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**BY EMAIL**

Robert Wright  
General Manager Compliance and Regulatory Operations  
Communications Group  
Australian Competition and Consumer Commission

**By email to: robert.wright@ACCC.gov.au**

Dear Mr Wright

**Public inquiry to make a final access determination for the Wholesale ADSL Service (the WDSL Public Inquiry)**

We act for iiNet.

We refer to the draft report relating to the above (**the Draft Report**). The purpose of this letter is:

- to request that:
  - the Australian Competition and Consumer Commission (**ACCC**) hold a hearing under section 501 of the *Telecommunications Act 1997* (**Telco Act**) as part of the WDSL Public Inquiry; or alternatively
  - the ACCC release reports:
    - that where submitted to it by Telstra pursuant to Telstra's obligations under the Telecommunications Industry Regulatory Accounting Framework Record Keeping Rules made by the ACCC under section 151BU of the CCA (**the RAF Record Keeping Rules**); and
    - have been considered by the ACCC when determining the draft prices for the Wholesale ADSL Service contained in the Draft Report; and
- to request an extension to the time period in which interested parties have to make submissions on the Draft Report.

The reasons for making these requests are set out below.

## 1. REQUEST FOR A HEARING

In order for iiNet to provide a meaningful response to the Draft Report, it is necessary to undertake a process that includes the following:

1. The ACCC's reasoning process and the information and evidence which the ACCC has considered in forming its preliminary views are identified and evaluated.
2. Where the information or evidence on which the ACCC has relied is not publicly available, that evidence is obtained.
3. Where an issue requires expert opinion, the expert is briefed and given sufficient time to become seized of the issues and to provide an opinion. This includes being in possession of the information and evidence referred to at 1 and 2 above.
4. A view is formed on all of the relevant issues and a submission drafted.

Because relevant data has not been disclosed during the public inquiry, iiNet has not been able to fully evaluate the application of the ACCC's reasoning process in the Draft Decision as regards the ACCC's draft price terms. In particular, iiNet has not been able to properly evaluate the ACCC's approach to the issue relating to the selection of assets for inclusion in the Regulatory Asset Base (**RAB**) for the Wholesale ADSL Service (**WDSL**) (**the RAB Issue**). This is because the Draft Decision and related materials currently available to iiNet do not contain information at the level of granularity that is required to properly assess the RAB Issue.

On 19 March 2013 we sought details from the ACCC of the particular assets and their costs that were allocated to the RAB for WDSL. The ACCC responded on 22 March 2013. In the ACCC's response reference was made to Telstra's response to the ACCC's information request of 12 August 2012. This information is confidential to Telstra. In order to consider this information it was necessary for us to obtain approval from Telstra. This approval has been obtained and a redacted version of the information has been considered. This consideration included seeking expert economic opinion from CEG Asia Pacific (**CEG**). CEG has informed iiNet that what is required in order to provide the transparency that is needed to evaluate the ACCC's preliminary views on the RAB Issue is:

- the WDSL asset register provided by Telstra to the ACCC in October 2012 (**the Asset Register**);
- a spread sheet that comprehensively shows which assets (i.e. not just the asset classes) were included in the WDSL RAB and which assets were excluded and a description as to why for each asset line (**the Asset Spread Sheet**); and
- the information submitted by Telstra and Regulatory Accounting Framework (**RAF**) data used by the ACCC to establish the initial RAB for the different asset classes in the Fixed Line Services Model (**the Telstra FLSM Data**),

(collectively referred to as **the Required Information**).

We have requested that Telstra provide access to the Asset Register to persons who have been approved to receive Telstra's confidential information under the terms of agreed confidentiality undertakings. Telstra has refused our request claiming that '*granting access to such information would allow parties to examine [Telstra's] cost structure to such an extent that they would gain a substantial competitive advantage*'. As regards the Asset Spread Sheet, this would require the ACCC to use information that is contained in the Asset Register

and would likely meet with the same objections from Telstra as regards its disclosure. This means that, due to confidentiality restrictions, iiNet is unable to assess the ACCC's consideration of the RAB Issue. Given that this information has come from Telstra, this has the result that Telstra is the only party that is in a position to properly assess the ACCC's consideration of the RAB Issue. As a party whose interests will be clearly and materially affected by the ACCC's final decision, iiNet finds this position to be unsatisfactory.

Accordingly, iiNet believes that the ACCC should conduct the WDSL Public Inquiry in a manner that allows appropriate personnel within iiNet (and/or external representatives and experts) (**Approved iiNet Persons**) to be given access to the Required Information. We believe that the most expedient way for this to happen is as follows:

- The ACCC hold a hearing under section 501 of the Telco Act.
- Pursuant to sub-section 502(3) of the Telco Act, the hearing be in private.
- The ACCC issue a direction under section 155 of the *Competition and Consumer Act 2010 (CCA)* that Telstra attend the hearing and produce the Asset Register and Telstra FLSM Data documents<sup>1</sup>.
- The ACCC issue a direction under section 504 of the Telco Act that in addition to ACCC and Telstra people, the only other people permitted to be present at the hearing are the Approved iiNet Persons.
- The ACCC produce the Asset Spread Sheet at the hearing.
- The ACCC issue a direction under Section 503 of the Telco Act that the Required Information be provided to the Approved Persons subject to suitable restrictions including confidentiality undertakings.

## 2. **REQUEST FOR DATA SUBMITTED UNDER THE RAF RECORD KEEPING RULES**

As regards the RAF data, we note that access to this information is subject to a statutory access mechanism set out in Division 6 of Part XIB of the CCA, which will require the following process:

- iiNet requests access;
- the ACCC provides a draft notice to Telstra which states that access will be provided;
- Telstra has at least 28 days in which to make submissions on the draft notice; and
- the ACCC issues a notice which requires Telstra to provide access after a period of at least 28 days.

Obtaining access to the RAF data by means of this process is likely to be unnecessarily time consuming as compared to the hearing mechanism suggested above. However, if the ACCC is not minded to grant the above request for a hearing, then, in accordance with sections

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<sup>1</sup> Section 506 of the Telco Act provides that Division 3 of Part 25 of the Telco Act does not limit the ACCC's powers under the CCA. This means that the ACCC can use its powers under the Telco Act in combination with its powers under the CCA.

151BUAB and 151BUA of the CCA, we wish to seek access to each report that satisfies both of the following conditions:

- it was submitted by Telstra pursuant to the RAF Recording Keeping Rules; and
- it was considered by the ACCC in forming its preliminary views included in the Draft Report and/or it contains data that is relevant to the inputs used in the Fixed Line Services Model,

**(the Requested RAF Data).**

Note that to the extent that the Requested RAF Data is contained in more than one report submitted pursuant to the RAF Record Keeping Rules, we hereby make a separate request under section 151BUA of the CCA for access to each report which contains RAF Data.

We note that section 151BUA allows the ACCC to specify which persons can have access and under what terms and conditions. We propose that the RAF Data be made available:

- only to iiNet's nominated personnel and representatives who have signed confidentiality undertakings in favour of Telstra and who have been approved by Telstra to access Telstra confidential information contained in the Draft Report; and
- in accordance with the confidentiality undertakings.

We believe that such access is appropriate as, without it, iiNet is hindered from properly considering material issues raised by the Draft Report which are relevant to the ACCC making an access determination under Part XIC of the CCA. In this regard we note that in an email to us dated 22 March 2013 from the ACCC, the ACCC stated that a significant amount of information used in the Fixed Line Services Model (which has been adapted to set the prices in the Draft Report) is derived from the RAF Data. We believe that without access to this primary evidence, iiNet cannot properly consider and respond to the Draft Report. We acknowledge that the RAF Data is confidential to Telstra. However, we believe that the limited rights of access proposed above are appropriate and sufficient to protect Telstra's legitimate interests. Accordingly, we submit that providing access on the terms requested would facilitate the operation of Part XIC of the CCA.

### **3. REQUEST FOR EXTENSION OF TIME**

We request that the ACCC extend the timeframe for submissions by an appropriate period of time to allow the above process, as relevant, to be completed and for iiNet to have a reasonable period of time in which to consider the documents that are forthcoming. Clearly, the hearing option is likely to be the speedier process.



Yours faithfully  
**HERBERT GEER LAWYERS**