

RG 011202  
20 January 2012

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Australian Competition and Consumer Commission

By email

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### NBN Co Limited Special Access Undertaking

Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**") in relation to its consultation paper concerning the above.<sup>1</sup> Macquarie considers that NBN Co's Special Access Undertaking ("**SAU**") is an essential and fundamental element of the emerging NBN regulatory environment. As such, it is very important that the SAU is examined carefully before the ACCC makes its decision on whether to accept the SAU.

Macquarie notes that the Consultation Paper essentially provides an overview of the contents of the SAU as opposed to a critical assessment against the statutory requirements for its acceptance. In addition, it is noted that the ACCC intends to release a supplementary consultation paper on the SAU in February 2012 which will identify key issues.

Against this background, Macquarie has prepared this submission which aims to identify areas of potential concern to access seekers such as Macquarie. Moreover, this submission suggests areas on which the ACCC should focus its attention in its assessment of the SAU and in the preparation of its supplementary consultation paper.

#### Clause 6 – Regulatory Recourse

This clause confers powers and functions on the ACCC in respect of the resolution of disputes. Such powers and functions are concerned with *inter alia*:

- timeframes for ACCC decision making;
- timeframes for parties to respond;
- substantiation of decisions; and
- publication of decisions.

Macquarie is concerned that the SAU proposes to dictate how the ACCC can make decisions and resolve disputes. The ACCC's functions and powers for decision making are provided for in legislation principally the *Competition and Consumer Act 2010*. Any role that the ACCC has in resolving regulatory disputes must in principle be dealt with in accordance with the ACCC's legislative authority.

<sup>1</sup> ACCC, NBN Co Limited Special Access Undertaking, Consultation Paper, December 2011 ("**Consultation Paper**")

### Schedule 3 (Clause 6.5) - UNI Availability

Under this clause, NBN Co will not supply an Access Virtual Circuit unless a User Network Interface (“**UNI**”) is available for use by the Customer. Macquarie is concerned that the availability of the UNI may be driven by access seekers rather than end-users. That is, there should be a safeguard against one access seeker acquiring all available UNIs at a given end-user location thereby blocking out the opportunity for a second access seeker to provide services that end-user.

### Schedule 7 – Long-term Revenue Constraint

This schedule sets out how NBN Co will determine its revenue requirements in order to recover its costs. Macquarie notes that many of components of the process as set out in this schedule are the same as those that the ACCC (and industry) have addressed in the setting of the ACCC’s fixed service access determinations. Such components include for example, WACC, regulatory depreciation, asset lives etc. Macquarie believes that there should be consistency between the approaches adopted in the SAU and the approaches which have already been adopted by the ACCC.

### Schedule 8 – Prudency

This schedule sets out how NBN Co will classify capital expenditure and operating expenditure as prudent. Macquarie is concerned that the prudency requirements, particularly in respect of operating expenditure, are not sufficiently robust. For example, there is a large number of expenditure categories which are simply “deemed prudent”. Macquarie believes that the prudency requirements need to be tightened.

### Schedule 9 – Review

This schedule provides for a review of the SAU no later than 1 July 2027. That is, a review no later than in 16 years’ time. Macquarie very strongly believes that a review should be conducted at an earlier point in time given the importance of the SAU to the operation of the NBN environment.

### Schedule 10 – Reporting

This schedule sets out the annual reporting of financial information by NBN Co to the ACCC. Macquarie is concerned that there is no evident independent audit of financial information. Nor is there any indication that any such information would be publicly available.

### Schedule 11 (Clause 6) - POIs

This clause is concerned with the review of POI locations and their closure and relocation. The clause also confers powers on the ACCC regarding decisions on the opening, closing and relocation of POIs. Macquarie is again concerned that the SAU proposes to dictate how the ACCC can make decisions concerning these matters. Moreover, Macquarie believes that the ACCC should remain in control of determining the number of POIs and their location in line with overall policy objectives.

Closing

Macquarie welcomes the opportunity to make this submission. The submission has identified a number of areas of potential concern for access seekers which are intended to guide the detailed review of the SAU by the ACCC. Macquarie looks forward to the ACCC's supplementary consultation paper on this matter. In the meantime, please do not hesitate to contact me should you have any queries.

Yours sincerely



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