

23 March 2012

Mr Michael Cosgrave
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Communications Group
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

By email: michael.cosgrave@accg.gov.au

Dear Michael,

NBN Co's Special Access Undertaking (SAU)

NBN Co welcomes the publication of the ACCC's Supplementary Consultation Paper (the ACCC Consultation Paper) on NBN Co's Special Access Undertaking (SAU), and would like to provide some comments on a number of matters that may assist the ACCC and industry respondents in their consideration of the SAU. The comments set out below are not intended to be a complete response to the ACCC Consultation Paper, but rather address some key points raised that may benefit from further input from NBN Co.

The contents of this letter are not commercial-in-confidence, and may be published by the ACCC.

Please do not hesitate to contact Tony Neilson in our regulatory team on (03) 8662 8154, or me if you have any queries in relation to the documentation provided.

Yours Sincerely


Caroline Lovell

Principal, Regulatory Affairs and Industry Engagement

1. The operation of the Regulatory Recourse Mechanism – clause 6 of the SAU

Clause 6 of NBN Co's SAU provides an Access Seeker or NBN Co with the ability to notify the ACCC in the course of negotiating an Access Agreement that the parties can't reach an agreement in respect of:

- Non-price terms or conditions, to the extent that they are not covered by the SAU; and
- Price-related terms or conditions that have not been announced by NBN Co prior to the SAU commencement date.

The ACCC is then empowered to assess the position put forward by each of the Access Seeker and NBN Co and accept the drafting of one of the parties having regard to a set of criteria set out in the SAU. The ACCC is required to issue a decision which outlines its reasons and the approved drafting of the term or condition.

A detailed discussion of the operation of the regulatory recourse mechanism in the SAU is contained at pp.76-78 of NBN Co's Supporting Submission of the SAU (Supporting Submission).

1.1 The ACCC notes the SAU does not state whether the concepts of reasonableness and promotion of the long-term interest of end-users employed in clause 6.2(a) take the same meanings as in Part XIC of the CCA.¹

NBN Co considers that the terms 'reasonableness' and 'promotion of the long-term interests of end-users (LTIE)' contained in clause 6.2(a) should be interpreted consistently with Part XIC of the CCA, as the SAU is submitted by NBN Co within the framework of Part XIC.

The ACCC's consideration of whether the terms or conditions are reasonable under clause 6.2(a)(i) will require the ACCC to have regard to the number of Access Seekers who have executed Access Agreements containing the term(s) and conditions(s) the subject of the Regulatory Recourse Dispute and the extent of any inconsistency between the terms or conditions as outlined in the notification, reply or response (as the case may be) and existing Access Agreements between NBN Co and other Access Seekers.

1.2 The ACCC notes that it is unclear whether the prohibition on ACCC decisions that would result in NBN Co engaging in conduct that breaches agreements is intended to differ from the restrictions on Access Determinations under Part XIC of the CCA (such as those in relation to protected contracts rights).²

As outlined in NBN Co's supporting submission, clause 6 of the SAU will operate in a manner that ensures compliance with legal requirements.³ Accordingly, clause 6.2 prevents the ACCC from making a decision that would result in the ACCC or NBN Co engaging in conduct that contravenes regulatory obligations, such as those relating to non-discrimination (clauses 6.2(b)(i)-(iii)), as well as complying with contractual obligations to any other party, including Access Seekers (clause 6.2(b)(iv)).

NBN Co's view on this issue is that clause 6.2(b)(iv) of the SAU is likely to have a different effect to restrictions on access determinations under Part XIC of the CCA. For example, under subsection 152BCB(4) of the CCA, an access determination that has the effect of depriving a person of a pre-determination right only then leads to a compensation right, but does not prevent the ACCC from making the access determination itself under subsection 152BCB(5) of the CCA. The SAU provision would preclude the ACCC from making a decision that lead to a breach of contract. NBN Co also notes that subsection 152BCB(4) refers to the concept of "depriving someone of a right", whereas clause 6.2(b)(iv) of the SAU is concerned with breach of contract, which is a different concept, and hence is not directly comparable to the restrictions under Part XIC of the CCA. NBN Co considers it to be reasonable that it is not required, by an ACCC decision, pursuant to clause 6, to breach an existing contract (unless by some means, the ACCC was able to manage the consequences of the breach, or compensate, NBN Co or the other party to the relevant contract for the breach).

¹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.14

² Ibid

³ NBN Co's Supporting Submission to the Special Access Undertaking; p.77

1.3 The ACCC notes it is unclear whether the practical outcome of the dispute resolution process in clause 6 of the SAU is to give ACCC decisions contractual force between the parties.⁴

Drawing on the above example of payment of interest discussed in 1.2, if Access Seeker A and NBN Co cannot reach agreement in relation to the rate of interest to apply under their Access Agreement, subject to satisfying the conditions in clause 6 of the SAU, either NBN Co or Access Seeker A is able to notify the ACCC of a dispute under clause 6.1(b). In accordance with clause 6, the ACCC must then assess the interest rates put forward by Access Seeker A and NBN Co, and accept the drafting of one of the parties. If the outcome accepted by the ACCC is an interest rate of X, the practical outcome of the clause 6 dispute resolution process will be as follows:

- The Access Agreement entered into between Access Seeker A and NBN Co must adopt an interest rate of X. That is, neither Access Seeker A nor NBN Co can seek to include a different interest rate in their Access Agreement⁵; and
- NBN Co will be required to incorporate an interest rate of X in its WBA so that it is available for all Access Seekers to include in any prospective Access Agreements⁶; and
- NBN Co will be required to offer (subject to time limits intended to provide certainty for NBN Co and Access Seekers) to vary any existing Access Agreements to incorporate an interest rate of X.⁷

The ACCC's decision will have contractual force between NBN Co and others once the term is incorporated into an Access Agreement that is executed by both parties. Once the ACCC has made the decision, NBN Co will be required to take steps in relation to Access Agreements (as listed above) in order to comply with the SAU.

2. The operation of Review mechanisms in SAU

Key aspects of the SAU are subject to review as follows:

- Every 5 years during the Term, NBN Co will review the operation of the customer engagement process and the Product Development Forum (PDF) Processes and will comply with any outcome of such a review;
- within the SAU Review Period, which will commence at the earlier of 30 June 2027 or when the Communications Minister declares that the NBN should be treated as built and fully operational under section 48 of the National Broadband Network Companies Act 2011; and
- NBN Co will review the SAU Review Matters and submit a request for variation of the SAU to the ACCC.

A detailed discussion of the various review mechanisms in the SAU is contained at pp.91-93 of NBN Co's Supporting Submission.

2.1 The ACCC notes that key commitments in relation to price-related terms and conditions include ... a mechanism, locked in for the term of the SAU, for classifying NBN Co's expenditure as prudent and efficient.⁸

As discussed in NBN Co's Supporting Submission⁹, and as drafted in clause 3.3 of Schedule 9 of the SAU, NBN Co has committed to reviewing its approach to prudence of capex and opex, including the ACCC's role in assessing the prudence of capex and opex as part of the SAU Review process (at the time of any sale of NBN Co). The SAU also **commits** NBN Co to submit a variation to the ACCC which addresses the prudence of its expenditure, which would then be assessed by the ACCC. The practical

⁴ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.15

⁵ NBN Co Special Access Undertaking, Clause 6.1(i)

⁶ NBN Co Special Access Undertaking, Clause 6.3(b)(i)

⁷ NBN Co Special Access Undertaking, Clause 6.3(b)(ii). Clause 6.3(c) sets out that a Customer will only be able to take up the offer to vary an existing Access Agreement to incorporate a term offered under clause 6.3(b)(ii) if it notifies NBN Co of its wishes to do so within 10 business days.

⁸ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.5

⁹ NBN Co's Supporting Submission to the Special Access Undertaking; pp. 61 and 92

impact of these commitments is that the mechanism for classifying expenditure as prudent and efficient will be reviewed and included in a variation to the SAU by no later than 2028.

2.2 The ACCC notes that the review processes specified in the SAU will only result in a variation to the SAU if NBN Co elects to submit a variation.¹⁰

NBN Co notes that clause 3.4(a) of Schedule 9 **commits** NBN Co to provide a SAU variation to the ACCC which addresses the SAU Review Matters (which must include the approach to prudence of capex and opex, the ACCC's role in assessing prudence, the manner in which capex and opex will be included in the RAB and the approach to WACC). Thus, if NBN Co "elects" to not to submit a variation, it would not be compliant with this clause of the SAU.

2.3 The ACCC notes that the SAU review and the periodic reviews of the customer engagement process and PDF Processes are conducted by NBN Co.¹¹

It is correct that NBN Co conducts the review of these processes, but it is important to note that the ACCC has an extensive role in determining the nature of the customer engagement and PDF processes that arise from these reviews, as committed to by NBN Co in clause 2 of Schedule 9 of the SAU:

- The ACCC can request additional information from NBN Co about the operation of these processes, which NBN Co must provide as soon as reasonably practicable;¹²
- the ACCC will determine the extent to which the customer engagement and PDF processes result in effective engagement between NBN Co and its customers, and whether to accept or reject NBN Co's proposed customer engagement and PDF process that follow NBN Co's review of these processes;¹³
- the ACCC can decide to either continue with current arrangements for customer engagement and the PDF, accept NBN Co's proposal, or decide that a variation to NBN Co's proposal is required;¹⁴
- If the ACCC considers that NBN Co's proposed customer engagement or PDF process requires variation, then NBN Co must provide a revised proposal to the ACCC within 60 business days;¹⁵
- This process is repeated until the ACCC is satisfied with NBN Co's proposal.¹⁶

Thus, while the review of the customer engagement and PDF processes is conducted by NBN Co, the ACCC has significant powers in relation to the nature of any new processes that are developed. NBN Co is not able to introduce new customer engagement or PDF processes without the ACCC making a determination in relation to those processes, and as noted above, the SAU confers on the ACCC the power to request variations to be made to any proposal made by NBN Co in relation to these processes.

3. Service Description

3.1 The ACCC notes that the SAU does not appear to include a commitment to supply product components other than those listed in clause 1.1 of Schedule 3 of the SAU.¹⁷

Clause 2.3(b) of the SAU provides that NBN Co will offer to supply the NBN Access Service through four Product Components, these being the UNI, AVC, CVC and NNI.

As noted in the ACCC's Consultation Paper, these Product Components are only one aspect of the definition of Product Components listed in Schedule 1 of the SAU. It also includes:

- Product components offered for supply by NBN Co as at the date on which NBN Co receives written notice of the acceptance of the SAU from the ACCC;
- the Product Components identified within the 'Initial Product Roadmap'¹⁸; and

¹⁰ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.6

¹¹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.18

¹² NBN Co Special Access Undertaking, clause 2.1(b), Schedule 9

¹³ NBN Co Special Access Undertaking, clause 2.2(a), Schedule 9

¹⁴ NBN Co Special Access Undertaking, clause 2.3(b), Schedule 9

¹⁵ NBN Co Special Access Undertaking, clause 2.4(a), Schedule 9

¹⁶ NBN Co Special Access Undertaking, clause 2.4(b), Schedule 9

¹⁷ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.29

- any new and varied product components introduced by NBN Co pursuant to Schedule 6 of the SAU.

Clause 1.1 of Schedule 3 of the SAU notes that NBN Co will offer to supply the UNI, AVC, CC and NNI. Clause 1.3(a) of Schedule 3 of the SAU notes that that Products Components to be supplied by NBN Co on and from the commencement of the SAU are *not limited* to those Product Components described in clause 1.1 of Schedule 3, and that NBN Co will make any additional Product Components available to Customers under the WBA and these will be subject to and in accordance with the product development processes under Schedule 6 of the SAU.

Thus, the SAU makes a commitment to supply all four Product Components that are currently defined and available, but does not limit supply to only those Product Components. As any future Product Components do not yet exist and therefore cannot be specified or defined, it is necessary to provide a commitment of the type defined by clause 1.3.

Further, clause 10 of the PDF Processes covers the implementation and introduction of new products under the WBA, and NBN Co's commitments in respect of new product solutions.

3.2 The ACCC notes that dispute resolution provisions in the WBA do not apply to the Product Development Forum Processes.¹⁹

NBN Co considers it appropriate that the PDF processes, given their consultative nature, are not subject to the dispute resolution provisions in the WBA.

NBN Co's stewardship of product development is consultative, transparent and open to constructive criticism by all Customers. The PDF processes require NBN Co to make continuous disclosure to Customers throughout the development process; and provide reasons for all decisions.²⁰

To ensure the PDF processes themselves are resulting in the operation of the PDF in a manner that leads to its effective utilisation by both NBN Co and Customers, Schedule 9 of the SAU provides for the refinement of the PDF processes, by allowing for their variation through ACCC review.²¹

In addition, under clause 3.5 of Schedule 6 of the SAU, if a product development falls within the scope of NBN Co's prudency commitments in Schedule 8, NBN Co will need to seek Customer or ACCC endorsement of the product development. Therefore in these specific circumstances, even though dispute resolution provisions do not apply under the PDF processes, endorsement of the proposed product development presumably will only be forthcoming in situations where the process has resulted in a satisfactory outcome for customers and/or the ACCC.

3.3 The ACCC notes that a broad range of NBN Co's new product components will not be subject to consultation via the PDF, as they fall within the definition of the Initial Product Roadmap²²

The ACCC expresses a concern that a broad range of product components and product features will not be subject to consultation via the PDF as they are on the Initial Product Roadmap, and hence NBN Co will not be required to consult with customers on initial prices or service levels. It should be noted that there has already been extensive consultation on the initial Ethernet services (both those in the market today, and those that are currently being developed) by NBN Co. As discussed in NBN Co's Supporting Submission²³, there was an extensive, two-year consultation process conducted by NBN Co prior to lodgement of the SAU, much of which related to the design and price of the initial set of products offered by NBN Co. We have also undertaken additional consultation in developing our initial business-focused products and the facilities access arrangements, and see this as being part of our normal mode of operation.

¹⁸ Initial Product Roadmap is defined in Schedule 1 of the SAU.

¹⁹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.35

²⁰ See NBN Co Special Access Undertaking, Annexure 1 to Schedule 6

²¹ See NBN Co Special Access Undertaking, Schedule 9

²² ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.35

²³ NBN Co's Supporting Submission to the Special Access Undertaking; Section 2.3

3.4 The ACCC notes that there is some uncertainty around the scope of application of the service level commitments set out in clause 14.2 of Schedule 11 of the SAU.²⁴

The Service Level commitments set out in clause 14.2(a) of Schedule 11 of the SAU commit NBN Co to introduce a service level regime for the fibre network by no later than 30 June 2012 in relation to NBN Co's existing fibre products.

For new product components or associated product features which have been the subject of a product idea developed through the PDF, clause 3.7 of Schedule 6 of the SAU states that NBN Co will consult with customers through the PDF in relation to:

- The service levels applicable to such products (including any remedies for breaching the levels); or
- If NBN Co is unable to offer service levels prior to the introduction of the new products, the estimated timeframe and process of consultation in relation to the introduction of service levels.

NBN Co has also committed in the SAU to maintaining and updating a service level regime for products for which it has introduced a service level.²⁵

3.5 The ACCC has sought views on whether it is sufficiently clear which commitments in the SAU do and do not apply to ancillary services.

Schedule 1 of the SAU defines Ancillary Services as including the Facilities Access Service, the Systems Interfacing Service and any other product or service developed by NBN Co from time to time that is ancillary to the supply of the Product Components and associated Product Features.

Clause 2.4(b) of the SAU provides that Ancillary Services do not form part of the NBN Access Service. That is, the Ancillary Services will not form part of the service that will become the 'declared' service under subsection 152AL(8E) of the CCA if the SAU is accepted.

Although not 'declared' via the SAU, NBN Co has made enforceable commitments in the SAU in relation to Ancillary Services, which if not complied with will result in NBN Co being in breach of its SAU.

Broadly, the SAU provides that:

- NBN Co will offer to supply Ancillary Services to Customers subject to the terms of the SAU;²⁶
- NBN Co will set out in the WBA the terms and conditions on which NBN Co will supply the Ancillary Services;²⁷
- prices for the Ancillary Services will be subject to the CPI/2 individual price control limit;²⁸ and
- the underlying assets supporting the provision of the Ancillary Services form part of the Relevant Assets, and the revenues earned by NBN Co in relation to the Ancillary Services will form part of the revenues considered under the SAU.²⁹

Subsection 152CBA(3C) of the CCA sets out that NBN Co is able to specify that it will engage in conduct in relation to activities set out in the subsection, including an activity that is ancillary or incidental to the supply of a declared service.³⁰

NBN Co considers that the commitments made in the SAU with regards to Ancillary Services may be regarded as specified conduct in relation to an activity that is ancillary or incidental to the supply of the NBN Access Service.³¹

²⁴ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.31

²⁵ NBN Co Special Access Undertaking, clause 14.2(b), Schedule 11

²⁶ NBN Co Special Access Undertaking, clause 2.4(a) of the SAU.

²⁷ NBN Co Special Access Undertaking, clause 2.6 of the SAU

²⁸ NBN Co Special Access Undertaking, clause 3.1(a), Schedule 5

²⁹ NBN Co Special Access Undertaking, clause 2.4(b) of the SAU

³⁰ NBN Co's Supporting Submission to the Special Access Undertaking; p.76, discusses in detail the application of subsection 152CBA(3C) of the CCA.

³¹ The definition of Ancillary Services includes a service that is ancillary to the supply of the Product Components and associated Product Features. NBN Co Special Access Undertaking, Schedule 1

If this applies, then paragraph 152CBD(2)(cb) of the CCA requires the ACCC to be satisfied that the conduct specified will promote the LTIE of carriage services or of services supplied by means of carriage services.

NBN Co submits that the commitments it has made in the SAU in relation to the Ancillary Services promote the LTIE by:

- promoting competition through providing Customers with access to services that are ancillary but necessary for the supply of the declared NBN Access Service;
- achieving any-to-any connectivity through facilitating the NBN Access Service as an input into an end-to-end service; and
- encouraging the economically efficient investment in infrastructure through subjecting the Ancillary Services to price controls and the long-term revenue constraint methodology (LTRCM) thereby providing a level of certainty to Access Seekers that should enable them to develop and implement medium to long-term business models that are predicated on NBN based supply.

4. Price terms and conditions

As described in NBN Co's Supporting Submission, the price-related terms and conditions in the SAU were developed as a package that is intended to³²:

- provide the long term framework necessary for Uniform National Wholesale Pricing (UNWP);
- provide the opportunity for recovery of prudently incurred costs over time;
- encourage the economically efficient take up and usage of NBN Co's products; and
- strike a balance between pricing certainty for Access Seekers and pricing flexibility for NBN Co, having regard to the need to account for evolving technology, applications and demand.

The practical implications of this package as implemented via the Price Controlled Offers, individual price increase limit of CPI/2 and the LTRCM include the following:

- Access Seekers are provided with a high level of certainty regarding the maximum annual change in prices for NBN Co's product components, product features and Ancillary Services. For example,
 - Over a 3, 5 and 10 year period, the maximum cumulative price changes would be 3.8%, 6.4% and 13.2% respectively (which translate to real price reductions of 3.6%, 6.0% and 11.5% respectively, assuming 2.5% annual CPI).³³
 - In addition, as the CPI/2 price control applies on an annual basis, NBN Co cannot store up and carry forward potential price increases. Consequently, if (as described in the December 2010 Corporate Plan, p.101 and p.103) NBN Co reduces AVC and CVC prices in nominal terms as average access speed (PIR) and average data usage (GB/user/month) increase over time, those lower prices are progressively locked in as the basis on which the CPI/2 price control applies.
- There are no 'free lunches' with regard to cost recovery. As discussed in NBN Co's letter to ACCC of 13 February 2012³⁴, if one part of NBN Co's pricing strategy were to be changed, for example the starting level or time profile of CVC charges, then this would need to be balanced in terms of its revenue impact by a change to other parts of the strategy, such as to the starting level or time profile of AVC charges.

4.1 The ACCC notes that the use of a single Regulatory Asset Base (RAB) methodology with no revenue and cost allocation may allow NBN Co to cross subsidise the prices of

³² NBN Co's Supporting Submission to the Special Access Undertaking; p. 47

³³ Although (under clause 4 of Schedule 5 of the SAU) NBN Co can request ACCC to approve an above CPI/2 increase in the price of a Product Component, associated Product Feature or Ancillary Service, there is a high threshold on the ACCC's approval. The proposal must not be inconsistent with the LTIE criteria and applicable law, regulation, Ministerial determination or Government policy.

³⁴ Published on ACCC website (<http://www.accc.gov.au/content/index.phtml/itemId/10288610>) as "NBN Co submission – Response to initial industry submissions to SAU consultation paper"

services it provides in competitive markets with revenues earned from services supplied in markets that are not competitive.³⁵

NBN Co submits that its remit is to supply layer 2 Ethernet bitstream services on a wholesale only, non-discriminatory basis, and subject to a uniform national wholesale pricing requirement. In addition, all of NBN Co's services are regulated. In this context, there will necessarily be some degree of cross-subsidisation between services (e.g. between fibre, wireless and satellite based services) and the traditional regulatory concern about supplying to competitive and non-competitive markets is misplaced (because there would be no financial advantage to NBN Co from engaging in some form of cost shifting because all of its services fall under the long term revenue constraint).

4.2 The ACCC discussion of two alternative approaches to construction-in-progress allowance.³⁶

The ACCC discusses two alternatives to NBN Co's approach to the construction in progress allowance. In net present value terms, all of three of these approaches are equivalent, and NBN Co has adopted the approach in the SAU because of its simplicity. That is, it does not require keeping two sets of capex records, one on an in-service basis (for depreciation) and one on an as-incurred basis (for rate of return), and does not require NBN Co to track on an asset by asset basis the financing cost between the start of construction and when the asset comes into service. Instead, NBN Co's approach takes a simple aggregated approach to estimating an annual allowance for construction in progress based on the value of construction in progress at the start and end of each year.

As a practical matter, NBN Co also notes that the annual value of the construction in progress allowance is less than the contribution that the new assets currently being built would make to the annual building block revenue requirement in the first year after they are placed in service. This is because the annual construction in progress allowance is simply a rate of return on construction in progress and does not include any element of depreciation (which does not commence until an asset is placed in service). Seen in this way, NBN Co's approach will not lead to any discontinuity in the Annual Building Block Revenue Requirement (contrary to what might be expected from ACCC's characterisation of the annual allowance as a "lump sum") but, rather, will lead to a smooth time path.

4.3 The ACCC has sought views on what aspects of the LTRCM are reasonably necessary to achieve Uniform National Wholesale Pricing.³⁷

On p.68 of its Supporting Submission, NBN Co has set out its views on this issue.

4.4 The ACCC notes that inclusion of NBN Co's actual expenditure in the long-term revenue calculations may have implications for NBN Co's incentives to invest and operate efficiently.³⁸

The ACCC has raised a concern that the use of actual opex and capex in the operation of the LTRCM "may not promote strong financial incentives on NBN Co to seek cost savings, or to invest efficiently, as it is not being financially rewarded for doing so."³⁹

This point has been addressed in the expert report provided by Synergies Economic Consulting, which concludes that:

- "having regard to all the circumstances of NBN Co:
 - governance and investment pressures during the prolonged loss-making period, in combination with the SAU mechanisms, can reasonably be expected to generate strong incentives to operate efficiently;
 - if or when these pressures subside, or possibly earlier, Ministerial Declarations under the National Broadband Network Companies Act 2011 can reasonably be expected to trigger

³⁵ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.48

³⁶ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.49

³⁷ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.50

³⁸ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.55

³⁹ Ibid

- o a comprehensive review of regulatory and operational arrangements to address shortcomings in any SAU or other regulations that govern NBN Co operations thereafter; in the absence of such declarations, the 2027 SAU review can reasonably be expected to address those same issues in a timely fashion;⁴⁰

4.5 In relation to the prudency mechanisms in the SAU, the ACCC notes that it will have no ongoing role in approving or overseeing NBN Co's expenditure.⁴¹

Although NBN Co agrees that the SAU does not provide the ACCC with a role in *approving* expenditure, the ACCC has a significant responsibility under the CCA to *monitor* and *enforce* NBN Co's compliance with the terms of the SAU. As noted by the ACCC in its Consultation Paper, the ACCC has a range of information gathering powers that it could use to ensure compliance, and it may therefore not be necessary for the SAU itself to require NBN Co to furnish all of the information to the ACCC that it may need for that purpose.

As a case in point, if the ACCC was concerned that NBN Co may be including certain expenditure in a deemed prudent category where it may not otherwise have been included (a scenario raised by the ACCC in the Consultation Paper⁴²), then the ACCC could use its information gathering powers to investigate and monitor as appropriate. The ACCC's powers in this regard could be expected to sharpen the incentive for NBN Co to be diligent in how it approached such an issue.

4.6 Initial Prices

In relation to the questions raised by the ACCC on the initial pricing approach in the SAU⁴³, NBN Co has addressed a number of these points in its letter to ACCC of 13 February 2012. NBN Co also notes that its initial pricing of a number of upcoming product releases (such as multicast) have already been extensively consulted upon even though the products have not yet been launched.

5. Consultation

NBN Co has incorporated commitments in relation to customer consultation throughout the SAU. As discussed in section 7.5.6 and Appendix B of its Supporting Submission, NBN Co believes that customer engagement provides significant benefits to all market participants, as it allows better decisions to be made. The specific customer engagement commitments that are made in the SAU include:

- The Product Development Forum;⁴⁴
- Customer endorsement of network changes;⁴⁵
- The development of consultation processes in the WBA;⁴⁶
- Review of Point of Interconnection (POI) locations;⁴⁷ and
- Consultation with affected customers on major NBN upgrades.⁴⁸

5.1 The ACCC notes that clause 14.3 of Schedule 11 of the SAU does not currently set out specific timeframes in which consultation is to occur.⁴⁹

⁴⁰ Synergies Economic Consulting, Advice on NBN Co's Special Access Undertaking; pp.4-5

⁴¹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.58

⁴² ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.58

⁴³ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; pp.42-43

⁴⁴ NBN Co Special Access Undertaking, clause 3 of Schedule 6 and section 7.3 of NBN Co's Supporting Submission to the Special Access Undertaking

⁴⁵ NBN Co Special Access Undertaking, clause 6 of Schedule 8 and Appendix A (section A.1.1(ix) of NBN Co's Supporting Submission to the Special Access Undertaking

⁴⁶ NBN Co Special Access Undertaking, clause 1 of Schedule 11 and Section 7.5.6 of NBN Co's Supporting Submission to the Special Access Undertaking

⁴⁷ NBN Co Special Access Undertaking, clause 6 of Schedule 11 and Section 7.5.11 of NBN Co's Supporting Submission to the Special Access Undertaking

⁴⁸ NBN Co Special Access Undertaking, clause 5 of Schedule 11 and Section 7.5.10 of NBN Co's Supporting Submission to the Special Access Undertaking

As defined in clause 14.3(d)(iv)B of Schedule 11 of the SAU, NBN Co must provide Customers with at least 60 business days notice of any proposed change, and that in that period, Customers may seek, and the ACCC may issue, an interim access determination or binding rule of conduct in relation to that change.⁵⁰ If the ACCC makes such an access determination or binding rule of conduct then NBN Co can only make a change to the Access Agreement that is consistent with that decision.⁵¹

The practical effect of all the elements of this clause is that if Customers or the ACCC are not satisfied with a change to the Access Agreement that is proposed by NBN Co, regulatory remedies are available. Thus, NBN Co would gain nothing by an inadequate consultation process, as it would not necessarily have its proposed change accepted. However, as there could be a wide variety of changes required to Access Agreements over the term of the SAU, it is not apparent that it is appropriate to specify time frames at the outset of the SAU that would then be locked in for the SAU term. Instead, the interaction of clauses 14.3(d) to 14.3(f) ensures that concerns about the outcome or process of any NBN Co changes to Access Agreements can be addressed.

5.2 The ACCC notes that clause 14.3(d) is limited to consultation with a particular Customer, and that broader consultation with Customers, Access Seekers or the general public may be appropriate.⁵²

Consistent with the comments made in 5.1, NBN Co notes that the commitments made in clauses 14.3(d) to 14.3(f) of Schedule 11 of the SAU work together to provide a mechanism by which the ACCC is able to make a decision about a proposed change to an Access Agreement, within the 60 day notice period specified in clause 14.3(d). This approach means that NBN Co has no incentive to inadequately consult on a proposed change, but given the potential range of issues that may be considered over the SAU term, the SAU does not attempt to lock-in a particular approach to consultation in relation to changes to the Access Agreement. Given NBN Co's strong non-discrimination obligations, it is of course possible that a change to one Access Agreement under clause 14.3 of the SAU will be required to be made to other Access Agreements, which means that NBN Co will need to consult more widely than with just the affected customer.

5.3 The ACCC notes that the manner and extent to which NBN Co will consider input to the POI Review Process in clause 6 of Schedule 11 of the SAU is unclear.⁵³

NBN Co notes that whilst the ACCC has made the above point, the ACCC's Consultation Paper goes on to highlight that "...this uncertainty may be mitigated by other factors ... [including] an obligation for NBN Co to permit interconnection to its facilities upon request, and ACCC approval is required prior to NBN Co relocating, closing or adding a POI".⁵⁴ Further, NBN Co has deliberately left the parameters of the review process (including how NBN Co will consider input) broad so as to maximise what NBN Co assumed would be desirable flexibility to respond to, or accommodate, the prevailing circumstances etc.

To the extent that the ACCC has concerns about how NBN Co considers input to POI consultation, NBN Co notes that clause 6 of Schedule 11 of the SAU commits NBN Co to:

- Consult with the ACCC on the criteria to be applied in conducting the POI review⁵⁵, as well as with Access Seekers;⁵⁶
- Conduct a review of POI locations using those agreed criteria;⁵⁷
- After obtaining ACCC approval, close or relocate established POIs⁵⁸, but only after providing at least 12 months notice to Access Seekers; and
- Provide that the ACCC may consult with any person in making a decision on POI locations.⁵⁹

⁴⁹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.62

⁵⁰ NBN Co Special Access Undertaking, clause 14.3(e) of Schedule 11

⁵¹ NBN Co Special Access Undertaking, clause 14.3(f) of Schedule 11

⁵² ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.24

⁵³ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.71

⁵⁴ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.71

⁵⁵ NBN Co Special Access Undertaking, Clause 6.2(a) of Schedule 11

⁵⁶ NBN Co Special Access Undertaking, Clause 6.2(b) of Schedule 11

⁵⁷ NBN Co Special Access Undertaking, Clause 6.3 of Schedule 11

⁵⁸ NBN Co Special Access Undertaking, Clause 6.4 of Schedule 11

Thus, if the ACCC does not believe that NBN Co has consulted appropriately with industry during its review of POI locations, the ACCC will be able to address this during its decision-making process in relation to any NBN Co requests to close, relocate or open new POIs. Ultimately, if the ACCC is not convinced that NBN Co has appropriately consulted on POI locations, this could form a reason for it to reject NBN Co's request.⁶⁰

6. Points of interconnect

6.1 The ACCC has sought views on whether the SAU should include a commitment that NBN CO will permit interconnection at its facilities, including the POIs it owns and controls directly and those it leases from Telstra, consistent with its obligation under section 152AXB(4) of the CCA?⁶¹

NBN Co considers that clauses 1.1, 1.2 and 2.3(a)(ii) of the SAU ensures that NBN Co has made enforceable commitments in relation to permitting interconnection consistent with its obligations under subsection 152AXB(4) of the CCA.

A detailed discussion of the SAU's compliance with legislative requirements, including subsection 152AXB(4) of the CCA, is contained at pp.107-111 of NBN Co's Supporting Submission.

7. The ACCC notes that the SAU does not appear to require NBN Co to report compliance with commitments made about non-price terms and conditions.⁶²

The SAU makes specific and detailed reporting commitments in relation to *price*-related terms and conditions of the SAU, which in particular support the operation of the long term revenue constraint methodology. As noted by the ACCC, the ACCC has a range of other information gathering powers that it may be able to utilise to monitor NBN Co's compliance with the rules committed to in the SAU.

Given the approach to *non-price* commitments in the SAU, it is challenging to determine the most appropriate reporting arrangements and embed them in the SAU at the outset. We do, however, fully anticipate that we will need to report on non-price matters over time. NBN Co is happy to consider and develop any further reporting arrangements that the ACCC believes are required as the need arises over time, noting the powers that the ACCC already has in this regard.

8. Application of Legislative Criteria

8.1 The ACCC notes that it proposes to, in general, not to assess whether certain aspects of the SAU or the acceptance of the SAU itself would satisfy the statutory criteria by comparing a 'future with' the SAU to a 'future without' the SAU.⁶³

NBN Co considers that the approach outlined by the ACCC in its Consultation Paper is consistent with the legislative framework (as also discussed in detail in NBN Co's Supporting Submission).⁶⁴

In its Supporting Submission NBN Co has acknowledged that the application of the 'with and without test' may be appropriate in considering individual criteria in the assessment of reasonableness, but ultimately, the reasonableness test is applied as a stand-alone test, taking into account all the criteria in section 152AH of the CCA.

⁵⁹ NBN Co Special Access Undertaking, Clause 6.6(e) of Schedule 11

⁶⁰ NBN Co Special Access Undertaking, clause 6.6(d) of Schedule 11

⁶¹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.72

⁶² ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.78

⁶³ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.11

⁶⁴ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.18

It is within this context that NBN Co has made submissions that it may be appropriate and useful to consider the 'future with' the SAU to a 'future without' the SAU in examining whether the terms and conditions of the SAU would promote the LTIE.

In accordance with the ACCC's final decision in FANOC, NBN Co considered that applying a 'with or without test' may assist in facilitating the ACCC's analysis in determining the overall reasonableness of the terms and conditions of the SAU.⁶⁵

9. Interaction between SAU and the WBA⁶⁶

NBN Co has consistently expressed its intention to set out terms and conditions of access to its services using both a SAU (if accepted) and the WBA. These documents are intended to operate as complementary documents and have been drafted accordingly.

NBN Co considers that no inconsistency exists between the SAU and WBA. Each instrument has been designed to impose related but distinct obligations on NBN Co. For example under the SAU, NBN Co makes commitments to consult with the ACCC and Access Seekers in relation to the criteria to be applied by NBN Co in conducting a POI Review and ultimately NBN Co's ability to relocate, close or add an Established POI stemming from such a review is subject to the ACCC approval.⁶⁷ The terms and conditions in the WBA relating to POIs do not set out the terms and conditions relating to the POI Review (because they are in the SAU) but address the implementation of a POI review decision, for example the information NBN Co will provide to Customers in moving a POI.⁶⁸

The complementary operation of these documents is further strengthened by NBN Co making provision in the WBA for alignment between this SAU and the WBA (if necessary, for example because the SAU is varied between lodgement and acceptance).

Table 1 below seeks to clarify the interaction between the WBA and SAU in relation to some of the specific queries raised in the ACCC Consultation Paper.

10. References in the SAU to 'WBA' and 'Access Agreement'⁶⁹

NBN Co's general approach to the use of WBA and Access Agreement in the SAU is intended to distinguish between commitments NBN Co makes in relation to the WBA as NBN Co's SFAA and commitments made by NBN Co in relation to executed bilateral agreements ('Access Agreements') respectively.

Table 1 below seeks to clarify NBN Co's specific use of WBA/Access Agreements throughout the SAU. NBN Co would be happy to provide any further clarification of the use of WBA/Access Agreement throughout the SAU.

11. The ACCC notes that it will need to consider whether the SAU refers to Access Seekers and Customers.⁷⁰

NBN Co has adopted the terms Customer and Access Seeker throughout the SAU according to whether the commitments are most appropriately made to a party that has/will have a contractual relationship with NBN Co (i.e. a Customer) or otherwise (i.e. an Access Seeker).

Table 1 below seeks to clarify NBN Co's specific use of Customer/Access Seeker throughout the SAU.

⁶⁵ In its Final Decision on Foxtel's SAU, the ACCC noted at p.122: "...In using the 'with and without' test, the Commission will only use the test in having regard to those criteria where it facilitates (as opposed to 'determines') the Commission's analysis toward the Commission ultimately determining the overall reasonableness of the Undertaking terms and conditions."

⁶⁶ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; pp: 20-21

⁶⁷ NBN Co Special Access Undertaking, clause 6 of Schedule 11

⁶⁸ NBN Co Wholesale Broadband Agreement (November 2011); Module C.13

⁶⁹ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.21

⁷⁰ ACCC Supplementary Consultation Paper on NBN Co's Special Access Undertaking; p.22

NBN Co would be happy to provide any further clarification of the use of Access Seekers/Customers throughout the SAU.

Table 1: Clarification on common approaches to the operation of the SAU

SAU/WBA reference	ACCC Consultation Paper page #	Description	Clarification by NBN Co
Clause 2.2 of the SAU – Supply of NBN Access Service through the Product Components and associated Product Features	p.22	The ACCC notes that NBN Co only undertakes to offer to supply the Product Components and associated product features to 'Customers' as a means of implementing its obligations under the SAU in respect of the NBN Access Service	<p>Clause 1 of Schedule 2 sets out the Service Description of the service to be declared. The NBN Access is described as a layer 2 service supplied on the NBN Co Network (between and including the UNI and NNI) for the purpose of enabling an Access Seeker to supply Carriage Services or Content Services.</p> <p>NBN Co considers that this is the declared service for the purpose of subsection 152AL(8E) of the CCA.</p> <p>Clause 2.2 of the SAU sets out the terms and conditions NBN Co undertakes to comply with the Category B SAOs in supplying the NBN Access Service under the SAU, including offering to supply to a Customer, i.e. an Access Seeker that has entered into, or is otherwise subject to, an Access Agreement.</p> <p>NBN Co considers this is an appropriate approach given that the terms and conditions of access to the NBN Access Service are set out in both the SAU and WBA, as permitted and contemplated for under Part XIC of the CCA.</p>
Clause 5 of Schedule 11 – Major NBN upgrades	p.73	Reference to Customer as opposed to Access Seeker	<p>Clause 5 of Schedule 11 relates to Major NBN Upgrades that will require a Customer to take a particular action to continue to use an NBN Co product, result in an existing product not being available or require a Customer to commit capital to implement that upgrade.</p> <p>NBN Co considers that the use of Customer is appropriate because the works discussed in this clause relate to a material change to existing contractual arrangements between NBN Co and a party to an Access Agreement (i.e. Customer).</p>
Clause 7 of Schedule 11 – Access to platforms	pp.74-75	Interaction between WBA/ SAU. The ACCC notes that NBN Co is proposing to include the basis on which Customers may access the NBN Co platform in the WBA.	Locking NBN Co into using a particular format or technology to interface with its Customers over the 30 year term of the SAU would be nonsensical and will not result in appropriate outcomes for both NBN Co and its Customers. As such NBN Co considers that the WBA is the most appropriate instrument to set out the terms on which Customers may access the NBN Co platform.
		Reference to WBA as opposed to Access Agreement	<p>NBN Co considers that it is appropriate to set out the basis on which Customers may connect to and access NBN Co's platforms in NBN Co's SFAA, the WBA, rather than as part of each bilateral Access Agreement. This approach obliges NBN Co to offer these terms in the WBA. Failure to incorporate such terms in the WBA would be a breach of NBN Co's SAU.</p> <p>NBN Co acknowledges that Access Seekers are able to negotiate away from these commitments in the WBA and enter into an Access Agreements with different terms (subject to NBN co's non-discrimination obligations).</p> <p>However this is an outcome that is permitted and contemplated under Part XIC of the CCA.</p>
		Reference to Customer as opposed to Access Seeker	NBN Co considers that the terms and conditions to be included with regards to access to NBN Co platforms will form part of the WBA, and hence reference to Customer is appropriate.
Clause 8 of Schedule 11 of the SAU – Billing and Payment	p.68	Reference to WBA as opposed to Access Agreements	NBN Co has made commitments in the SAU to include certain terms and conditions in the WBA relating to billing and payment. NBN Co notes that these commitments are currently reflected in the WBA. Failure to offer these terms in

SAU/WBA reference	ACCC Consultation Paper page #	Description	Clarification by NBN Co
			<p>the WBA would be a breach of NBN Co's SAU.</p> <p>NBN Co acknowledges that Access Seekers are able to negotiate away from these commitments in the WBA and enter into an Access Agreements with different terms (subject to NBN co's non-discrimination obligations).</p> <p>However this is an outcome that is permitted and contemplated under Part XIC of the CCA.</p>
		Reference to Customer as opposed to Access Seeker	As the commitments made in the SAU relate to contractual terms to be included in the WBA, the use of 'Customer' is more appropriate then an 'Access Seeker'.
Clause 9 of Schedule 11 – Credit Management	p.69	Reference to WBA as opposed to Access Agreement	<p>NBN Co has made commitments in the SAU to develop a credit policy as part of the WBA, to comply with such a policy and sets out information that must be contained in the document.</p> <p>NBN Co considers that it is appropriate to develop a credit policy as part of NBN Co's SFAA, the WBA, rather than as part of each bilateral Access Agreement.</p>
		Reference to Customer as opposed to Access Seeker	As the credit policy will form part of the WBA, references to Customers are appropriate.
Clause 11, Schedule 11 – Confidential Information and Module D of the WBA	p.67	The ACCC notes that the proposed confidentiality regime in the SAU is subject to the provision of the WBA. The ACCC considers that this could mean that NBN Co could control the circumstances in which confidential information may be disclosed or used through incorporating terms in the WBA.	<p>NBN Co considers that detailed terms and conditions in relation to confidentiality are most appropriately set out in the WBA, rather than the SAU.</p> <p>If NBN Co were to include limiting terms relating to confidentiality in the WBA, an Access Seeker is able to seek to vary those terms (subject to NBN Co's non-discrimination obligations).</p> <p>If as part of such bilateral negotiations an Access Seeker and NBN Co are unable to reach an agreement, then depending on whether the term in dispute is 'covered' by the SAU and provided it is before the execution of the Access Agreement being negotiated, the Access Seeker would be able to apply to the ACCC seeking regulatory recourse under clause 6 of the SAU.</p> <p>In addition, if NBN Co was seeking to vary confidentiality terms in an executed Access Agreement, Customers would have the opportunity to seek an AD or a BROC in respect of all changes notified under the change management provisions outlined in schedule 14 of the SAU.</p>
		Reference to Customer as opposed to Access Seeker	NBN Co considers that the reference to Customer (as opposed to Access Seeker) is appropriate within this clause, as it relates confidential information obtained/generated by NBN Co in the course of contractual engagements with an Access Seeker (i.e. a Customer).
Clause 13(a), Schedule 11 of the SAU – Risk management and liability Module E of the WBA	pp.65-66	Interaction between the SAU and WBA – Specifically terms in the SAU being subject to the SAU, and terms and conditions applying except as expressly provided for by the WBA. NBN Co has the ability to modify liability and indemnity commitments set out in the SAU by including 'limiting' terms and conditions in the WBA.	<p>Clause 13 of Schedule 11 of the SAU sets out specific commitments in respect of what types of liabilities will be subject to exclusions or indemnities under the WBA. Module E of the WBA has been drafted to be complementary to clause 13 of Schedule 11 of the SAU. For example clause E2.5 builds upon the general commitments made in clause 13(a) of Schedule 11 of the SAU, by outlining the details of NBN Co and Customer's liability in relation to Indirect losses.</p> <p>If an Access Seeker did not like any 'limiting' terms and conditions NBN Co may include in a future WBA, the Access Seeker is able to seek to vary these terms via bilateral</p>

SAU/WBA reference	ACCC Consultation Paper page #	Description	Clarification by NBN Co
			<p>negotiations with NBN Co (subject to NBN Co's non-discrimination obligations).</p> <p>If as part of such bilateral negotiations an Access Seeker and NBN Co are unable to reach an agreement on any precise terms, then the Access Seeker may be able to apply to the ACCC seeking regulatory recourse under clause 6 of the SAU, subject to the conditions set out in clause 6 (discussed at 1.1).</p> <p>If NBN Co sought to change an existing term or condition relating to risk management and liability in the WBA, it would be subject to the Change Management Process noted in clause 14 of Schedule 11 of the SAU, and if the ACCC makes an interim access determination or a binding rule of conduct relating to the change proposed by NBN Co before the effective date of that change, then NBN Co may only implement the change in a manner consistent with the ACCC's decision. (clause 14.3(f), Schedule 11)</p>
		References to WBA as opposed to Access Agreement	<p>NBN Co considers it more appropriate to make these commitments in relation to the WBA rather than in Access Agreements because it will provide an Access Seeker the ability to engage in bilateral negotiations with NBN Co to vary the terms (subject to non-discrimination) as contemplated under Part XIC of the CCA.</p> <p>Making such commitments in the SAU in relation to the WBA will ensure that NBN Co will be obliged to offer such terms and conditions.</p>
		Reference to Customer as opposed to Access Seeker	<p>The commitments made in this clause relate to the exercise of NBN Co's rights under the WBA. The WBA sets out these obligations in respect of a 'Customer' rather than an 'Access Seeker', as such it is appropriate that the commitments NBN Co makes in its SAU are in relation to Customers.</p>
Schedule 11, clause 14.1 and 14.3 of the SAU – Contract lifecycle management	p.21	The ACCC has noted that this clause contains the use of both 'WBA' and 'Access Agreement'. References to 'Customer' as opposed to 'Access Seeker'	<p>Clause 14.2 refers to the WBA because the terms and conditions in the clause are commitments that NBN Co is making in relation to the SFAA setting out standard access terms NBN Co will offer to all Customers.</p> <p>Clause 14.3 refers to Access Agreements rather than the WBA because the clause is referring to variations to executed Access Agreements.</p> <p>The references to Customer in this schedule are appropriate because the clause deals with NBN Co's commitments to a party to a contractual agreement, i.e. a Customer.</p>