6 months notice; and
- a right to reduce the amount of multiplex capacity being acquired pursuant to the access agreement on 6 months notice.

This second option is necessary to cover circumstances where an access seeker only wishes to hand back a portion of multiplex capacity, but does not wish to terminate the access agreement or cease obtaining all the multiplex capacity being acquired.

CRA would not object to the following amendments to clause 16 of the access agreement:

- insert a new clause 16.3:

“16.3 Termination for convenience

An Access Seeker may terminate this Agreement at its discretion at any time by giving the Multiplex Licensee 6 months written notice of its intention to do so.”

- insert a new clause 16.5:

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“16.5 Reduction of Multiplex Capacity

- (a) *An Access Seeker may request a reduction in the amount of Multiplex Capacity that it acquires under this Agreement by giving the Multiplex Licensee 6 months written notice of its intention to do so and the amount of any such reduction. The Multiplex Licensee will reduce the amount of Multiplex Capacity being acquired by the Access Seeker in accordance with such notice.*
- (b) *For the avoidance of doubt, a request by an Access Seeker to reduce the amount of Multiplex Capacity pursuant to clause 16.5(a) will not result in, or constitute, a termination of this Agreement.”*

CRA considers that the requirement for an access seeker to provide 6 months written notice of its intention to terminate the agreement or reduce the amount of multiplex capacity is reasonable.

Given that the amount of access charges varies depending on the amount of multiplex capacity that is being utilised by all access seekers at a certain point in time (and will vary as the number of access seekers on the multiplexer increases or decreases)¹, CRA does not wish to have a scenario where there are frequently occurring adjustments to the level of access charges based on changes in the number of access seekers or the amount of multiplex capacity being utilised.

CRA considers that a 6 months notice period provides:

- access seekers with the flexibility to terminate the access agreement or reduce the multiplex capacity within a reasonable timeframe; and
- the remaining access seekers with greater certainty as to the level of access charges that are payable, including with respect to the increases in the level of access charges payable by these remaining access seekers following a reduction in the overall number of access seekers or amount of multiplex capacity being acquired.

CRA would be happy to have further discussions with the Commission about its views, if necessary. If you have any queries in relation to this matter, please don't hesitate to contact Ara Margossian on (02) 9263 4224.

Yours faithfully



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¹ Access Agreement, clause 4.3 of Schedule 2 (Pricing Principles).