



BY E-MAIL ONLY

Australian Competition & Consumer Commission
Communications Group
To Mr. Grahame O'Leary and Mr. Julian James
GPO Box 3648
SYDNEY NSW 2001

Subject:
Submission on the consultation paper to review of policies
and procedures relating to the identification of listed NBN POIs

Tinana, March 21st 2013

Dear Sirs,

With this letter, our company wishes to forward the following submission to the ACCC in regards to the above mentioned consultation paper.

Introduction

The RSPs can be divided into two groups, the larger RSPs who engage directly with NBNSCo and the smaller RSPs who engage with wholesalers.

As the wholesalers own, in majority, the fibre that can establish connectivity between the POI's and the State capitals, they alone are able to aggregate the services from the different POI's and deliver them either as layer-2 or layer-3 services to the POP of the smaller RSP.

To establish a competitive market, this submission will argue that the competition criteria have to be extended to the wholesale market or that an alternative arrangement has to be made on the number of POI's for the smaller RSPs.

It is important to understand that this submission is written on our experiences, as a Queensland based company, concentrating solely on the Queensland market.

Cost analysis

When engaging in a new market, any business run by good commercial practice will conduct a cost analysis. To establish market share, businesses are prepared to accept a certain loss at a starting period if this can be offset against future expected profits.

Our Industry does not work any differently when new markets emerge. As a build to deliver a NBN service requires several NBNSCo services, RSPs will conduct a cost analysis on each of those NBNSCo services and the required backhaul.

It could have been expected that investment capital for NBN Brownfields would be first allocated to high density populated areas close to capital cities. This would be particular the case if the investment capital is limited.

NBN Greenfields are currently sponsored by NBNCo and are also delivered to the temporarily POI in the State capital. This lowers the costs for the RSP and the result is more positive when performing a cost analysis. However when in due course these benefits are removed (and they will), the RSPs will occur the same costs as with NBN Brownfields.

These cost analysis are, under good business practise, also made by wholesalers.

After performing a cost analysis, the RSP or wholesaler will decide if a certain activated area will be served or not.

The general public calls this negatively cherry picking as it is expected that lower profit /loss areas are funded by higher profit areas. From commercial perspective this is unreasonable to expect of any RSP or wholesaler, as the core business goal is to maximize profit.

Smaller RSPs who serve the market thru a wholesaler, are no party in the decision process of the wholesaler on which areas to serve. This is where the Competition Criteria fail.

Competition Criteria

The competition Criteria set out what conditions have to be satisfied for a POI location. The scope is based on RSPs and wholesalers dealing directly with NBNCo. However for smaller RSPs who wish to compete on an equal level in a certain POI area, it is important if sufficient wholesalers are servicing the POI.

If this is not the case, however the current Competition Criteria are met, the smaller RSPs will be unable to engage in this market with their direct competitors.

Effectively in those circumstances the Competition Criteria create for smaller RSP an unfair competition as the market becomes unreachable due to government policy.

This opinion can be supported by the following arguments.

Firstly, NBNCo is incorporated by the government as a monopoly and consequently the smaller RSP has no other choice than dealing with the wholesalers if it wishes to access the NBN.

Secondly, NBNCo had to raise the amount of POIs under these Competition Criteria, under the argument that the assets of the fibre owners had to be protected. It are now exactly those fibre owners who decide not to serve certain POIs.

The real world

As company we have engaged and are engaging with several wholesalers. Due to non-disclosure agreements and out of respect for existing business relationships we can not disclose any detailed information to the ACCC in a public submission. However we can state the following.

Due to the Competition Criteria we have missed out on the following markets:

- 4TOB and 4APL – Fibre products
- 4TOB – Fixed-wireless products

We lost a significant amount of customers that were prepared to sign-up with us but as no availability / serviceability could be guaranteed, we have advised them after a certain period of time to sign-up with a larger RSP.

Marketing investments in the above markets were consequently completely wasted.

At the moment of writing of this submission, it remains unclear when (and if) access will be made available to us.

Solutions

We have the opinion that the current unfair competitive developments for smaller RSPs can be corrected in the following three ways.

POI threshold

Establish a POI threshold which decides if data traffic is transported by NBNC0 to the permanent POI or the temporarily POI in the State capital.

This makes it possible for smaller RSPs to deal directly with NBNC0 against a much lower initial capital investment. Once a certain amount of end users is reached within a POI, the RSP has to arrange backhaul from the permanent POI to the POP of the RSP within a predefined time-frame.

The threshold amount can be established per POI based on a variety of parameters by the ACCC.

This solution has our preference for the following reasons:

- It establishes a growth model for smaller RSPs with direct communication with NBNC0;
- It will have limited affect on the fibre owners as smaller RSP's are only a very extreme small portion of the backhaul market (in bandwidth requirements).

The model of NBNC0 could be extended with a "backhaul" charge in the circumstances that the data is handed off at the temporarily POI. This charge will establish that a level playing field is created between competitors big and small.

Adjustment of the Competition Criteria

The competition Criteria can be adjusted in such a manner that at least two wholesalers have to serve the POI location to smaller RSPs.

This solution has not our preference as some wholesalers have already implemented surcharges on certain POI's or FSA's which has resulted in that smaller RSPs with certain wholesalers can never establish a profit in smaller Greenfields for many years to come.

The size of the development and the large difference between passed and occupied premises play a significant role in this.

It is to be expected that these surcharges will become general practice and that it will affect directly the possibility of smaller RSPs to compete with large RSPs. This undermines the original concept of equal NBN pricing regardless of where you live.

This option is difficult to assess and accurate criteria have to be established.

Policies wholesalers

Policies can be implemented that make engagement compulsory in all NBN-enabled areas if a fibre owners are advertising as aggregator.

Currently there is no obligation for wholesalers to publish what areas they serve to prospective smaller RSPs.

These policies would be beneficial for smaller RSPs as they do not have to maintain relationships with a large amount of wholesalers to engage in the market. But even in the instance they do, it is questionable if all NBN-enabled areas would be served by the wholesalers, as their cost analysis would be similar and likely would deliver the same outcome.

Further we are opposed against any over regulation of our Industry and for this reason this solution does not have our preference.

Wholesale market ... where?

We wish to bring it also to the attention of the ACCC that currently a lot of wholesalers are listed on NBNCo's website but that effectively only a very minimal amount of wholesalers actively engage in the market.

Many are still in the developing stage and when we contacted them, they do not take wholesale business. As result the impression exists that there is a large amount of offerings from different wholesalers when when in fact there is only a very small amount.

When you take then into consideration the NBN Fibre Service Areas that each active wholesaler serves, then it could well be the case that there is perhaps only one offering or none at all. In those instances, the larger RSPs have exclusive access to market.

As a company we wish to thank the ACCC for the opportunity in providing our views. I am well aware that our views are at large different from larger RSPs or wholesalers. I am also aware that it might be for some parties confronting, nevertheless it is simply based on our experiences in the last 9 months as a smaller RSP.

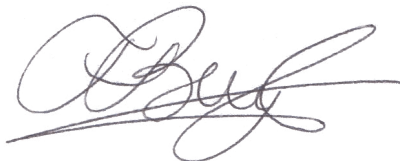
We believe that smaller RSPs have to be better consulted in their opinions, views and experiences outside consultative processes. Smaller RSPs do not have the resources or the experience to make at length submissions. My point is proven by the absence of submissions by smaller ISPs in previous ACCC consultations.

It must be said that simply ignoring the presence of smaller ISPs in the market under the heading "They had their opportunity." when not receiving any submissions have resulted in unsound policies and procedures for a part of the market. Asking the question "Why did we not receive any submissions from smaller ISPs?" would have been much more effective in establishing sound policies and procedures. It can be concluded that the smaller RSPs are basically still in the same boat as before the introduction of the NBN. They have no opportunity to compete fairly in the market.

The ACCC has showed no intention, action or willingness to protect the smaller ISPs against this development. In fact they contributed to it by ignoring their absence in submissions. In addition, on operational level they allow false advertising in the wholesale market while in the retail market ISPs are brought to Court.

If smaller RSPs will be ignored consistently how they experience the NBN-market, then there is a good possibility that only a handful of smaller RSPs remain. It could also be good well possible that smaller ISPs will become something of the past and that they are extinct by poor government policy and procedures. Sadly this will very negatively affect the future broadband choices and experiences of the general public.

Yours sincerely,



Frank Buijk
Director

On behalf of
Fastel
PO Box 4019
TINANA QLD 4650
Tel (1300) 55 25 60
Fax (07) 41 21 25 69
E-mail afg.buijk@team.fastel.com.au