



Optus Submission to the ACCC
Supplementary Consultation

NBN Co's Special Access Undertaking

(Public Version)

30 March 2012

Appendices

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Appendix A. Examples of applying instruments

- A.1 This appendix provides some practical examples of issues and the uncertainty that is likely to arise in practice in terms of the operations of the respective provisioning of the WBA and the SAU.

Example 1 – Points of interconnection (POI) terms

Scenario:

- A.2 A customer disagrees with an NBN Co decision to close a POI location, because the customer will bear costs in relocating to another POI and is concerned the relocation will adversely impact service.

Under the WBA

- A.3 WBA clause C13.2 allows NBN Co to relocate or close a POI location with 12 months' notice to the Customer of:
- (a) the closure; and
 - (b) relocation or closure plan.
- A.4 The plan must address the matters in clause C13.2(c). Each requirement is for NBN Co to provide information about what it is doing about an issue (eg. to set out steps being taken to minimise disruption to the Customer).
- A.5 NBN Co is required to use reasonable endeavours to minimise disruption due to the relocation or closure and minimise the frequency of these sorts of changes (clause C13.6). There is no requirement on NBN Co to ensure certain things are done (eg. there is no requirement to ensure there is minimal disruption to the Customer).
- A.6 The Customer must bear the cost of re-establishing connections between the NBN Co Network and Customer Network (clause C13.3).
- A.7 Clause C13.7 prevents a dispute about the closure from delaying the closure:
- "A decision by NBN Co to relocate, close or replace a Point of Interconnection or Temporary POI cannot be disrupted, and NBN Co is entitled to implement any relocation, closure or replacement of a Point of Interconnection or Temporary POI despite the existence of any Dispute."*

Under the SAU

- A.8 SAU Schedule 11, clause 6 reflects:
- (a) a 5 year review of POIs in consultation with access seekers;
 - (b) NBN Co will only propose closures or relocating an Established POI in accordance with the results of the published review; and
 - (c) NBN Co will obtain ACCC approval before closing or relocating an Established POI.

- A.9 To the extent SAU clause 6 would prevent NBN Co exercising its rights under clause C13 in a WBA with a customer, clause 6 is of no effect.¹

Questions:

- A.10 Are NBN Co's obligations under the SAU to obtain ACCC approval to close or relocate a POI inconsistent (and therefore of no effect) with NBN Co's ability under the WBA to close or relocate a POI (as long as the 12 month notice and plan requirements are met)?
- A.11 Could a customer or the ACCC seek to enforce NBN Co's non-compliance with the SAU (eg, closing a POI not approved by the ACCC) and stop the closure until NBN Co complies with the SAU requirements or is enforcement prevented because when the WBA clause C13.7 prevents a dispute about the closure from delaying the closure?
- A.12 Upon acceptance of the SAU, does NBN Co intend to propose under WBA clause F3 alignment of WBA clause C13 with SAU Schedule 11 clause 6 (eg, to make any closure of a POI subject to the requirements in SAU Schedule 11 clause 6)?

Example 2 – Variation of an access agreement

Scenario

- A.13 BROCs have been issued by the ACCC setting out procedures for NBN Co to follow in varying an access agreement. NBN Co purports to vary an access agreement without following the procedures required by the BROCs.

Under the WBA

- A.14 WBA clause F4 addresses the basis for making changes to the WBA:
- (a) clause F4.1 permits NBN Co to change the WBA where the change is made in accordance with one of 14 specific processes set out elsewhere in the WBA, another document or agreed with the customer; and
 - (b) clause F4.2 sets out a process allowing NBN Co to make other changes to the WBA after following a process, including requirements to seek feedback from the customer in a forum determined by NBN Co and notifying the customer. NBN Co is not expressly required to notify, consult with or take into account feedback from the ACCC about the change. However, F4.2 (f) provides that if the ACCC issues an interim AD or BROCs relating to the change, then NBN Co may only implement the change in a manner consistent with that interim AD or BROCs.
- A.15 The WBA does not address whether a failure by NBN Co to comply with a procedural requirement such as to implement a change in a manner consistent with an interim AD or BROCs will affect the validity of the change. The failure could merely be a breach of the WBA.

Under the SAU

- A.16 SAU Schedule 11 (Non-price terms and condition) clause 14.3 contains terms addressing how changes to access agreements may be made:

¹ Part XIC s. 152CBIC

- (a) clause (a) contains an acknowledgement that in addition to NBN Co's right to set and vary prices in accordance with the terms of the SAU, NBN Co may make other changes to Access Agreements in accordance with the terms of those Access Agreements, including for the purpose of ensuring NBN Co's compliance with its statutory non-discrimination obligations;
- (b) clause (b) requires NBN Co to always give the ACCC and the customer prior notice of the change;
- (c) clause (c) provides that NBN Co may make changes in accordance with any specific process set out in the access agreement. This would correspond to the specific processes clause in WBA clause F4.1;
- (d) clause (d) states that, for changes not covered by (c), NBN Co may change an access agreement after following a process including requirements to seek feedback from the customer, to take into account customer and ACCC feedback and notifying the customer and the ACCC. This corresponds to WBA clause F4.2, but there are a few differences between the two instruments in the requirements on NBN Co to interact with and take into account feedback from the ACCC (eg, NBN Co is required to take into account ACCC feedback under the SAU but not under the WBA);
- (e) clause (e) gives a customer the opportunity to ask the ACCC to issue before the effective date of the change an interim AD or binding rules of conduct; and
- (f) clause (f) states that if the ACCC issues an interim AD or BROCC then NBN Co may only implement the change in a manner consistent with that interim AD or BROCC.

A.17 The SAU does not address whether a failure by NBN Co to comply with a procedural requirement such as to give the ACCC notice or implement a change in a manner consistent with an interim AD or BROCC will affect the validity of the change. The failure could merely be a breach of the SAU.

Questions

- A.18 Can BROCC relating to procedures for amending an access agreement override the procedures for amending the WBA that are stated in the WBA? It would appear that a BROCC relating to procedures amending the WBA would only be binding on NBN Co in cases where NBN Co seeks to make an amendment to the procedures for amending the WBA.
- A.19 Does a BROCC relating to procedures for amending an access agreement override the procedures for amending the WBA that are stated in the SAU?
- A.20 Does the acknowledgement in SAU clause 14.3(a), mean that certain terms of the SAU allow NBN Co to amend an access agreement on terms stated in the SAU but not reflected in the access agreement?
- A.21 If NBN Co fails to take into account ACCC feedback on a change (as required under the SAU but not the WBA), will that affect the validity of the change?

Appendix B. Network design rules

- B.1 Optus submits that the Network Design Rules do not present a consistent view of the design rules that will enable an understanding of the cost drivers of the network as per its 'Purpose' given in paragraph 2 of Chapter 2. The Network Design Rules (and the covering SAU) do not take into account impacts on or the requirements of the end user/customer. As such, the Network Design Rules do not present a set of rules that could be used to take into account the long term nature of the NBN. In particular there is specific detailed reference to current design rather than the implications that need to be considered for requirements well beyond the lifetime of the current technology choices.
- B.2 The document also presents an inconsistent level of detail in certain areas providing detail on the design rather than the rules governing the design.
- B.3 Optus therefore recommends that NBN Co amend the document to take into account the customer outcomes of the NBN including providing rules for the performance of the Network taking into account design targets/rules for availability, resilience/redundancy and capacity planning, and prudence.
- B.4 This appendix outlines a number of key high level changes Optus considers will need to be re-examined in the Network Design Rules. As a starting point, Optus has set out comments with regards to the following issues:
- (a) Customer outcomes;
 - (b) Fibre network; and
 - (c) Wireless and satellite network
- B.5 Optus further recommends that NBN Co engage with industry in the development and refinement of the Network Design Rules, in particular prior to the finalisation and publication of the Initial Network Design Rules. Such engagement should be undertaken under the supervision of the ACCC.

Customer outcomes

- B.6 Optus submits that the current network design rules lack the remit required to meet customer expectations. As discussed elsewhere in this submission, Optus notes that there exists a strong social policy objective for the construction and operation of the NBN, of which a key measure will be the affordability of the services NBN Co provides to end users.
- B.7 As such, and in line with the comments set out in the 2006 Expert Panel on Access Pricing for energy pricing, it has been noted that "*The significance to the Australian economy of a reliable energy supply at the lowest sustainable prices, and the importance more generally of ensuring an efficient, efficiently priced and reliable supply of energy.*"² These comments are equally relevant in the context of the framework being proposed for the NBN.

² Expert panel on Energy Access Pricing – report to the Ministerial Council on Energy, April 2006, p.10; as cited in AEMC, Economic Regulation of network Service Providers, and Price and Revenue Regulation of Gas Services, Directions Paper, 2 March 2012, p.7

- B.8 In addressing this issue, the design rules should therefore be framed with a set Customer Experience target, and that addresses both network availability and capacity planning/management issues. For example,
- (a) *Network availability* – Optus submits that a comprehensive set of design rules for the availability of the network should be set.
 - (b) *Capacity Planning/Management* – Optus submits that rules need to be established to ensure a minimum service level for shared portions of the Network. It follows that where NBN Co offer any shared capacity, a design rules should be established to ensure both a fair allocation of network capacity, as well as providing NBN Co with transparent trigger points for upgrading network capacity.

Network Design: fibre network

- B.9 Optus submits that the design rules should take into account the factors that will drive the majority of the cost of the NBN. In particular, given information from NBN Co, the main cost driver is considered to be the construction for the fibre access and distribution network.
- B.10 To this extent, Optus recommends that this portion of the Network should (as a minimum) be constructed to the following rules:
- (a) The design should minimise the fibre within the Network;
 - (b) The design should anticipate multiple changes in technology during the lifetime of the fibre access and distribution network; and
 - (c) The network should be designed to allow for efficient replacement of the passive splitting technology at the splitting point and allow for efficient replacement of any active equipment.

Network Design: wireless and satellite network

- B.11 Optus acknowledges that the section on the satellite access solution is still under development; hence the design rules are only indicative at this stage.
- B.12 To this extent, Optus is unable to make any specific comments on the satellite design, however considers that the satellite network should also address the following principles:
- (a) The end user equipment should be designed to be able to have the active equipment readily upgraded and limit the need to change out or upgrade of the passive antenna including any need to adjust or repoint the antenna. Additionally the design should limit the active elements within the Network to meet the Network availability and customer requirements and should enable ready upgrade of the active equipment to cater for technology upgrades; and
 - (b) The design rules currently provide some detail but limit the rules for the Wireless Network. The rules for the wireless network should take into account similar principles to the other components of the network including ready upgrade of active components of the network and limit the need for upgrade of the end user antenna.

Appendix C. Regulatory Oversight of Expenditure in Other Network Industries

- C.1 This appendix provides a high level summary of some common approaches to regulatory oversight of expenditure in other Australian network industries.

Electricity Networks

- C.2 The Australian Energy Regulator (AER) oversees the expenditures of electricity networks in the National Electricity Market (NEM) in accordance with Chapter 6 (distribution) and 6A (transmission) of the National Electricity Rules (NER).
- C.3 Network service providers (NSP) submit regulatory proposals to the AER approximately 12 months prior to the commencement of the next regulatory period (which are 5 years) for review. The NSP is responsible to *prove* to the AER that its proposed expenditures are appropriate. This generally involves the NSP submitting hundreds of pages of supporting information such as forecasts, underlying methodologies, justifications, procedures, consultant reports, benchmarks and models. In addition, distribution networks are required to submit tariff variation proposals annually, since they are also subject to price caps.
- C.4 The AER assesses the NSP's proposal on the basis of the information submitted in addition to conducting its own analyses (such as internal and external expert review) and a public consultation. Stakeholders will also submit hundreds of pages of evidence for consideration during the consultation process.
- C.5 The AER can accept or reject a spending proposal. The Productivity Commission (PC) has recently summarised the AER's determination role as:

The AER must reject operators' initial spending proposals if it is not satisfied that they reasonably reflect efficient, prudent and realistic spending decisions... and has frequently done so.³

- C.6 For example, in the most recent review of TransGrid's revenue proposal the AER proposed in its Draft Decision to reject the forecast capital expenditure on the basis that:

its own analysis and PB's [the AER's consultant] assessment of a sample of TransGrid's network and non-network projects, its replacement capex [capital expenditure] program and its project costing and escalation processes. PB's assessment determined that while TransGrid generally operates consistent with good industry practice in terms of corporate governance and project delivery, there were weaknesses with respect to its [TransGrid's] assessment of project options and the assessment of project risks. The AER undertook its own analysis of TransGrid's unit cost escalators and assessed them as not being reflective of efficient costs.

On the basis of its analysis and the advice of PB, the AER reduced the capex allowance proposed by TransGrid by \$173 million (\$2007-08).⁴

³ Productivity Commission, Electricity Network Regulation, Productivity Commission Issues Paper, February 2012, p.21

⁴ AER, TransGrid transmission determination: 2009-10 to 2013, Final Decision, 28 April 2009, page 11

- C.7 Under the NER, the AER is also required to develop and publish the specific regulatory test used to assess the efficiency of new network capital investment over a threshold of \$1 million; in addition, where the total capitalised expenditure is in exceed of \$10 million, this application must also be subject to public consultation.⁵ As such, *“The regulatory test is an analysis tool used by transmission and distribution businesses in the National Electricity Market (NEM) to assess the efficiency of network investment.”*⁶
- C.8 There are two limbs to the regulatory test:
- (a) *The reliability limb – this is applied to reliability driven augmentations which are based on service obligations imposed by the NER or state legislation, regulations or statutory instruments. A reliability augmentation will satisfy the test if it is the least cost option considering the total costs of alternative options to those who produce, distribute or consume electricity in the NEM.*
 - (b) *The market benefits limb – this is applied to any investment not assessed under the reliability limb. New investment will satisfy the market benefits test if it maximises the net present value of the net market benefits having regard to alternative options, timing and market development.*⁷
- C.9 In 2010 this regulatory test was supplanted by the AER’s publication of the regulatory investment test for transmission network investment projects over \$10 million. The purpose of the regulatory investment test for transmission (RIT-T) is to provide a single framework *“to identify the transmission investment option which maximises net economic benefits and, where applicable, meets the relevant jurisdictional or Electricity Rule based reliability standards... [as such] removes the distinction in the regulatory test (version three) between reliability driven and projects motivated by the delivery of market benefits.”*⁸ The two-limb regulatory test framework maintains its relevance in the context of electricity distribution networks.
- C.10 The AER has recently put forward a Rule Change proposal to the Australian Energy Markets Commission (AEMC) that, if accepted, will change the framework for regulating NSPs. In particular, the proposal seeks to accord greater discretion and flexibility to the AER to impose particular amendments to regulatory proposals to replace the ‘accept or reject’ framework.⁹ It has been made in the context of concern over rising electricity network costs. The PC is also reviewing the regulation of electricity networks to examine the use of benchmarking and how it can be used to enhance efficient outcomes.¹⁰

⁵ AER, Regulatory Test version 3 & Application Guidelines, Final Decision, November 2007, Appendix A

⁶ AER, Regulatory Test version 3 & Application Guidelines, Final Decision, November 2007, p.4

⁷ AER, Regulatory Test version 3 & Application Guidelines, Final Decision, November 2007, p.5

⁸ AER, Regulatory investment test for transmission and regulatory investment test for transmission application guidelines, Final Decision, June 2010, p.1

⁹ AEMC, Rule Change Request – Economic Regulation of Network Service Providers, <http://www.aemc.gov.au/Electricity/Rule-changes/Open/economic-regulation-of-network-service-providers-.html>

¹⁰ PC, Electricity Network Regulation, <http://www.pc.gov.au/projects/inquiry/electricity>

Gas Distribution

- C.11 The AER is also the economic regulator of covered (declared) gas distribution networks in all states and territories (except Western Australia). It is governed by the National Gas Rules (NGR).
- C.12 Similar to electricity networks, gas distribution networks must submit variations to their access arrangements (regulatory proposals) to the AER prior to the commencement of the next control period, and they are also subject to annual tariff reviews. This must include very detailed information to support expenditures incurred in the previous control period (especially if there were variations in outturn expenditures from the forecast) as well as the forecasts for the proposed period. Again, it is not uncommon for the AER to reject proposals due to insufficient supporting information.
- C.13 For example, in the AER's Draft Decision of Jemena's Gas Networks NSW (JGN) most recent access arrangement proposal it required JGN to make revisions prior to gaining approval. One specific aspect was to provide further information in support of its proposed capital expenditure programme:

The AER considers that while Jemena has provided a high level description of why projects meet the requirements of the NGR, the AER has not been given enough information...

The AER further notes that in addition to the concerns about the timing and delivery of projects there was no information provided that evaluated or demonstrated that the proposed capital expenditure was the least cost option selected.

In light of these comments, the AER and Wilson Cook report cannot determine whether individual projects that make up the capital expenditure are efficient based on the information provided by Jemena.¹¹

- C.14 This highlights the level of detail the AER expects to receive in support of a capital expenditure forecast – consideration of alternatives, ability to deliver the project in the given timeframe and detailed reasons for carrying out specific projects.
- C.15 Under the NGR there are two forms of capital expenditure: conforming and non-conforming capital expenditure, essentially expenditure that can be recovered from declared services tariffs and expenditure that cannot. For capital expenditure to be considered 'conforming', Rule 79(1) states that:

the capital expenditure must be such as would be incurred by a prudent service provider acting efficiently, in accordance with accepted good industry practice, to achieve the lowest sustainable cost of providing services; [and] the capital expenditure must be justified on a ground stated in subrule (2).¹²

- C.16 The remainder of Rule 79 describes the various conditions in which capital expenditure may be justified in order to be rolled into the projected capital base, ie. it is considered to meet

¹¹ AER, Jemena: Access Arrangement Proposal for the NSW gas networks, 1 July 2010 – 30 June 2015, Draft Decision, February 2010, page 52

¹² NGR, <http://www.aemc.gov.au/Gas/National-Gas-Rules/Current-Rules.html>

the 'new capital expenditure criteria'. This generally relates to the project resulting in positive economic value or carried out to meet safety or regulatory obligations.

- C.17 However, nothing in the NGR restricts a service provider from making a capital expenditure that is, in whole or part thereof, 'non-conforming' capital expenditure. However the Rules 82 to 84 set out the requirements and key limitations in which the service provider may seek approval from the AER of its intent to recover these costs via some form of surcharge or capital contribution. This provision essentially aims to limit the capital costs included in tariffs for regulated services.

Fixed-line Telecommunications Services

- C.18 Under the amended CCA the ACCC has price determination powers with respect to declared services and was required to release Final Access Determinations (FADs) for all declared services within twelve months of the new legislation coming into effect. The FAD for Telstra's fixed line services was released in July 2011.

- C.19 Despite the shortened timeframe available, the ACCC, Telstra and industry stakeholders participated in a highly scrutinised process in which all aspects of the RAB framework (including the fixed-line service model (FLSM) itself) were subject to review.

- C.20 The ACCC assumed regulatory oversight of all inputs into the FLSM. This included the role of assessing the reasonableness of the capital and operating expenditure forecasts that would be allowed in each of the RAB roll-forward calculations for the annual revenue requirement, including the value of the initial RAB. Given the timeframe (or other unknown constraints), the ACCC was unable to conduct a review as rigorous as those described above, as it stated that:

... forecasts were not provided for the entire proposed regulatory period. Further, the explanatory material provided with the forecasts was insufficient to enable a full assessment by the ACCC of the basis for the forecasts.¹³

- C.21 In the absence of robust information from Telstra the ACCC was able to establish a RAB based on its own assumptions. The ACCC is currently consulting on a more robust ex-ante framework to regulate Telstra's fixed-line services - one that relies on extensive justification being provided by Telstra to gain approval for its expenditures and prices:

... the draft BBM RKR requires that Telstra provide an explanatory statement containing:

- *the method used to determine the forecasts*
- *the assumptions used to determine the forecasts, and*
- *the basis for the assumptions.¹⁴*

¹³ ACCC, Public inquiry to make final access determinations for the declared fixed line services, Discussion Paper, April 2011, p.34

¹⁴ ACCC, Draft Building Block Model RKR, ACCC Position Paper, March 2012, p.11

- [In addition, for capital expenditure forecasts, this should also include] *any internal guidelines used by Telstra to assess the prudence of forecast capital expenditure or to tender or contract out capital expenditure projects.*¹⁵

C.22 Importantly, in assessing the above forecasts, the ACCC has set out that it will have regard to the following principles:

Under a building block model (BBM) approach, forecast operating expenditures [and capital expenditures] should reflect prudent and efficient costs. The following matters are relevant to whether forecast operating expenditures [and capital expenditures] reflect prudent and efficient costs:

- *the access provider's level of operating expenditure [and capital expenditure] in the previous regulatory period;*
- *reasons for proposed changes to operating expenditure [and capital expenditure] from one regulatory period to the next regulatory period;*
- *any relevant regulatory obligations, or changes to such obligations, applicable to providing the relevant declared fixed line services; and*
- *any other matters relevant to whether forecast operating expenditures [and capital expenditures] reflect prudent and efficient costs.*
- [In addition, for capital expenditure forecasts, this should also include] *whether the access provider's asset management and planning framework reflects best practice.*¹⁶

Water

C.23 In contrast, while the National Water Commission (NWC) oversees the progress towards the sustainable management and use of Australia's water resources under the National Water Initiative (NWI) framework, the regulation of water pricing remains subject to the independent bodies governing each jurisdiction. The NWI in turn sets out a number of principles these independent bodies are required to abide by to ensure consistency in the way Australia manages, measures, plans for, prices and trades water resources.

C.24 The 1990s was a pivotal period for microeconomic reforms in Australia, particularly in the area of water policy and pricing reforms. The 1994 Council of Australian Governments (COAG) Water Reform Framework had a strong focus on pricing and institutional reform, in particular embracing *"pricing reform based on the principles of consumption-based pricing and full-cost recovery, the reduction or elimination of cross-subsidies and making the remaining subsidies transparent."*¹⁷

¹⁵ ACCC, Draft Building Block Model RKR, ACCC Position Paper, March 2012, pp.13-14

¹⁶ ACCC, Inquiry to make final access determinations for the declared fixed line services, Final Report, July 2011 – Appendix 3: FAD instruments for the declared fixed line services, 20 July 2011, p.7

¹⁷ National Water Commission, Review of pricing reform in the Australian water sector, April 2011, p.4

- C.25 With this objective in mind, this mandate was reiterated in 2004 under the Inter-Governmental Agreement on the NWI¹⁸ and has played an influential role in shaping pricing reform in the Australian water sector.
- C.26 Notably, this has led to the use of water pricing as an instrument to encourage economic efficiency, particularly in relation to government-owned monopoly water businesses this involved regulation to ensure that it allowed for:
- (a) Cost-reflective pricing signals to end users;
 - (b) Recovery of full efficient costs; and
 - (c) Establishment of price-setting processes and related institutional arrangements.
- C.27 Under the NWI, independent bodies are required to set or review prices, or price setting processes, for water storage and delivery by government water service providers. For example, paragraph 65(ii) in the NWI requires that pricing policies should entail *“full cost recovery for water services to ensure business viability and avoid monopoly rents, including recovery of environmental externalities, where feasible and practical.”*
- C.28 As such, paragraph 66 in the NWI also recommends a movement towards upper bound and lower bound pricing approach, for metro and regional water suppliers respectively. These have been defined in Schedule B of the NWI, as set out below.
- (a) **upper bound pricing** – the level at which, to avoid monopoly rents, a water business should not recover more than the operational, maintenance and administrative costs, externalities, taxes or tax equivalent regimes (TERs), provision for the cost of asset consumption and cost of capital, the latter being calculated using a weighted average cost of capital WACC.
 - (b) **lower bound pricing** – the level at which to be viable, a water business should recover, at least, the operational, maintenance and administrative costs, externalities, taxes or TERs (not including income tax), the interest cost on debt, dividends (if any) and make provision for future asset refurbishment/replacement. Dividends should be set at a level that reflects commercial realities and stimulates a competitive market outcome.
- C.29 It follows that the key distinction between the two pricing approaches is its ability to allow for the recovery of the cost of capital, ie. upper bound pricing would allow for a commercial rate of return on capital investments in a forward-looking manner.
- C.30 Price regulation processes also include a number of requirements, such as the requirement to publicly review and report annually on the pricing and performance in government and private water service providers. In addition, as set out in paragraph 69 of the NWI, it is also recognised that:

¹⁸ Intergovernmental Agreement on a National Water Initiative (the NWI Agreement) between the Commonwealth of Australia and the Governments of New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and the Northern Territory was signed on 25 June 2004.

*Given that investments in water infrastructure ultimately have a large impact on the prices paid by users, the NWI also requires that proposals for investments continue to be assessed as economically viable and ecologically sustainable prior to the investment occurring.*¹⁹

- C.31 As such, while there are a number of different approaches adopted in the water sector for cost recovery, there still remains an overarching document (the NWI Agreement) that sets out the commitments and framework for the pricing of water services in Australia. Importantly, entrenched within this agreement is the recognition of an institutional arrangement requiring strict reporting obligations and regulatory oversight of the price setting mechanisms to ensure that prices reflect the efficient costs of service provision.

¹⁹ National Water Commission, Review of pricing reform in the Australian water sector, April 2011, p.13

Appendix D. NBN Co Service Commitments

- D.1 NBN Co has commenced the consultation process regarding service levels as part of the Contract Development Process for its long-term WBA.
- D.2 **CiC**
- D.3 **CiC**
- D.4 **CiC**
- D.5 **CiC**
- D.6 **CiC**

Appendix E. Risk and Liability Management

E.1 Detailed below are Optus' proposed changes to Clause 13 of Schedule 11.

13 Risk management

(a) ~~NBN Co will ensure that:~~

- i. ~~NBN Co will not be liable to make any payment to a Customer; and~~
- ii. ~~a Customer will not be liable to make any payment to NBN Co, for any and all Indirect Losses arising from or in connection with the NBN Access Service or the Special Access Undertaking Wholesale Broadband Agreement or its subject matter, except as expressly provided otherwise by the Wholesale Broadband Agreement.~~

(b) ~~NBN Co will ensure that:~~

- i. ~~NBN Co's liability to each Customer; and~~
- ii. ~~each Customer's liability to NBN Co,~~

~~for all Losses under, arising from or in connection with the NBN Access Service or the Special Access Undertaking Wholesale Broadband Agreement or its subject matter is not limited in respect of:~~

- iii. ~~negligent or wilful acts or omissions that cause death or personal injury; or~~
- iv. ~~negligent or wilful acts or omissions that cause damage to tangible property.~~

(c) ~~NBN Co will ensure that the Wholesale Broadband Agreement requires:~~

- i. ~~NBN Co (in this clause, an **indemnifying party**) ~~will~~ pay to a Customer (in this clause, an **indemnified party**) on demand an amount equal to all Losses suffered or incurred by that Customer; and~~
- ii. ~~a Customer (in this clause, an **indemnifying party**) ~~will~~ pay to NBN Co (in this clause, an **indemnified party**) on demand an amount equal to all Losses suffered or incurred by that NBN Co,~~

~~arising from or in connection with:~~

- iii. ~~any breach by the indemnifying party of the confidentiality provisions of the Special Access Undertaking Wholesale Broadband Agreement;~~
- iv. ~~any claims by a third party that the exercise by the indemnified party of any intellectual property rights assigned, transferred, licensed or granted, or purportedly assigned, transferred, licensed or granted, by or on behalf of the indemnifying party in connection with the NBN Access Service or the Special Access Undertaking Wholesale Broadband Agreement (including, where the indemnified party is the Customer, the use of the NBN Access Service) infringes the intellectual property rights of that third party;~~

- v. any death or personal injury of any person to the extent caused or contributed to by:
- ~~A~~ ~~a negligent act or omission of the indemnifying party in connection with the Wholesale Broadband Agreement;~~
 - ~~BA~~ ~~an act or omission of the indemnifying party or any of its personnel in connection with the NBN Access Service or the Special Access Undertaking Wholesale Broadband Agreement intentionally causing or contributing to that death or personal injury;~~
 - ~~CB~~ ~~the indemnifying party's networks platforms or equipment in connection with the NBN Access Service or the Special Access Undertaking; and~~
- vi. any damage to tangible property in connection with the NBN Access Service or the Special Access Undertaking ~~Wholesale Broadband Agreement~~ to the extent caused or contributed to by the indemnifying party or any of its personnel, ~~subject to and in accordance with the terms of the Special Access Undertaking Wholesale Broadband Agreement.~~

Appendix F. Optus' response to ACCC questions

F.1 Sets out below is Optus' response to selected questions included in the ACCC's supplementary consultation paper.

Service description and product components

F.2 NBN Co has recognised Product Components, associated Product Features and Ancillary Services to comprise the main suite of products and services it will supply to access seekers over the NBN. As such, the SAU is intended to reflect this broad coverage of NBN Co services through the supply of the NBN Access Service through the use of Product Components and associated Product Features on each NBN Co Network.

F.3 In general, the NBN Access Service is a Layer 2 wholesale bitstream service which will be supplied initially through four Product Components (and which are the same across each NBN access network). In addition, while NBN Co also intends to supply Ancillary Services these do not form part of the NBN Access Service.

NBN Access Service

What services supplied by NBN Co fall outside the scope of this service description? Are there any services supplied by NBN Co for which this is unclear?

F.4 NBN Co has stated that it considers all its services to be regulated.

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 nation wholesale pricing requirement. In addition, all of NBN Co's services are regulated.²⁰

F.5 Yet in the same submission, it has also acknowledged that Ancillary Services do not form part of the NBN Access Service. Despite this, *"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 the its SAU."*²¹ These statements are somewhat contradictory, and Optus further notes the non-existence of such 'enforceable' commitments in the SAU.

F.6 Furthermore, Optus submits that Ancillary Services should be an integral part of the NBN Access Service, particular given that the close interrelationship shared by both services. It follows that by having both services subject to declaration it will ensure that access seekers will be subject to the same non-discriminatory terms and that NBN Co will not be able to impose any significant market power on the price setting mechanisms applicable to both the NBN Access Service and their associated Ancillary Charges.

F.7 The treatment of Ancillary Services provides a clear example of the deficiency in the current arrangement. To this extent, NBN Co has defined Ancillary Services to include:

²⁰ NBN Co, Letter in response to ACCC's Supplementary Consultation Paper on NBN Co's Special Access Undertaking, 23 March 2012, p.8

²¹ NBN Co, Letter in response to ACCC's Supplementary Consultation Paper on NBN Co's Special Access Undertaking, 23 March 2012, p.8

- (a) The Facilities Access Service;
- (b) The Systems Interfacing Service; and
- (c) 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.²²

F.8 The Facilities Access service refers to *“a service that enables a Customer to install, operate and maintain its telecommunications equipment at or near a Point of Interconnect for the purpose of interconnecting their network with the NBN Co Network.”*²³ The proposed product construct for Facilities Access will comprise of three product components: (i) Cross Connect; (ii) Optical Distribution Frame (ODF) Termination Point; and (iii) Co-Located Racks. However in terms of pricing construct, this will only comprise a single NBN Co-location price point, with no charges levied for the cross connect or the ODF Termination Point product components.²⁴ Under the SAU, NBN Co has not proposed pricing or justification for pricing even though the supply of the services is essential for interconnection to NBN Products. Even so, the prices that have been proposed (in a document separate to the SAU) are not reasonable, since they are well above current facilities access prices.

F.9 As a consequence, facilities access remains an enduring bottleneck for several reasons.

- (a) Access to the POI site will always be required by the access seeker (ie. the RSP) in order to connect to the NBN. As such, access seekers will need to order Facilities Access from NBN Co for each POI they wish to connect; and
- (b) NBN Co has also acknowledged that across each of the 121 POI sites,
 - (i) 111 will be housed in facilities leased from Telstra; and
 - (ii) 10 will be housed in NBN Co leased/own facilities.²⁵

F.10 The distinction between a Telstra-owned and a NBN Co owned facility represents the onus on who the access seeker is required to deal with in order to *“arrange the physical build of transmission links into the facility (access to duct, installation of fibre)”*²⁶ prior to gaining access to NBN Co’s Facilities Access Product. As such, not only is the access seeker subject to a Facilities Access charge if it wishes to maintain its own backhaul presence at the POI site, but must access TEBA from Telstra in the majority of POI sites in order to even interconnect with the NBN. This not only represents an inefficient duplication of costs to the access seeker, but also highlights Telstra’s ability to extract monopoly rents from other access seekers (or act as a form an additional barrier) as they seek access to the NBN Co POI site. As such, Telstra’s ability to ‘gate’ access to TEBA either through unreasonable terms or via ‘capping of exchanges.’ Optus submits that NBN Co must commit to equivalent access

²² NBN Co, NBN Co Special Access Undertaking, 5 December 2011, Schedule 1 (Definitions and Interpretations)

²³ NBN Co, NBN Co Special Access Undertaking, 5 December 2011, Schedule 1 (Definitions and Interpretations)

²⁴ NBN Co, Facilities Access, Overview of the NBN Co Facilities Access Product, July 2011, p.8

²⁵ NBN Co, Multicast and Facilities Access, Presentation, 31 August 2011, slide 22

²⁶ NBN Co, Multicast and Facilities Access, Presentation, 31 August 2011, slide 26

terms for all access seekers, including Telstra, and the Facilities Access Service should form part of the NBN Access Service.

- F.11 The Systems Interfacing Service (SIS) refers to *“a service for the establishment, testing, operation and maintenance of a connection to the NBN Co Platform.”*²⁷ As such, ancillary services, such as the SIS, are integral to the supply and ongoing operation of the NBN product, hence should be included as part of the NBN Access Service. It follows that the ancillary charges associated with this include a suite of non-recurring charges, such as for installations and activations, service modifications and service management events. However, while these are currently charged at \$0,²⁸ NBN Co has reserved the right to modify the charges in accordance with the WBA. This discretionary ability for NBN Co to ‘suddenly’ impose additional charges on access seekers can create widespread uncertainty and substantially inflate the costs incurred by the access seeker.
- F.12 Optus therefore reiterates that Ancillary Services should be an integral part of the NBN Access Service to ensure certainty in the supply of the NBN Access Service. As such, it is important that any proposed changes to ancillary charges, including price changes, should first be subject to regulatory oversight and approval before it can be imposed on access seekers.

Does the SAU provide terms and conditions of access in relation to all the services which NBN Co supplies that downstream users require in order to supply carriage services or content services?

- F.13 Optus submits that the SAU does not provide terms and conditions of access in relation to all services which NBN Co will supply to downstream users. This is a fact not lost on NBN Co, who similarly acknowledges that while it purports to supply ancillary services in line with the SAU, the terms and conditions of access for the supply of ancillary services will be set out in the WBA. Optus considers that this is not acceptable and affords NBN Co too much discretion to skew all relevant terms and conditions of access in its favour.
- F.14 To this extent, Optus considers that the relevant enablers, such as service qualification, ordering, provisioning, and service assurance for the NBN Access Service need to be explicitly identified as key elements of the NBN Access Service across all access platforms. It will also be necessary to monitor operational aspects such as ordering, billing, complaint handling, repairs and other non-price elements required to provide these services. This is discussed further in Section 5.
- F.15 In addition, the proposed service description should also have regard to how the following process and operation arrangements will be provided as part of the access service.
- (a) Quality of service (covering the speed, accuracy and reliability of a service);
 - (b) Class of service (covering the manner in which traffic is prioritised);
 - (c) Protocol management;

²⁷ NBN Co, NBN Co Special Access Undertaking, 5 December 2011, Schedule 1 (Definitions and Interpretations)

²⁸ NBN Co, NBN Co Wholesale Access Service, Product and Pricing Overview for Service Providers, Version 2.0, December 2011, Appendix F; NBN Co, WBA Product Catalogue, 30 November 2011, Price List Release 1.0, Clause 3

(d) Stream management.

F.16 At the very least, it is likely that a number of minimum commitments should be set out in the SAU rather than being 'randomly' referred to in other NBN Co documents. Given that these only refer to the minimum commitments required, any increase in minimum commitment levels can be addressed during the SAU review periods.

Does the service description in the SAU sufficiently describe the service that NBN Co purports to supply? Are there any missing essential elements in the service description?

Is the service description sufficiently technology neutral to remain applicable as technology changes in the future, given the proposed term of the SAU?

F.17 The service description for the NBN Access Service purports to be sufficiently technology-neutral and applicable to the supply of the service across all three NBN Co Platforms. It is also generally accepted that the NBN Access Service will be delivered using Ethernet as the default delivery technology.²⁹

F.18 The NBN Access Service is therefore intended to reflect a single product construct.³⁰ That is, the NBN Access Service is defined in Schedule 2 (NBN Access Service) to be a Layer 2 service between the end-user and the relevant point of interconnect (POI), and therein makes particular reference to both the UNI and NNI (which refer to two out of the four initial product components). Of the remaining product components, the AVC and CVC, these are implied to make up the link between the two defined end-points of the NBN Access Service.

F.19 Optus submits that the service description set out in the SAU is sufficient from a technical viewpoint, however reiterates that this should be supported by ensuring that all necessary inputs for the supply of the NBN Access Service, including ancillary services, are included.

How does the service description for the NBN Access Service compare against the principles that the ACCC has previously specified for service descriptions?

F.20 The ACCC in its draft decision on the FANOC Undertaking outlined the 11 minimum elements that should be addressed as part of any bitstream access service description. This should be required in order to be in the LTIE and promote competition and investment in new services.

F.21 In particular,

The ACCC is of the view that in relation to an FTTN network upgrade, or similar fibre access network rollout, any bitstream access service should include the following:

- 1. A Layer 2 bitstream access service, which may be offered at a variety of rates but should include a product that is not throttled as well as a product that is symmetric to the extent the technology permits. Products (both consumer and business-grade) should be equally available to all access seekers on a non-discriminatory basis.*

²⁹ NBN Co, Supporting Submission NBN Co Special Access Undertaking, 20 December 2011, p.34

³⁰ NBN Co, Product Update, Presentation, 17 November 2011, slide 3

2. *A service (whether the bitstream service or another service) that allows access seekers to provide a voice service.*
3. *Points of interconnect as close to the customers as is feasible and efficient, which in the first instance is likely to mean at or near existing local access switches and other points of interconnection for current ULLS and LSS products (it may have other points of interconnection as well).*
4. *Interconnection protocols based on well-accepted standards for broadband, voice and, if applicable, video, which are sufficiently well-described to allow access seekers to design and build their own interconnecting facilities.*
5. *Arrangements for access to buildings, shelters and facilities for interconnection.*
6. *Well-described and appropriate protocols for how packets are to be prioritised and handled.*
7. *Well-described and appropriate protocols for how congestion in shared network elements is to be handled.*
8. *Equivalent treatment of access seekers in relation to quality of service parameters such as jitter, delay and packet loss.*
9. *Interaction by access seekers with operations support systems, including:*
 - a. *visibility of provisioning, fault reporting and rectification and service assurance; and*
 - b. *control of own customer configuration and use of the access seeker's allocated part of the capacity.*
10. *No barriers to multicasting and IPTV by access seekers.*
11. *An appropriate process for amending service specifications in later periods as needed or desirable.³¹*

F.22 In general, Optus submits that the SAU currently does not sufficiently meet several of the ACCC's principles. It follows that where the above criteria are not explicitly addressed in the service description, then at a minimum, it should be set out elsewhere in the SAU. Importantly, it should not be relegated to separate NBN Co documents.

Is an appropriate interconnection protocol specified in the service description?

How should appropriate mechanisms for handling congestion in shared network elements be specified? What are the appropriate mechanisms?

Should a stand-alone low committed information rate product suitable for voice-only services be supplied?

³¹ ACCC, Assessment of FANOC's Special Access Undertaking in relation to the Broadband Access Service, Draft Decision, December 2007, pp.60-61

- F.23 While the ACCC has sought comment on a number of issues such as the applicable interconnection protocol, mechanisms for handling congestion and provision of a stand-alone voice service for the NBN Access Service, Optus is unable to comment specifically given the lack of information provided on each of these issues in the SAU.

Ancillary services

Are the definitions of ancillary services accurate and complete? Are there ancillary services supplied by NBN Co which would fall outside the scope of the definition but should be included?

What are the consequences of the exclusion of the ancillary services, for example, the Facilities Access Service, from the NBN Access Service?

Is it sufficiently clear which commitments in the SAU do and do not apply to ancillary service?

- F.24 NBN Co states that ancillary services do not form part of the NBN Access Service (Clause 2.4(b)), and defers to the WBA for the terms and conditions that apply to ancillary services. Optus is concerned that the exclusion would give NBN Co complete discretion for the terms of supply of ancillary services.

- F.25 Optus refers the ACCC to section 5 paragraph 5.40 to 5.52 of its submission for further comments.

Service levels

Are the commitments in the SAU with regard to service level regimes sufficient to ensure that the SAU promotes the LTIE and is reasonable for the proposed term of the SAU?

Should service levels be specified in the SAU for the NBN Access Service?

Is the process described in the SAU appropriate for the development of a service level regime? No

Are the quality criteria specified by NBN Co (network performance, service delivery, communications with customers and planned and unplanned event management) sufficient to define the service level regime for the fibre network? Are there additional criteria that should be specified?

Should the service level regime also apply to wireless and satellite networks?

- F.26 Optus does not consider the commitments NBN Co made in the SAU with regard to service levels are sufficient to ensure that the SAU promotes the LTIE and is reasonable for the proposed term of the SAU. Optus refers the ACCC to section 5 paragraph 5.16 to 5.32 regarding service levels.

Product development and withdrawal

Is the approach to product development likely to promote efficient investment in network capacity and network upgrades?

Do the product development, variation and withdrawal processes apply to a sufficiently broad range of NBN Co's products?

Is it in the LTIE to be open to participation by NBN Co's customers only?

Are the criteria for determining whether a product variation or enhancement is minor appropriate?

Are the criteria to which NBN Co may have regard when determining whether to develop a product idea submitted by a customer appropriate and in the LTIE?

Do the processes by which NBN Co will determine whether to develop, and consult with customers on, product ideas provide an appropriate balance between the interests of NBN Co and its customers?

Are the PDF Processes likely to provide for effective and transparent engagement between NBN Co and its customers regarding product development?

Are there appropriate processes for resolving disputes between NBN Co and its customers that arise under the PDF process?

Are the confidentiality and IP terms in the PDF processes appropriate? Do they discourage or prevent customers from participating in the PDF?

Do you consider that the review process for the customer engagement and PDF process is appropriate and in the LTIE? Is there sufficient involvement of other interested parties in the review process?

Do the product withdrawal processes in the SAU provide an appropriate balance between the interests of NBN Co and its customers? Should the SAU provide greater detail about how NBN Co will consult with customers?

Should product withdrawal be subject to dispute resolution procedures?

Are the commitments around product development, variation and withdrawal likely to be appropriate and in the LTIE for the proposed term of the SAU?

F.27 Optus has raised a number of concerns regarding the product development and withdrawal process. Optus refers the ACCC to section 5 paragraph 5.59 to 5.76 for further comments.

Product Components

Is the 'Product-Component' construct reasonable? What are the effects of the product component-based product construct on downstream markets in which carriage services or content services are supplied?

F.28 Notwithstanding the 11 elements set out above, the NBN architecture and proposed access and regulatory arrangements will all influence the extent to which the network will support downstream service innovation. For instance, standardised network protocols can provide a robust basis for downstream providers to invest in new (or better) quality services, and to supply them to the extent supported by the access network architecture.

F.29 The reasonableness of this service description will therefore be directly influenced by the reasonableness of the component-based construct. It follows that where one feature can be found unreasonable, then this would also undermine the reasonableness of the other features.

Does the limitation that the NBN Access Service is only to be supplied through the 'Product Components' adversely affect the supply of the NBN Access Service to access seekers?

- F.30 Notwithstanding the service description, Clause 1.1(b) in Schedule 3 (Product Components) establishes that *“Customers must acquire each Product Component referred to in clause 1.1(a) between a Premises and a Point of Interconnection.”* This requirement therefore essentially commits the access seeker to purchase (hence accept the terms associated with) all four product components supplied in order to provide the NBN Access Service.
- F.31 Optus submits that a major concern relates to the scalability of the product components for both the supply and provision of an end-to-end NBN Access Service.
- F.32 In the first instance, the product components construct has been designed to provide access seekers with the flexibility to scale and aggregate the various product building blocks to meet their needs. However, when applied, this is not necessarily as straight-forward as it seems and instead raises several concerns for access seekers.
- F.33 For example, product aggregation is only limited to the quantum established by NBN Co. As such, where an access seeker seeks to acquire a symmetric service, they will be required to buy the basic AVC or CVC component at the lowest traffic class in addition to the symmetric service they intend to acquire.
- F.34 The consequence of this ‘technicality’ is essentially two-fold:
- (a) Access seekers will be required to at a minimum purchase a TC_4 service before it can even overlay it with a higher class of service (TC-1 to TC-3); and
 - (b) Access seekers will be limited to the quantum (ie. bandwidth sizes) available for each designated each class of traffic.
- F.35 In doing so, and notwithstanding the exorbitant charges that NBN Co has determined for these quantum increments, this leads to an increase in the access charges being incurred by the access seeker.
- F.36 Optus further notes that the implication of this is even more pronounced for business customers, given the significant price multipliers incurred in order to move up to the next traffic class. As such, this issue needs to be re-examined.

Non-price terms and conditions

Scope and development of the Wholesale Broadband Agreement

Should the SAU contain commitments around the scope of the WBA? If so, are the current commitments likely to be effective, and are they sufficient and reasonable?

- F.37 Optus refers the ACCC to section 5 paragraph 5.9 to 5.15 of its submission for further comments. However, in summary Optus submits that:
- (a) The SAU should be a self-contained document;
 - (b) NBN Co should not be allowed to simply defer its terms in the SAU to a commercial agreement;
 - (c) The SAU should set out comprehensive commitments on its non-price terms and conditions of supply; and

- (d) In the absence of a SAU that could be accepted by the ACCC, the ACCC should consider alternate means to regulate NBN Co.

Are the consultation obligations in the SAU relating to development of the WBA reasonable? Should they apply more broadly, to 'Access Seekers' and not just 'Customers'?

Is it sufficiently clear to whom and in what circumstances these commitments apply?

- F.38 Optus does not consider the obligation in the SAU relating to the development of the WBA is reasonable. The SAU simply states "NBN will consult with Customers in respect of the development of the Wholesale Broadband Agreement, including the NBN Co Operations Manual."
- F.39 Optus considers that this is only a mere assertion rather than a commitment. The SAU does not specify the criteria for consultation, the consultation period, the consultation process or whether the consultation process is subject to regulatory oversight.
- F.40 Optus has already started the consultation process with NBN Co regarding the WBA, under the Contract Development Process which concludes in November 2012. Already there are concerns about the objective criteria, and the process to be followed. Any changes to the WBA and the process for engagement remain within the discretion of NBN Co. Optus considers that this is unacceptable and all Customers should have the right to dispute a change to the agreement and have ultimate access to regulatory oversight.

Changes to Access Agreements

Are customers provided with reasonable notice of changes to be made to their Access Agreements by NBN Co under the SAU?

Are customers provided with a reasonable opportunity to consult with NBN Co regarding possible changes to their Access Agreements? The ACCC notes that clause 14.3 of Schedule 11 (Non-Price Terms and Conditions) does not currently set out specific timeframes in which consultation is to occur.

Is NBN Co's obligation to 'reasonably consider' any feedback given by a customer or the ACCC reasonable?

Is NBN Co's undertaking to only implement a change that is consistent with an interim Access Determination or Binding Rules of Conduct reasonable?

Are the 'Changes to Access Agreements' provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU? Please outline those aspects of the provisions that you consider to be reasonable and/or unreasonable.

Is it sufficiently clear to whom and in what circumstances these commitments apply?

- F.41 Optus is concerned that the consultation process set out in clause 14.3(d) Schedule 11 of the SAU will only apply to limited circumstances where the specific processes are not defined within the Access Agreement. This means that consultation will NOT occur for changes to: Products and Ancillaries in the Product Roadmap; "minor" variations; product withdrawals; most price changes; POI rearrangements; Insurance Policies; changes that NBN Co deems will not have a material adverse impact on customer; changes to the Credit Policy; Product Technical Specifications and other documents referred to in the WBA; Operations Manuals;

PDF processes; and changes due to NBN Co's alignment with any SAU or a change to the CDP process.

- F.42 NBN Co has wide discretion to change critical parts of the Access Agreement by simply giving notice to its Customers. Optus refers the ACCC to section 5 paragraph 5.53 to 5.58 for further comments regarding the changes to access agreements provision.
- F.43 Where consultation does occur, NBN Co does not have any objective criteria by which it will take account of feedback received by Customers.

Dispute management

Does the SAU enhance the likelihood that reasonable contractual dispute resolution processes will be able to be agreed to in Access Agreements? For example, in the event that access seekers and NBN Co cannot agree to a contractual dispute resolution process, is there sufficient scope for regulatory intervention to resolve the issue?

Does the SAU ensure that access seekers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias?

Are the dispute resolution terms and conditions reasonable and described with sufficient specificity?

Are the provisions relating to the appointment of resolution advisors, selection of arbitrators and timeframes for each stage of the dispute resolution process reasonable?

Do interested parties consider it is reasonable to conduct arbitrations in accordance with the Commercial Arbitration Act 2010 (NSW)? Is it sufficiently clear to whom and in what circumstances these commitments apply?

Is the proposed process reasonable, and is it likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances these commitments apply?

- F.44 Optus submits that the SAU does not enhance the likelihood that reasonable contractual dispute resolution process will be able to be agreed to in Access Agreements. Optus' main concern in relation to the dispute management provision is that the SAU does not describe the dispute resolution processes in sufficient detail to ensure fair outcomes are achieved based on objective criteria. It simply defers the relevant provisions to the WBA.

Default management

Is NBN Co's proposed commitment in relation to default management reasonable, and likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitment applies?

- F.45 Optus submits that the NBN Co's proposed commitment in relation to default management is not reasonable and will not remain reasonable over the proposed term of the SAU.
- F.46 Optus refers the ACCC to section 5 paragraphs 5.87 to 5.90 of its submission for further comments regarding the default management provisions.

Risk management and liability

Do the risk management and liability provisions clearly describe the types of liability (that is, the legal responsibilities, duties and obligations) of each party?

Do the risk management and liability provisions clearly describe the indemnities (that is, the circumstances where one party will compensate the other party for the losses resulting from the first party's actions)?

Does the scope of the proposed risk management and liability regime enable NBN Co and its customers to efficiently operate and invest in their services, networks and facilities?

Are the risk management and liability provisions, reasonable and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

F.47 Optus submits that the risk management and liability provisions in the SAU do not clearly describe the types of liabilities and indemnities of each party. They are in effect a 'skeletal' or high level summary of some of the key elements of the liability regime in the WBA.

F.48 Optus refers the ACCC to section 4 paragraphs 5.91 to 5.94 of its submission for further comments regarding the risk management and liability provisions.

Confidential information

Is the proposed confidentiality regime appropriate, taking into account the wholesale-only structure of NBN Co? Do the confidential information provisions clearly describe NBN Co's and its customers' rights and obligations in respect of the disclosure and use of customer confidential information?

Are the confidential information provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

F.49 Optus does not consider the confidential information provisions are reasonable. Optus refers the ACCC to section 5 paragraph 5.77 to 5.86 for further comments regarding the confidential information provisions.

Billing and payment and credit management

Billing and payment

Do the billing and payment provisions clearly describe NBN Co's commitments in respect of billing and payment disputes? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Do the billing and payment provisions create an incentive for NBN Co to provide accurate and timely billing?

Are the billing and payment provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

- F.50 Optus submits that the billing and payment provisions do not clearly describe NBN Co's commitments in respect of billing and payment disputes. The SAU simply states that the billing dispute process, provisions on Customers' rights to withhold payment of disputed amounts and payment of interest will be contained in the WBA.
- F.51 As mentioned elsewhere, Optus is concerned that as the SAU has lower priority than the WBA in the statutory hierarchy. This effectively locks in NBN Co's broad discretion over those terms without requiring access seekers' agreement or providing the ACCC's oversight.
- F.52 The SAU fails to include a commitment that NBN Co will provide accurate and timely billing data. Optus considers that there should be sufficient details contained in the invoice to allow customers to verify the accuracy of the charges.
- F.53 In addition, the WBA currently restricts the number of disputes that can be raised and access seekers' rights to withhold the disputed amounts. This is not acceptable as customers should be able to raise billing disputes and withhold disputed amounts if they reasonably believe that the invoices are inaccurate.
- F.54 Further, the SAU currently states that the overdue rate will be the same for both NBN Co and Customer. Optus considers that to provide greater certainty to access seekers, both the payment term and interest rate should be specified. Optus proposes that an appropriate payment term would be 30 days.

Credit management

Do the credit management provisions clearly describe NBN Co's rights and obligations in respect of credit management? Is it sufficiently clear to whom and in what circumstances the commitments apply?

Do the credit management provisions enable NBN Co to respond to changes in customer circumstances over time?

Are the credit management provisions reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

- F.55 Optus submits that the credit management provisions do not clearly describe NBN Co's rights and obligations in respect of credit management. The SAU simply states that NBN Co will develop, publish and maintain a credit policy as part of the WBA.
- F.56 The SAU provides NBN Co broad power to set the terms of the credit policy. Optus considers that this is unreasonable as NBN Co is not in a position to assess the creditworthiness of its customers.
- F.57 The creditworthiness of a customer should be determined by independent agencies such as Standards and Poors, Moody and Fitch. The rating will then determine whether a reasonable Financial Security needs to be in place or whether a credit limit applies.
- F.58 The SAU also fails to include the criteria for a credit policy review. As the proposed term of the SAU is 30 years, the SAU should contain clear commitment that any change to the credit policy should be subject to agreement by customers.

Points of interconnect

Is the specification of the POI locations sufficient to promote the LTIE, comply with category B SAOs, and likely to be reasonable, and remain reasonable over the proposed term of the SAU?

Will the proposed POI review mechanism ensure that the locations of POIs promote the LTIE and comply with the category B SAOs over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

Are the circumstances and criteria for the creation of a temporary POI adequate?

Should the SAU include a commitment that temporary POIs will close and provide details about the criteria, timeframe and processes for closure?

F.59 Optus is concerned about the POI review mechanism. Optus refers the ACCC to section 5 paragraph 5.33 to 5.39 for further comments.

Should the SAU 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?

F.60 Optus submits that 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 third parties such as Telstra.

F.61 As indicated in section 5 paragraph [] to [] of Optus' submission, NBN Co has stated that ancillary services do not form part of the NBN Access Service and simply defers to the WBA for the terms and conditions that apply to the ancillary services.

F.62 Optus is particularly concerned that there is a complete lack of oversight on all ancillary services and that Telstra, being the prime building owner will gain a competitive advantage over other access seekers.

F.63 Optus refers the ACCC to section 5 paragraph 5.40 to 5.52 for further comments.

Access to common property

Are the situations where NBN Co proposes to take responsibility for procuring access to common property reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

F.64 Whilst NBN Co has proposed to take responsibility for procuring access to common property, this commitment only extends to procuring access to common property where required by NBN Co and its personnel.

F.65 Optus submits that NBN Co should extend its commitment to procure access to common property when required by access seekers to meet its obligations under the WBA or when the access seekers require access to common property to activate the service.

F.66 Optus considers that this is a more efficient solution for access that can best be handled by a single entity. An example would be a high rise building.

Major NBN upgrades

Does the proposed process for how NBN Co will inform and consult with customers in relation to major NBN upgrades assist customers with planning and provision of services to end-users? Are the proposed timeframes for providing notice of upgrades adequate? Do the matters that NBN Co will consult on assist customers to minimise disruptions to existing services?

Does the proposed process for how NBN Co will inform and consult with customers in relation to major NBN upgrades minimise the operational and cost impact on the provision of services by customers?

To what extent do the commitments about major NBN upgrades in the SAU affect incentives for investment in downstream markets?

Should NBN Co also supply information to, and consult with, access seekers or the general public about major NBN upgrades?

Are the commitments reasonable, and are they likely to remain reasonable over the proposed term of the SAU?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

F.67 Optus submits that the major NBN upgrade provisions under the SAU are unreasonable. NBN Co may perform network upgrades by simply providing “notice” to its Customers. There is no onus on NBN Co to contain, or minimise, the impact of these activities.

F.68 Optus refers the ACCC to section 5 paragraph 5.22 to 5.32 of its submission for further comments.

F.69 Further, the SAU provides NBN Co with wide discretion in determining whether an upgrade is ‘major’ or ‘minor’. NBN Co will only provide upgrade information to Customers if they will be “materially adversely affected” by the upgrade or if it requires a Customer to commit “material capital expenditure” in response to the implementation of that upgrade.

F.70 It is unclear what “materially adversely affected” and “material capital expenditure” means and NBN Co cannot speak on behalf of its Customers if they will be “materially adversely affected” or if they commit “material capital expenditure” in response to the upgrade.

Access to NBN Co platform

Are there any other systems, documents and processes that should be included in the SAU?

Are the features or qualities that NBN has specified for these systems, documents and processes appropriate?

Do the SAU provisions clearly describe NBN Co’s commitments in respect of access to the NBN Co platform?

Are NBN Co’s commitments in respect of access to the NBN Co platform in the LTIE? Are they likely to remain so over the proposed term of the SAU?

Does the proposed content and functionality of the NBN Co platform assist customers to efficiently invest in and operate their services, networks and facilities?

Is it sufficiently clear to whom and in what circumstances the commitments apply?

1.1 Optus submits that the SAU fails to describe clearly NBN Co's commitments in respect of access to NBN Co platform. The reasons are as follow;

- (a) The SAU fails to include a commitment that NBN Co platform will be developed in consultation with customers or industry (through code development). For example, Telstra platforms were typically developed without customer input, resulting in a less than adequate system;
- (b) The SAU omits any compliance with the relevant industry codes;
- (c) The SAU simply states that it will set out in the WBA the basis on which customers may connect to and access the NBN Co Platform. Optus considers that this is an important issue and should be subject to regulatory oversight. As noted by the ACCC, it is likely that the content and functionality of such a system will significantly impact upon the ability of the access provider and access seekers to effectively and efficiently manage and operate their services, network and facilities;³² and
- (d) The SAU fails to describe in detail the content and functionality of the NBN Co platform. Optus considers that at a minimum, the SAU should include the following:
 - (i) Response time, for example when a service qualification is conducted or when there is an address mismatch.

Optus considers that NBN Co should commit to provide real time response. Currently under the WBA, NBN Co states that it will provide customers with a response within 20 business days from receipt of customers' request which is unreasonable;
 - (ii) Alternate methods when the platforms are unavailable; and
 - (iii) Transactional volume each platform is capable to handle.

Does the proposed process for how NBN Co will provide information about the rollout of the network assist access seekers and customers to efficiently invest in and operate their services, networks and facilities? Are the proposed timeframes for providing information adequate? Is the information that NBN Co will provide adequate? Is it sufficiently clear where this information will be published?

F.71 Under clause 3, NBN Co will publish construction roll-out plan, monthly ready for service rollout plan and historical footprint list. Optus supports NBN Co publication of such information as it promotes transparency and allows access seekers to undertake network planning for the downstream markets.

F.72 However, Optus submits that the SAU should include a commitment that NBN Co needs to publish detailed address information. Currently the SAU only requires NBN Co to provide the proposed footprint list and the estimated number of premises that will be ready for service.

³² ACCC, Discussion paper, p.74

- F.73 Detailed address information that are provided in GNAF form will be useful in allowing access seekers to make investment and marketing plans. Optus considers that such information should be available at least 3 months in advance.
- F.74 Without such information, it is difficult for access seekers to know the exact boundaries of the proposed footprint and make plans accordingly. This defeats the purpose of publishing the information at the first place.
- F.75 In addition, there should be a commitment in the SAU that the relevant information will be published for both brownfields and greenfields build.

Should NBN Co commit to providing construction and service rollout progress information to 'Access Seekers' as well as 'Customers'?

- F.76 Optus submits that NBN Co should provide construction and service rollout progress information to 'Access Seekers' as well as 'Customers'. This promotes transparency and allows access seekers to make network investment plans even when they are not customers of NBN Co.

Enforcement of SAU commitments

Monitoring and reporting

Are the commitments made by NBN Co in the SAU sufficiently clear and unambiguous that they will be enforceable by a Court?

Does the design of the SAU provide effective arrangements for enforcement of the commitments in the SAU?

Does the SAU include sufficient reporting commitments to assess compliance with the SAU? If not, what other reporting obligations would be required, and how should these obligations be established?

- F.77 Optus does not consider the commitments made by NBN Co in the SAU are sufficiently clear and unambiguous to be enforceable. Optus submits that this is a significant concern. Many of the commitments contained in the SAU are particularly high-level and general, which may either mean they may not be enforceable, or more significantly for access seekers, the commitments do not set a sufficiently high standard for NBN Co.
- F.78 NBN Co will be able to comply with these commitments in a manner which does not provide access seekers with adequate protection and comfort.

WBA development and Access Agreement change management

Common approaches –SAU interactions with other reference documents

Interaction with the WBA and other external documents

Are there any significant issues caused by references to 'the WBA' or other documents in the SAU?

- F.79 NBN Co has made numerous references to the WBA in the SAU. Optus is concerned that if the SAU becomes accepted by the ACCC, access seekers will be bound by the terms outlined in the SAU as well as terms that have been deferred to in the WBA.
- F.80 The SAU has lower priority than the WBA in the statutory hierarchy. This effectively locks in NBN Co's broad discretion over those terms without requiring access seekers' agreement or providing the ACCC's oversight.
- F.81 Optus refers the ACCC to section 2 and section 5 paragraph 5.9 to 5.15 for further comments.

References to WBA versus Access Agreement

Have references to the WBA or Access Agreements been used appropriately in the SAU?

- F.82 The ACCC states that the WBA is a Standard Form of Access Agreement (SFAA) and is not an executed contract between NBN Co and access seekers.
- F.83 However, the ACCC further states that an access seeker may request NBN Co to enter into an Access Agreement on the terms and conditions set out in the WBA. Alternatively, access seekers may adopt different terms and conditions from those set out in the WBA.
- F.84 Optus submits that where appropriate, the SAU should always make references to the WBA rather than the Access Agreement. This ensures access seekers' rights are protected.
- F.85 Optus refers the ACCC to section 5 paragraph 5.9 to 5.15 regarding its comments on the relationship between the WBA and Access Agreement.

References to Customer versus Access Seeker

Have the terms 'Access Seeker' and 'Customer' been used appropriately in the SAU?

- F.86 Optus submits that the SAU should always make reference to "Access Seeker" rather than "Customer". Again this ensures access seekers' rights are protected even if they do not execute the WBA.
- F.87 Under the SAU, the vast majority of commitments NBN Co makes are to its "Customers" rather than to "Access Seekers". For example, NBN Co will only offer to supply the Product Components and associated Product Features to its Customers rather than to Access Seekers.
- F.88 Further, as Optus considers that the SAU should be a standalone document without reference to the WBA, it would be appropriate that the term "Access Seeker" be used in all circumstances.

Recitals or assertions of fact

Do the recitals or assertions of fact in the SAU assist in the interpretation of other parts of the SAU?

- F.89 Optus does not think the recitals or assertions of fact in the SAU assist in the interpretation of other parts of the SAU. As the ACCC notes, NBN Co has simply asserted that it is committed to establish and maintain positive working relationships with customers.

- F.90 Other examples include how NBN Co stated that it is committed to consult with access seekers and the ACCC in relation to the development and ongoing evolution of the WBA. However, the SAU does not contain specific details about how this consultation process will operate in practice.
- F.91 As these commitments are so general and high level, it will be difficult to have them enforced.