



1 February 2012

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Australian Competition and Consumer ACCC  
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Dear Richard

### **NBN Co Limited Special Access Undertaking**

This letter is in response to the ACCC's December 2011 Consultation Paper on NBN Co Limited's Special Access Undertaking (SAU). The ACCC has encouraged interested parties to provide early views on any particular areas of the undertaking which they consider the ACCC should focus its attention on in developing its supplementary consultation paper.

In this short submission, Optus takes the opportunity to identify some high level areas of focus for the ACCC's consideration. Optus also refers the ACCC to its submission of August 2011 that was submitted to NBN Co in response to its SAU Discussion Paper (see Attachment). Optus notes that a number of the issues set out in that submission remain relevant to the current SAU before the ACCC.

### **Scope of Regulation**

It is anticipated that within the next decade the NBN will become the monopoly infrastructure provider carrying the bulk of fixed line broadband traffic. This will create tremendous opportunities for the national economy and Optus is supportive of the policy objectives underpinning the NBN. However, the ability for the industry to realise these opportunities will be influenced by how the policy is implemented in practice. A critical component of this is the manner in which the network, and NBN Co, is regulated.

Whilst NBN Co will be a structurally separated wholesale-only entity, it is important not to lose sight of the fact that it will also be a monopoly provider with unprecedented market power. It should not be taken for granted, therefore, that the interests of NBN Co will always align with those of Retail Service Providers and Consumers. The regulation of the NBN is therefore of utmost importance. It will have long term ramifications that will impact

the industry structure, levels of investment, consumer welfare and, ultimately, the success or failure of the NBN policy.

The recent reforms to the regulatory framework that were designed to address Telstra's market power demonstrates that structural separation has to go hand in hand with strong ACCC oversight. This is why the reforms to the Competition and Consumer Act (CCA) sought to enhance the powers of the ACCC whilst also introducing measures to achieve the structural separation of Telstra.

To ensure that the NBN is effectively regulated Optus considers that the ACCC will similarly need to have available to it all of its current powers under the CCA, which will give it the flexibility to respond to unforeseen circumstances given the dynamic nature of the industry.

It is concerning, therefore, that the SAU seeks to place restrictions and limitations on the ACCC's powers to regulate access to the NBN. Such an outcome is likely to compromise the ability for the ACCC to regulate access to the NBN in a manner that is consistent with the long-term interests of consumers.

In assessing the SAU, the ACCC should consider whether the oversight arrangements the SAU will confer on it are an appropriate substitute for the powers it would otherwise have under the CCA by virtue of the fact that services supplied over the NBN are declared services. To the extent there are deficiencies in these powers then the ACCC should consider the broader question of whether it would be more appropriate to insist on amendments to the SAU or to regulate the NBN through other instruments.

### **Pricing**

The ACCC has previously stated that lower prices, in addition to greater diversity and quality, are in the long term interests of end-users.<sup>1</sup> Optus agrees with this position and suggests that lower (minimum) access prices should be an objective in assessing the long-term reasonableness of the SAU.

Optus notes that whilst NBN Co has made changes to the SAU following stakeholder feedback on its Discussion Paper, the framework set out in the SAU appears to allow for access prices to increase over time. It also provides NBN Co with wide discretion to step outside that framework and to seek even higher access prices.

The access prices levied by NBN Co will be a critical factor influencing consumer take-up and demand for services on the NBN. Optus is not convinced that the price constraint mechanisms and oversight arrangements set out in the SAU are appropriate. In particular, the proposed ability for the ACCC to approve a price increase by more than half of CPI appears to be vaguely defined and potentially gives NBN Co significant discretion to increase prices (whether or not such changes are justified in relation to NBN Co's efficient costs of supply). Optus also continues to question whether the long term revenue cap on NBN Co will operate as an effective constraint, an issue that was discussed at length in Optus' submission of August 2011 (see attached).

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<sup>1</sup> ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999, p.33

### ***NBN Co's Costs of supply***

The costs that are included in the regulatory asset base will be a prime determinant for both future access prices and retail prices. It is therefore imperative that the ACCC, and stakeholders, have the opportunity to review NBN Co's underlying cost models and assumptions to ensure that these are reasonable. Such an approach is standard regulatory practice.

In this respect, it is deeply concerning that no cost information has been put forward to support NBN Co's proposed starting prices. In the absence of such information it is difficult to test the reasonableness of those access prices and hence the reasonableness of the SAU.

It is also concerning that a substantial proportion of NBN Co's costs are to be 'deemed' prudent with little, if any, regulatory oversight. Again, this issue was discussed at length in Optus' submission of August 2011 (see attached).

### ***Efficiency Incentives***

A key challenge the ACCC will face in the regulating the NBN is to ensure that over time it remains efficient and responsive to customer needs. In this respect Optus encourages the ACCC to broaden its assessment of the specific terms of the SAU in front of it and to consider the need for additional incentives and mechanisms to be built in the SAU to help deliver on these objectives.

In this respect, Optus engaged SPC Network to assess the regulatory and governance framework that will apply to the NBN and to identify methods of ensuring that NBN Co operates efficiently and remains focused on its customers and that the governance arrangements are appropriate to meet its objectives (a copy of this report is set out as an attachment to this submission). The report set out a number of important recommendations to lift the regulation of the NBN including the key proposal to ensure that NBN Co is subject to a form of incentive regulation that links its ability to set price according to its quality of performance, in addition to inflation.

### ***Non-price terms***

The non-price terms and conditions form an integral part of any access agreement. Whilst NBN Co does not intend the WBA to form a part of the SAU, it is part of a suite of instruments that will dictate the terms of access to the NBN. Optus submits that the WBA should be scrutinised accordingly. Any issues of concern with the WBA should be addressed as part of the ACCC's overall assessment of the SAU.

A critical issue the ACCC should consider in this context is the inter-relationship between the WBA, the SAU and parties' rights to seek regulatory recourse under the CCA. In this regard Optus and others in the industry have raised concerns that NBN Co has used the WBA to unilaterally impose restrictions on access seekers' rights to seek ACCC recourse (except under limited terms specified by NBN Co in the WBA and the SAU). Optus does not consider it to be reasonable for NBN Co to impose such unilateral restrictions on access seekers' rights. Further, such restrictions are unlikely to be in the long term interests of end-users or

consumers. This is an important threshold issue that should be addressed by the ACCC in consideration of the SAU. It is related to the broader question discussed above as to whether the oversight arrangements set out in the SAU and the WBA are an appropriate way to regulate the NBN.

***Conclusion***

The areas of focus identified in this letter are by no means comprehensive and we look forward to providing a more detailed submission on the SAU in due course. Nevertheless, we hope that the ACCC will find these initial comments useful in developing its discussion paper on the SAU.

Yours sincerely

A handwritten signature in black ink, appearing to read 'AS', with a long horizontal flourish extending to the right.

Andrew Sheridan  
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Interconnect and Economic Regulation