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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

Commercial-in-confidence

Dear Ms Barker,

Statement of differences—extension of WBA—ispONE Pty Ltd

NBN Co Limited (**NBN Co**) and ispONE Pty Ltd ABN 70 103 220 766 (**ispONE**) entered into an access agreement based on the Wholesale Broadband Agreement (**WBA**) on 20 January 2012. ispONE subsequently entered into three extensions of the WBA, the last of which extended its term until 20 December 2013.

From 13 December 2013, the WBA on which ispONE's agreement was based (**WBA1**) was no longer available on NBN Co's website as a standard form of access agreement (**SFAA**) for the purposes of Part XIC of the *Competition and Consumer Act 2010* (**CCA**). From that day, a new WBA (**WBA2**) was made available on NBN Co's website as an SFAA, in preparation for execution by customers.

As previously advised to the ACCC, on 23 September 2013, ispONE was placed into liquidation and liquidators were appointed. [REDACTED]

To assist the purchaser of ispONE's assets in preparing for the transfer of end users, on 20 November 2013 NBN Co extended ispONE's WBA1, which was due to expire on 31 October 2013, until 20 December 2013 [REDACTED]

NBN Co now understands that the purchaser of ispONE's assets requires additional time to prepare for supply under WBA2. On 8 January 2014, NBN Co made an offer [REDACTED] to extend ispONE's WBA1 until 31 January 2014 [REDACTED]

[REDACTED]. This extension also varied ispONE's WBA1 in certain other respects:

1. clause F3 of WBA1 will be of no force or effect;
2. subject to paragraph 3, the terms of Module G (Dispute Management) of the next version of the wholesale broadband agreement which was published as a standard form access agreement on 13 December 2013 (commonly referred to as WBA2) will be substituted for the terms of Module G (Dispute

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Management) in WBA1 and apply to any dispute that is or would have been a Dispute and the terms of WBA1 will be read so as to give effect to this paragraph 2;

3. paragraph 2 does not apply to any "Billing Dispute" (as defined in WBA1); and

4. after 31 January 2014, in accordance with clause F13 of WBA1:

- a) NBN Co will cease supplying Ordered Products to Customer; and
- b) Customer's rights to use Ordered Products (including as an input to the supply of Customer Products) will immediately cease.

NBN Co has also offered to extend to 31 January 2014 the WBA1 of customers that require additional time to complete administrative processes necessary before they are able to execute WBA2, although without requiring prepayment for future supply.

As the terms of this WBA1 extension impose requirements on ispONE that are different to those set out in the extension provided to other Customers [REDACTED], NBN Co understands that the requirement for a statement of differences in this situation is triggered by acceptance of NBN Co's offer. [REDACTED]

As WBA1 was no longer an SFAA at the time these variations were entered into, we provide this statement of differences as between the varied access agreements based on WBA1 and the SFAA for WBA2. A high-level description of the key differences between WBA1 as varied and the SFAA for WBA2 is set out in **Appendix A**.

The offer to ispONE's liquidators was made and accepted on a commercial-in-confidence basis. [REDACTED]

[REDACTED] Accordingly, NBN Co requests that the ACCC treat this letter as the statement of differences for the purposes of section 152BEBA of the CCA and confirm that it will only post a redacted version of this letter on the register.

NBN Co will also be separately providing the ACCC with a copy (again on a commercial-in-confidence basis) of the form of the offer made to ispONE as it constitutes a variation to ispONE's WBA.

As the SFAA on which WBA1 is based is no longer available, and these terms are not relevant with respect to WBA2, no SFAA will be updated to reflect them.

Any terms not defined in this letter should be read as defined in the WBA.

Yours sincerely



Caroline Lovell
Head of Regulatory Affairs & Industry Analysis

Appendix A: 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.