



**Superfast Broadband Access Service and Local Bitstream Access
Service Final Access Determination Joint Inquiry**

Response to ACCC discussion paper of September 2016

Public version

1. Introduction

OptiComm is one of the small number of network operators that is subject to the LBAS declaration and will therefore be directly affected by the final access determination (FAD). We are pleased to have the opportunity to make a submission to the ACCC's inquiry process.

2. Executive summary

OptiComm considers that LBAS and SBAS are very similar services and therefore should be subject to similar regulation. The key points in OptiComm's submission are as follows:

- We are not aware that there is a need to alter the existing anchor pricing approach to apply regulated pricing to a range of product tiers beyond the entry-level 25/5 Mbps product tier.
- It remains appropriate to anchor the regulated access price to NBN Co's current access charge in initially setting the FAD rate, however the regulated price should not remain pegged to NBN Co such that it follows changes in NBN Co's pricing structure.
- There are significant variances in backhaul costs incurred by LBAS/SBAS providers, which would make it difficult for the ACCC to set a regulated aggregation price.
- Small access providers do not have the same economies of scale or negotiating power as NBN Co, which means that their underlying cost base is higher.
- A significant issue for small service providers is NBN Co's refusal to provide a B2B interface and become a wholesaler of wholesalers that would enable all access seeker retail service providers (**RSPs**) that acquire services on the NBN to also acquire services on all other networks.
- SBAS and LBAS regulation should apply to all service providers no matter their size.

3. Responses to the ACCC's questions

3.1 Pricing approaches

OptiComm considers that in setting the FAD, NBN Co's access price should be taken into account but the FAD price should not remain pegged to changes in NBN Co's pricing. OptiComm does not believe it is necessary to regulate additional product tiers beyond the anchor pricing point.

3.1.1 Tiered pricing

OptiComm considers that everything reasonable should be done to encourage end-users to maximise their use of high-speed broadband services and to maximise efficiency in network operation. We have therefore introduced dimension pricing to enable RSPs to encourage their end-user customers to utilise higher bandwidth retail plans. If RSPs buy more average bandwidth per user, it is offered to them at a discount. This enables the RSPs to efficiently offer higher bandwidth plans to end-users and makes better use of our network.

We do not believe that other product tiers beyond the existing 25/5 Mbps anchor tier need to be regulated. We are not aware that the unregulated pricing of other product tiers is considered problematic by RSPs or that it negatively impacts the interests of end-users of telecommunications services. SBAS/LBAS providers need to match or better the product tiers and prices offered by NBN Co in order to ensure that their products are competitive and to enable RSPs to offer retail product tiers that are homogenous across the different networks on which they operate.

We agree with the ACCC's comment that a regulated anchor product effectively constrains access providers from acting unreasonably in pricing other product tiers.

3.1.2 Pricing methodologies

Pursuant to Part 8 of the *Telecommunications Act 1997*, LBAS providers such as OptiComm are prohibited from providing retail services to residential and small business customers. As such, we consider that there is likely to be little available information to enable the ACCC to conduct a Retail Minus assessment. The costs therefore would probably have to be extrapolated from other telecommunications service providers that do provide retail services, such as Telstra's ADSL service or TPG's FTTB service, which are very unlikely to be a close approximation of another service provider's actual or hypothetical retail costs. For these reasons, we consider that it would be inappropriate to utilise a Retail Minus approach to set LBAS and SBAS prices across the board

We agree with the ACCC's view that given LBAS and SBAS are supplied by different providers with different networks and cost inputs, it is inappropriate to utilise cost-based pricing methodologies for setting access prices. We also agree that given the small scale of Australian SBAS and LBAS providers, benchmarking access prices against larger international networks would also be inappropriate. OptiComm considers that it remains appropriate to initially benchmark access prices against NBN Co's wholesale rates.

We are concerned that the ACCC appears to consider it likely that SBAS/LBAS providers operate on a lower cost base than NBN Co because they are not required to provide uniform prices for services in all geographic areas. Though we agree that NBN Co will have to cross subsidise non-economic services though services in profitable geographic locations, it also true that NBN Co has several considerable competitive advantages over its far small competitors that we believe preclude the ACCC from setting FAD access prices that discount the NBN's wholesale rate. For example:

- NBN Co has access to cheap government revenue for its rollout, marketing and other operating expenses.
- NBN Co has used very low interest funds from the government to build its networks between its Fibre Access Node (FAN) sites and its Points of Interconnect (POI) and therefore only has to recoup the capital cost, whereas OptiComm and in all likelihood other LBAS providers, must pay to lease capacity between these elements of the network at full commercial rates.
- NBN Co has access to NBN specific regulation that enables it to reduce costs in rolling out its network. For example, the *Telecommunications (Low-impact Facilities) Determination 1997* was amended to define a number of additional facilities and installation methods as "low-impact" but only when they are being installed by NBN Co. As a result, no other carrier except NBN Co has a statutory right to install aerial cables between power poles without the permission of the power company or local government consent, or similarly to install POPs in buildings without the owner's consent. Other carriers must utilise more expensive methods to rollout their networks
- Given its vast size and rollout, NBN Co has the ability to negotiate substantial discounts on equipment, duct access and labour from its suppliers. We are aware that the rates available to NBN Co on the basis of it being the biggest game in town are simply unavailable to smaller providers such as OptiComm and other LBAS operators.
- The government is already considering implementing a levy on high-speed fixed line network operators to assist NBN Co's cost of providing services to non-economic areas¹. It would be unreasonable to hit SBAS/LBAS operators twice, both in terms of the levy and a lower regulated access price.
- The NBN will use a mixture of technology, including existing copper and HFC, which will lower NBN Co's operational costs. We consider that the costs of the mixed

¹ See the Bureau of Communications consultation on funding the NBN in non –commercial areas, at: <https://www.communications.gov.au/have-your-say/final-consultation-nbn-non-commercial-services-funding-options>

technology network cannot be readily compared with the costs of a network such as OptiComm's, which is a Fibre to the Premises network and more expensive.

Further, as the ACCC will be aware there is growing contemplation that the government may write off part of its investment in the NBN to allow a means for NBN Co to drop its access prices, particularly its CVC charge. If this occurred and regulated price terms are pegged to NBN Co's price terms, NBN Co could use its market power to damage its competitors. It is also possible that NBN Co could use its market power to hurt competitors if their price is pegged to it by dropping its price below its costs. For these reasons, we consider that the FAD price should not be pegged to move in line with changes in NBN Co's rates.

We consider that the regulated access price should provide an annual increase of the lesser of CPI or 2.5%.

3.1.3 Interaction with the NBN

Contrary to the assumptions adopted in the ACCC's discussion paper regarding the CBD or metro-centric geographic location of SBAS/LBAS networks, OptiComm provides networks into greenfield estates in a broad range of geographic locations, including outer metro and regional areas. It costs us more to provide services outside CBD and outer metro areas, as we have to pay higher backhaul charges to third party carriers. As acknowledged by the ACCC, being substantially smaller, we are not able to take advantage of the economies of scale enjoyed by NBN Co, which means that in operating our network, we pay more in both set up and in on-going costs such as backhaul. For example, we are often not able to obtain the discounted rates available for buying large amounts of backhaul, as our capacity needs are not high enough.

Like the NBN, OptiComm also cross-subsidises loss-making networks in some estates from the profits in other estates. For example, to secure a developer's business we may agree to provide services to a small development where we may never recoup our investment in order to assist in securing a contract to provide a profitable network in another development. In addition, developments are usually built in stages. We need to ensure that the early stages of the development are adequately provisioned at the start despite this resulting in us running the development's network at a loss for many months and sometimes years before the network begins to be profitable. If regulated access prices are too low, we would not be able to afford cross subsidies and we expect new entrants would often be simply unable to enter the market, as they would be unable to carry losses for several years.

3.1.4 SBAS and LBAS components that should be priced

- Are there other charges for accessing SBAS and LBAS that need to be regulated?

We are not aware of any other charges that need to be regulated.

- Are there differences in aggregation requirements that should be taken into account in setting prices?

OptiComm's aggregation costs differ between geographic locations. For example, we have to pay more for regional bandwidth than for metro bandwidth. Accordingly, our aggregation charges are priced to reflect this with prices set in bands of inner metro, outer metro and regional. Our costs also vary depending on how much capacity we buy on a particular route. Typically, it can take years in a new broadacre estate before we cover on-going costs. This is because connections at premises in an estate are often slow at the beginning as house completion can be staggered, though we need to ensure that the infrastructure is ready and operational right from the start to provide services to the first homes in the estate. The number of connections need to ramp up to a certain level to cover the costs that we pay for bandwidth to the estate. We subsidise the loss making estates from our profitable estates until the newer estates become sufficiently populated with a threshold number of connections before they operate in a commercially viable manner.

- Are SBAS/LBAS sold on a 'fully loaded' basis so the costs of aggregation are included in the port charge? Is there any reason for the separate of bundled charge being used?

OptiComm sells LBAS either fully loaded or with port access and aggregation separately. Under the fully loaded model, the service is provided with either backhaul aggregation on a per access port basis at a set contention ratio or RSPs can purchase an aggregated NNI speed with an RSP selectable amount of bandwidth so as to differentiate their retail service on the basis of price and quality. This enables RSPs with their own networks to self-supply backhaul, providing them with greater flexibility and lower costs.

3.2 Other economic and technical issues

As noted in the ACCC's discussion paper, OptiComm does not provide retail services and we recover our costs through the provision of wholesale access, including the regulated LBAS. We consider that it is possible for other LBAS providers to also recover their costs in this manner. We note Optus's comments referred to by the ACCC² regarding the costs and difficulties for an RSP to connect to multiple wholesale providers. We acknowledge Optus' concerns and agree that multiple interconnection arrangements and interfaces can be problematic. To ensure that RSPs are able to and are willing to interconnect with our network, OptiComm undertakes additional work to provide them with an acceptable interface. This adds to our costs. Large RSPs such as Optus and Telstra are reluctant to connect to multiple interfaces. We consider that this significant competitive problem could be overcome if NBN Co was willing to act as an aggregator or wholesaler of wholesalers, providing a common interface between RSPs and access providers. The cost of this common B2B interface and an interconnect with NBN Co could be borne by the access providers, including OptiComm, and not by NBN Co. Unfortunately, NBN Co is unwilling to agree to this as it knows that the lack of a uniform B2B interface and wholesaler of wholesaler interconnect gives it a competitive advantage over smaller network operators in wholesale markets. We consider this is contrary to the long term interests of end-users as it prevents consumers being offered access to as broad a range of RSPs as possible wherever they reside or operate their business.

Beyond our view that a standard B2B interface and a wholesaler of wholesalers interconnect operated by NBN Co should be implemented, we do not consider it appropriate for the SBAS/LBAS FADs to mandate consistent arrangements or standards with the NBN. This would result in NBN Co being a quasi-standards setter, which would be an extraordinary situation given that NBN Co will be the dominant player in the market for the supply of wholesale telecommunications services. Giving NBN Co the ability to set standards that apply to its smaller competitors has clear potential to lead to anticompetitive outcomes. NBN Co does not have any incentive to treat its competitors fairly and is unlikely to do so. Given NBN Co's dominance, it is already clear that SBAS/LBAS providers need to at least match NBN Co's arrangements and service levels to be able to compete. This should not be made more onerous by providing NBN Co with a regulated ability to implement changes that could damage its competitors.

We do not have access to costing information for SBAS providers, however, we consider the following points suggest that SBAS operators could operate from a lower cost base than LBAS operators:

- In order to be an SBAS provider the carrier must have had networks in operation prior to 2011. It is likely that, to at least some extent, these networks have already been paid off.
- SBAS operators are not wholesale only and have retail arms on which they can recoup costs and make profits.
- To our knowledge, SBAS operators only provide SBAS within the footprint of their pre-existing networks. Therefore, it appears likely that they do not need to acquire backhaul from other carriers so their costs of providing SBAS would be likely be lower than the costs of LBAS providers.

3.3 Non-price terms and conditions

² ACCC, discussion paper, pp 23-24

We consider that the ACCC's non-price terms are reasonable and should apply equally between SBAS and LBAS providers.

3.4 Exemptions

We do not consider that it is appropriate to provide exemptions.

3.5 Commencement and expiry

We consider that the FADs should commence from publication and not be retrospective. As the LBAS FAD does not have an expiry date, we consider both the SBAS and LBAS FADs should expire upon expiry of the relevant SBAS declaration.