

15 July 2014

Ms Nicole Ross
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Dear Ms Ross

Telecommunications Final Access Determination inquiries—Non-price terms and conditions and supplementary prices

NBN Co welcomes the opportunity to comment on the ACCC's position paper on the Telecommunications Final Access Determination inquiries – non-price terms and conditions and supplementary prices (the Position Paper).

Scope of NBN Co's submission

The ACCC's Position Paper commences a combined final access determination (FAD) inquiry for non-price terms and conditions (NPTCs) and supplementary pricing relating to a number of declared services. NBN Co's submission is focussed on the DTCS, and is limited to providing our views on:

- the general approach the ACCC should take in setting NPTCs in FADs; and
- setting supplementary charges for the Domestic Transmission Capacity Service (DTCS).

NBN Co does not currently acquire any of the other (non-DTCS) services that form part of the ACCC's combined FAD inquiry.

NBN Co currently purchases managed transmission services on a large number of routes, many of which are covered by the DTCS declaration. These routes variously link greenfield and brownfield sites with relevant interim and permanent Points of Interconnect (POIs). Although currently extensive, NBN Co's use of managed transmission services is temporary, and will phase down as the POI rollout and transit network build is completed and the interim POIs are migrated to the relevant permanent POIs. NBN Co's interest in DTCS also relates to the terms and conditions our customers face in accessing backhaul from NBN Co's 121 permanent POIs.

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Non-price terms and conditions

The Position Paper states,

"In broad terms, the ACCC intends to approach its task in considering the inclusion of non-price terms and conditions in the FADs from the perspective of ensuring that there would be an effective fall-back set of terms and conditions of access available to the parties."¹

NBN Co supports this approach as it is consistent with the intended role of access determinations under Part XIC of the *Competition and Consumer Act 2010* (CCA). That is, Part XIC emphasises and gives primacy to commercially negotiated terms by placing access agreements at the top of the access hierarchy. Terms and conditions in an access agreement take precedence, to the extent of any inconsistency, over terms and conditions in other instruments, including terms in access determinations.²

In setting an effective fall-back set of terms and conditions, NBN Co supports the ACCC's current approach of only setting NPTCs for those aspects of non-price access where commercial agreement is less likely to result. NBN Co submits that this approach is consistent with Part XIC because it prioritises commercial terms but provides alternatives where necessary.

The ACCC's model non-price terms and conditions³ and Telstra's existing Customer Relationship Agreements set out a large number of NPTCs. The ACCC could in theory address all of these aspects of non-price access in its access determination. However, narrowing the scope of this inquiry to only those terms where commercial agreement is less likely to result will allow the ACCC to focus on setting appropriate terms for a smaller yet key set of access terms and conditions. NBN Co agrees with the ACCC's view that one of the key benefits of this approach is the timeliness with which the ACCC may finalise the FAD terms.⁴

The Position Paper states that in order for the above approach to work effectively,

".. there would need to be assurance that certainty over the balance of the access terms would be delivered by way of a commercial agreement and that the agreement would not inappropriately restrict recourse to regulated terms in future."⁵

NBN Co considers that the broad scope of this inquiry and the invitation for access seekers to raise all important issues, even those they have previously raised,⁶ is likely to highlight those key NPTCs that have proved the most difficult to commercially negotiate. In addition, NBN Co notes that if further terms are identified after the FADs are finalised, the ACCC has the ability to vary any FADs to include additional terms, or issue a Binding Rule of Conduct to address urgent issues relating to non-price access.

¹ ACCC Position Paper, p.9

² Including also terms in an accepted special access undertaking and binding rules of conduct. Combined effect of Sections 152AY, 152BCC, 152BDB, and 152CBIC of the CCA.

³ ACCC Model Non-Price Terms & Conditions Determination 2008

⁴ Position Paper, p.9

⁵ *ibid*

⁶ Position Paper, p.11

Price terms for DTCS

At this stage, NBN Co does not have any comments in relation to the level of connection charges for the DTCS.

However, we are unclear as to why the DTCS access and connection charges are being considered in separate processes (as described in the Position Paper). NBN Co's experience in acquiring DTCS is that access and connection charges are inextricably linked. Even though the charges are specified distinctly, this does not mean that it is appropriate to benchmark the charges independent of one another.

NBN Co submits that the ACCC should consider both the connection charge and access charge for the DTCS in the same FAD inquiry, and collect both the primary and supplementary price benchmarking data for the DTCS at the same time.

Please do not hesitate to contact me or Matthew Cole in our regulatory team on (03) 9601 5231 if you have any queries in relation to anything contained in this submission. NBN Co would be happy to discuss this submission with the ACCC. We look forward to providing our further views in the next steps of the FAD inquiry processes.

Kind regards



Caroline Lovell
Head of Regulatory Affairs