

4 February 2015

Ms Nicole Ross  
Director, Communications Group  
Australian Competition and Consumer Commission  
360 Elizabeth Street  
Melbourne VIC 3000

Dear Ms Ross,

### **ACCC request for comments on proposed drafting of non-price terms and conditions for inclusion in Final Access Determinations**

On 8 December 2014, the ACCC requested interested parties to provide comments on proposed drafting of a limited set of non-price terms and conditions (NPTCs) for inclusion in relevant Final Access Determinations (FADs). The ACCC has also sought views and drafting suggestions on a number of 'other matters'.

NBN Co's comments on the proposed draft set of NPTCs and views on one of the 'other matters' (terms about recourse to regulated terms) are set out below.

#### **Proposed draft NPTCs**

NBN Co remains of the view, as expressed in our submission to the ACCC's discussion paper on *Telecommunications Final Access Determination inquiries – non-price terms and conditions* (Discussion Paper on NPTCs), that it would have been preferable for the ACCC to first communicate its preliminary view on whether the ACCC favours a targeted or a comprehensive approach to NPTCs in the FADs, before seeking feedback on a proposed draft set of NPTCs.<sup>1</sup> This would have appropriately set the context within which NBN Co and other interested parties provided their feedback on the proposed drafting.

Although the ACCC has not yet expressed a preliminary view, NBN Co notes that the proposed drafting of the NPTCs does reflect a targeted approach. NBN Co has reviewed the proposed drafting on the assumption that the ACCC will adopt a targeted approach and that the proposed drafting is exhaustive of the set of NPTCs under consideration by the ACCC. NBN Co reserves its right to make further submissions on the proposed drafting in the event that the ACCC moves to make a comprehensive set of NPTCs in the FADs or to make NPTCs in addition to those already proposed.

NBN Co does not have detailed comments on the drafting of the 'common terms' NPTCs. As previously stated<sup>2</sup>, NBN Co's interest in the combined FAD inquiry is focussed on the DTCS. NBN Co does not acquire any of the

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<sup>1</sup> NBN Co submission to ACCC Discussion Paper on Telecommunications Final Access Determination inquiries – non-price terms and conditions, 12 December 2014

<sup>2</sup> NBN Co submission to ACCC Discussion Paper on Telecommunications Final Access Determination inquiries – non-price terms and conditions, 12 December 2014

other (non-DTCS) services that form part of the combined FAD inquiry, and therefore does not have any views on the 'service-specific terms' NPTCs.

NBN Co notes that the ACCC's proposed drafting for the 'common terms' in the NPTCs is essentially the same as the terms included in the current Wholesale ADSL FAD 2013<sup>3</sup> and are terms and conditions that were consulted on by the ACCC as part of its 2012/13 FAD inquiry process. We further note that the NPTCs set out in the Wholesale ADSL FAD 2013 are similar to those contained in the current DTCS FAD<sup>4</sup>, with the exception of two new schedules<sup>5</sup> and the inclusion of additional terms relating to Network Modernisation and Upgrade.

NBN Co has no issue with the proposed NPTCs being incorporated into the DTCS FAD. In general, NBN Co agrees with the ACCC's view that there could be benefits in maintaining consistency across NPTCs in the various FADS.<sup>6</sup> Most of the 'common terms' that the ACCC is consulting on can be adopted across the broad suite of declared services under consideration. For example, terms and conditions relating to general dispute resolution processes could be the same across all the relevant declared services. However, other 'common terms' being consulted on may need to differ between declared services, for example liability and indemnity terms may require customisation to the extent that there are differences between the level and type of risk appropriate to be borne by the access provider in each context. NBN Co considers that careful consideration should be given to whether each 'common term' requires customisation prior to it being applied to a particular declared service.

#### Other matters - Terms about recourse to regulated terms

The ACCC's Discussion Paper on NPTCs cited a number of comments made by the Vertigan Committee on 'regulatory oversight'<sup>7</sup> (in an NBN context), noting that the issue was equally applicable when negotiating access to legacy services under the regulatory hierarchy set out in Part XIC of the *Competition and Consumer Act 2010* (CCA).<sup>8</sup> The ACCC is now seeking views on the possible drafting of a 'review mechanism' for access seekers to have recourse to new or varied regulated terms set by the ACCC after they have entered into access agreements.<sup>9</sup>

NBN Co notes that the Policy Paper setting out the Government's framework for regulatory reform in the telecommunications sector has deferred consideration of the Vertigan Committee's recommendation<sup>10</sup> in relation to regulatory oversight until after the NBN rollout is complete.<sup>11</sup> As such, NBN Co considers that it would be appropriate for the ACCC to also defer any consideration of 'recourse to regulated terms' until the Government has finalised its views on this issue. Any terms set by the ACCC during the current FAD process would be premature, in light of the Government's position on the issue, and may lead to inconsistencies in the application of the regulatory framework in Part XIC of the CCA. Please do not hesitate to contact me or Matthew Cole in our regulatory team on (03) 96015231 if you have any queries in relation to anything contained in this submission.

Kind regards



Caroline Lovell  
Chief Regulatory Officer

<sup>3</sup> Final Access Determination No. 1 of 2013 for the Wholesale ADSL service

<sup>4</sup> Final Access Determination No. 1 of 2012 (DTCS)

<sup>5</sup> Additional Schedules relating to Communication with end-users and Changes to Operating Manuals

<sup>6</sup> Discussion Paper on NPTCs; p.2

<sup>7</sup> Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014,

<sup>8</sup> Discussion Paper on NPTCs; p.13

<sup>9</sup> ACCC email to NBN Co; 8 December 2014

<sup>10</sup> Dr Michael Vertigan AC, Ms Alison Deans, Professor Henry Ergas and Mr Tony Shaw PSM, *Statutory review under section 152EOA of the Competition and Consumer Act*, June 2014 – Recommendation 11

<sup>11</sup> Australian Government, *Telecommunications Regulatory and Structural Reform*, December 2014; p. 15