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Anna Barker

Director, NBN Co Access Co-ordination – Communications Group

Australian Competition and Consumer Commission

Level 35, 360 Elizabeth Street

Melbourne, VIC 3000

Dear Ms Barker,

Statement of differences—Channel Incentive Program

The Wholesale Broadband Agreement (**WBA1**) is the contractual vehicle that NBN Co has used to supply products and services to its wholesale customers since its publication on 30 November 2011.

On 12 December 2013, a new Wholesale Broadband Agreement (**WBA2**) was published as the contractual vehicle that NBN Co will use to supply products and services to its wholesale customers for the next two years. Since its publication, WBA2 constituted a standard form of access agreement (**SFAA**) for the purposes of Part XIC of the *Competition and Consumer Act 2010* (**CCA**). On the same date, WBA1 ceased to be a SFAA.

Background to Channel Incentive Program

On 6 November 2013, NBN Co notified all of its WBA1 Customers of amendments to the Price List and NBN Co Operations Manual to enable NBN Co to offer Customers a Migration Offer Credit to maximise the speed and volume take up of the NBN (a **Migration Offer Credit**), and to enable NBN Co to apply any Migration Offer Credit to NBN Co invoices. Customers were advised that NBN Co would notify Customers of the terms and conditions of any Migration Offer Credit program (**Program Notice**) that NBN Co may offer from time to time.

The effective date of the Price List changes enabling Migration Offer Credits to be offered is 6 February 2014, unless the three-month notice period had been waived by the Customer, in which case the Migration Offer Credit enabling provisions took effect in the customer's access agreement on 19 December 2013. The 14 Customers that had waived the notice period before 19 December 2013 received a Program Notice for the Channel Incentive Program from NBN Co on 19 December 2013.

On 6 February 2014, the Customers (listed at **Appendix A**) that had not waived the notice period also received a Program Notice for the Channel Incentive Program from NBN Co, with the same terms as the Program Notice issued on 19 December 2013.

The Program Notice issued on 6 February 2014 is provided at **Appendix B**. The Program Notice is a commercial-in-confidence document (including at the request of Customers).

Statement of differences

The Program Notice varies the access agreements of the Customers listed at **Appendix A** based on WBA1 of Customers to which it was provided. As WBA1 was not a SFAA on the date the Program Notice was provided, we provide this statement of differences as between the varied access agreements based on WBA1 and the SFAA for WBA2.

With respect to the differences, we refer to **Appendix C**, which sets out a high-level description of the differences between WBA1 and the SFAA for WBA2 that do not relate to the Channel Incentive Program. These differences are in addition to those specified in the Program Notice, and reflect the input of NBN Co's Customers, as well as NBN Co's Special Access Undertaking, as now accepted by the ACCC on 13 December 2013 (**SAU**).

The additional differences that relate to the Channel Incentive Program specifically are as follows:

- NBN Co will provide a Migration Offer Credit to Customer for each eligible activation occurring during the program period (1 February 2014 to 30 April 2014) within FSAMs identified by NBN Co.
- The FSAMs in which the Migration Offer Credit will be available, and the amount of the credit, will be as NBN Co determines from time to time.
- To be eligible for the Migration Offer Credit, a Customer must submit to NBN Co, before the start of the program period, a Channel Activity Plan setting out how Customer intends to encourage higher rates of activations in participating FSAMs. The Channel Activity Plan must be approved in writing by NBN Co for Customer to be eligible for credits. Within 20 Business Days of the end of the Program Period, Customer must also provide NBN Co with evidence of activities undertaken as part of the Channel Activity Plan, which must evidence a minimum level of activity under that plan.

NBN Co provides this statement of differences having regard to section 152BEBA of the CCA, and having regard to the ACCC's letter of 6 February 2014 in which the ACCC confirmed that where NBN Co enters into a variation agreement with a customer that is based on WBA 1, where WBA 1 was no longer available as an SFAA at the time the variation agreement was entered into, NBN Co may lodge a statement of differences which is a written document specifying certain matters.

We understand that approach approved by the ACCC in its letter of 6 February 2014 applies only the specific circumstances outlined above. NBN Co does not take this as an indication of the ACCC's general approach to assessing and enforcing NBN Co's compliance with its statutory obligations around access agreement lodgement and obligations to provide statements of differences. NBN Co understands that unless the ACCC determines otherwise, the form of statements of differences specified in the guidelines still applies in all circumstances other than those outlined above.

Variation agreements relating to the Program Notice issued to Customers (listed in **Appendix A**) on 6 February 2014 will be lodged as required by section 152BEA of the CCA in due course.

Capitalised terms used in this letter have the meaning given to them in the Program Notice dated 6 February 2014 or in WBA1 unless otherwise defined.

Yours sincerely



Caroline Lovell

Head of Regulatory Affairs & Industry Analysis

Appendix A: Customers receiving Program Notice for Channel Incentive Plan on 19 December 2013

1. AARNet Pty Ltd
2. Amcom Pty Ltd
3. Anittel Communications Pty Ltd
4. Aurora Energy Pty Ltd
5. Aussie Broadband Pty Ltd
6. Bendigo Community Telco
7. Broadband Solutions Pty Ltd
8. Buroserv Australia Pty Ltd
9. Clear Networks Pty Ltd
10. Community Telco Australia Pty Ltd
11. Comscentre Networks Pty Ltd
12. DuxTel Pty Ltd
13. Gosford City Council
14. iBoss International Pty Ltd
15. ispONE Pty Ltd
16. Ivery Holdings Pty Ltd
17. Logic IT Solutions Pty Ltd
18. Luminet Pty Ltd
19. Macquarie Telecom Pty Ltd
20. Manage My Group Pty Ltd
21. Network Technology (Aust) Pty Ltd
22. Nextgen Networks Pty Ltd
23. Northern Technology Holdings Pty Ltd
24. On Q Network Operations Pty Ltd
25. Optus Networks Pty Ltd
26. SA Power Networks
27. Symbio Wholesale Pty Ltd
28. TasmaNet Pty Ltd
29. Telcoinabox Pty Ltd
30. Telstra Corporation Limited
31. TPG Internet Pty Ltd
32. VicTrack Pty Ltd
33. VMVault Pty Ltd
34. Vocus Pty Ltd
35. Vodafone Hutchison Australia Pty Ltd

Program Notice for a Migration Offer

Credit - Channel Incentive Program

6 February 2014



Background

NBN Co is offering Customers the opportunity to participate in a “Channel Incentive Program” and receive a Migration Offer Credit, which is designed to enable Customers to drive activations and encourage the early migration of End Users to NBN Co Fibre Access Services (**NFAS**) and NBN Co Wireless Access Services (**NWAS**) within specified new and existing fibre and fixed wireless locations.

Terms and Conditions of Migration Offer Credit

This document is to be read in conjunction with your Wholesale Broadband Agreement (**WBA**). This document is a “Program Notice” provided by NBN Co under section 3.7 of the Price List in the WBA Product Catalogue. By Customer submitting a Channel Activity Plan to NBN Co, Customer agrees to be bound by this Program Notice and the terms and conditions in this Program Notice form part of the WBA.

- (a) Subject to the conditions in this Program Notice, NBN Co will provide to Customer a Migration Offer Credit for each Eligible Activation which occurs during the Program Period, in accordance with the NBN Co Operations Manual.
- (b) Customer acknowledges that the purpose of NBN Co offering the Migration Offer Credit is to encourage higher rates of activation and use of NFAS and NWAS services across premises that have not yet connected to the NBN Co Fibre Network or the NBN Co Wireless Network, by Customer carrying out specific demand generation and migration activities to End Users within Participating FSAMs or Participating WSAs.
- (c) To be eligible for the Migration Offer Credit:
 - i. Customer, or a Downstream Customer, must be a party to a valid agreement with the relevant End User for the supply of a Customer Product, or a Downstream Product, as the case may be, to that End User.
 - ii. Customer must submit a Channel Activity Plan prior to the commencement of the Program Period, to be approved in writing by NBN Co, detailing the activities Customer plans to carry out in the Participating FSAM and/or Participating WSA to encourage higher rates of End User activation and use of NFAS and NWAS services in that Participating FSAM and/or Participating WSA;

- iii. within 20 Business Days of the end of the Program Period, Customer must submit to NBN Co evidence (including invoices and copies of marketing collateral and costs incurred) of the activities that the Customer carried out in the Participating FSAM and/or Participating WSA;
- iv. the evidence referred to in paragraph (c)(iii) must, in NBN Co's reasonable opinion, evidence a minimum required activity required by the Channel Activity Plan; and
- v. Customer must use reasonable endeavours to target Service Class 1 Eligible Premises and Service Class 2 Eligible Premises within the Participating FSAM and/or Service Class 4 and Service Class 5 Eligible Premises within the Participating WSA.

(d) Customer is not entitled to a Migration Offer Credit:

- i. if NBN Co determines, acting reasonably, that an Eligible Activation is not a bona fide Activation made consistent with the purpose specified in paragraph (b) above, including where:
 - A. an Activation is disconnected and re-Activated for the purpose of claiming a Migration Offer Credit;
 - B. the only costs incurred by Customer in carrying out the activities (such as special offers, demand generation and migration activity) are internal charges such as internal staff costs or internal IT system development;
- ii. if at the time of submitting an NFAS or NWAS order, Customer or a Related Body Corporate of Customer, has an active NFAS or NWAS service or has made a claim for a Migration Offer Credit, in respect of the relevant Eligible Premises;
- iii. in respect of an Eligible Activation, if Customer submits (or has submitted) a disconnection order within 3 months of the date on which the order status in respect of the activation was updated to "Completed"; or
- iv. if Customer receives a Migration Offer Credit other than in accordance with, or otherwise does not comply with, this Program Notice or the provisions of the WBA relating to the Migration Offer Credit.

(e) If paragraph (d) applies to any Activation in respect of which NBN Co has provided a Migration Offer Credit to Customer:

- i. an amount equal to that Migration Offer Credit must be repaid by Customer to NBN Co; and
- ii. NBN Co may (in its discretion):

- A. apply the amount of that Migration Offer Credit against any other Migration Offer Credits to which Customer may be entitled; or
- B. invoice Customer for the amount of the Migration Offer Credit to be repaid.

(f) For the purposes of this Program Notice, any capitalised term used but not defined in this Program Notice has the meaning given to that term in the WBA and:

- i. **Activation** means an NFAS or NWS order for a Premises which:
 - A. is submitted by Customer within the Program Period;
 - B. accepted by NBN Co; and
 - C. has its order status updated to "Completed", in accordance with the NBN Co Operations Manual.
- ii. **Channel Activity Plan** means Customer's proposed special offer, demand generation and/or migration activities in a Participating FSAM or Participating WSA for the Program Period, set out in the template provided by NBN Co.
- iii. **Eligible Activation** means an Activation in respect of an Eligible Premises:
 - A. which occurs during the Program Period; or
 - B. is submitted by Customer and accepted by NBN Co during the Program Period, which has had its order status updated to "Completed" after the end of the Program Period, where Customer scheduled an installation appointment for a date within the Program Period and NBN Co rescheduled that installation appointment (other than because an End User was not at the Premises) to a date after the end of the Program Period.
- iv. **Eligible Premises** means Premises in a Participating FSAM or Participating WSA.
- v. **Migration Offer Credit** means, in respect of each NFAS Service and each NWS Service, a credit of such amount as notified by NBN Co to Customer.
- vi. **Participating FSAM** means the Fibre Serving Area Module (with FSAM identifier) that NBN Co may, from time to time, determine to be subject to a Migration Offer Credit during the Program Period. NBN Co will provide Customers with 20 Business Days notice in writing prior to the commencement of the relevant Program Period for that Participating FSAM.
- vii. **Participating WSA** means the Wireless Serving Area (with WSA identifier) that NBN Co may, from time to time, determine to be subject to a Migration Offer Credit during a Program Period. NBN Co will provide Customers with 20 Business Days notice in writing prior to the commencement of the relevant Program Period for that Participating WSA.
- viii. **Program Period** means, in respect of any Participating FSAM and/or Participating WSA, the period commencing and ending on the dates notified by NBN Co to Customer.

Appendix C: key differences between the varied WBA1 and the SFAA for WBA2

WBA2 provides improvements for customers with respect to a range of terms, including service delivery, risk management, dispute management and change management, as well as protections offered with respect to confidential information and intellectual property rights. In addition, WBA2 has been drafted to improve its structure, consistency and clarity, including the creation of a unified Dictionary for the entire agreement.

Some specific differences with WBA1 include the following:

1. Module B (Financial Management): amended to include dispute resolution for Billing Disputes (previously set out in the NBN Co Operations Manual);
2. Module C (Operational Management): amended to ensure upstream contract alignment, and the obligation for customers to pass-through certain terms in their downstream customer contracts has been removed;
3. Module D (Information and Rights Management): D1 (Confidential Information) has been replaced by the equivalent provisions from the ACCC's local bitstream access service declaration; D5 (Intellectual Property) has been amended to narrow rights for the parties to use each other's IPRs, include recognition that any broader rights for NBN Co to use Customer IPRs will require negotiation for such rights on commercial terms and remove the requirement to comply with the NBN Co Brand Use Guidelines;
4. Module E (Risk Management): substantially simplified and the broad exclusions of NBN Co's liability that were formerly in E2.7 have been removed; also amended to clarify that (1) NBN Co limits its liability by excluding economic loss occasioned to end users by negligent acts or omissions of NBN Co to the extent that that loss can lawfully be excluded and (2) the indemnities between NBN Co and Customer are mutual except to the extent appropriate given the asymmetric nature of the supply relationship;
5. Module F (Agreement Management): amended to reduce NBN Co's unilateral change rights, in response to Customer concerns and ACCC feedback;
6. Module G (Dispute Management): significantly redrafted for clarity, as well as alignment with NBN Co's obligations as set out in the SAU and approaches taken in other industries, including to allow the parties to have a matter dealt with by expert determination or mediation without the need to involve the resolution advisor;
7. Product Catalogue: substantially rewritten for clarity and consistency, with significant substantive changes to the Service Level Schedule (including new order types, improved end user connection timeframe commitments, introduction of commercial rebates, clarification of CSG compensation arrangements, strengthening of the corrective action obligation, and the inclusion of service levels and performance objectives for a range of metrics);
8. Operations Manual: substantially rewritten to improve clarity and content;
9. NBN Co Platform Interfacing Service (**NPIS**): while commitments regarding the NPIS remain in the WBA, including regarding change management, the B2B specifications themselves have been removed from the WBA;
10. Product Development Forum Terms: incorporated by reference the PDF Processes set out in the SAU and also incorporated amendments to the confidential information and intellectual property rights provisions to reflect ACCC feedback on the SAU;
11. Term: the Expiry Date is defined as 1 March 2016 (subject to change in accordance with clause F2.2 of the Head Terms) or such other date as the parties may agree in writing.