

12 December 2014

Ms Nicole Ross
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Dear Ms Ross

ACCC discussion paper on Telecommunications Final Access Determination inquiries – non-price terms and conditions

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

NBN Co supports the ACCC's decision to limit the current inquiry to non-price terms and conditions (NPTCs), with supplementary pricing to be considered with primary pricing.

This submission is limited to providing NBN Co's views on the general approach the ACCC should take to setting NPTCs in Final Access Determinations (FADs). Any views expressed in relation to NBN Co's experience with purchasing declared services is limited to the purchase of managed transmission services, some of which are covered by the DTCS declaration. NBN Co does not acquire any other (non-DTCS) declared services that form part of the ACCC's combined FAD inquiry.

NBN Co notes that the ACCC has also recently sought views from interested parties on the proposed drafting of a limited number of NPTCs that the ACCC may include in the relevant draft and Final Access Determinations (FADs). Although such consultation will be required in due course, NBN Co considers that the ACCC should first communicate to interested parties a preliminary view on whether the ACCC favours a targeted or a comprehensive approach. This would appropriately set the context within which NBN Co and other interested parties provide their feedback on the proposed NPTC drafting. To this end, NBN Co suggests that the ACCC extend the timeframe for providing feedback on the proposed NPTC drafting to at least the end of January 2015 and in the meantime, and as soon as possible, provide interested parties with the ACCC's preliminary view on the NPTC approach.

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Targeted approach to setting NPTCs will provide an effective regulatory fall back

As per NBN Co's submission to the ACCC's Position Paper on NPTCs¹, we support the ACCC adopting the principle of considering NPTCs with a view to ensuring that there would be an effective fall-back set of terms and conditions of access available to the parties.² Although the ACCC has outlined a number of options for how an effective fall-back position could be established through FADs³, NBN Co submits that the most appropriate approach would be via the ACCC's current method of setting targeted NPTCs for those aspects of non-price access where commercial agreement is less likely to result.

The ACCC states:

"...for targeted FAD terms and conditions to provide an effective fall-back, they would need to operate alongside or within access agreements."⁴

With regards to the above, Part XIC of the *Competition and Consumer Act 2010* (CCA) sets up a framework for Access Agreements and FADs to operate alongside each other. The existence of the legislative hierarchy and provisions providing for the resolution of inconsistencies between the various 'instruments' clearly contemplates the co-existence of FADs and Access Agreements. The combined operation of sections 152AY and 152BCC makes it clear that commercially negotiated terms and conditions in Access Agreements prevail over inconsistent terms and conditions in FADs. NBN Co submits that the targeted approach to setting NPTCs is consistent with Part XIC's intended interaction between Access Agreements and FADs. That is, by focussing the NPTCs in FADs on areas of NPTCs that are less readily settled via commercial negotiations, the approach provides primacy to negotiated commercial outcomes whilst recognising, where necessary, the role of terms and conditions set in FADs.

NBN Co considers that the NPTCs set out in the current FADs provide a good starting point for a targeted set of terms. Industry is likely to highlight any other key NPTCs that the ACCC should consider as part of this inquiry. Focussing the industry and ACCC's efforts on a selected set of NPTCs is likely to produce a more effective and timely set of access terms. Even if additional NPTCs are identified following the finalisation of this inquiry, it is open to the ACCC to vary FADs or issue a Binding Rule of Conduct to address urgent issues relating to non-price access.

The ACCC should only set NPTCs in FADs to the extent necessary

As a principle, the ACCC should only set NPTCs in FADs to the extent that there is a justification for doing so. NBN Co submits that it would be inefficient and potentially disruptive for the industry if the ACCC intervenes (i.e. by setting a comprehensive set of NPTCs) where parties are able to reach commercial outcomes.

NBN Co notes that a large number of submissions to the Position Paper advocated for the ACCC to adopt a targeted approach to setting NPTCs⁵, suggesting that the majority of NPTCs are already well established via commercial negotiations. While a small number of submissions advocated for alternative approaches, industry submissions have not provided any actual evidence that the ACCC's current targeted approach to setting NPTCs is not producing workable outcomes for parties. NBN Co's own experience with DTCS indicates that a targeted approach to NPTCs is capable of fostering commercial outcomes.

¹ ACCC position paper on *Telecommunications Final Access Determination inquiries – Non-price terms and conditions and supplementary prices*, May 2014

² ACCC Position Paper, p.9

³ Ibid, p.12

⁴ ACCC Position Paper, p.17

⁵ Discussion Paper p.16

NBN Co submits that a targeted approach to NPTCs should continue to be adopted in the absence of any specific and practical evidence that such an approach is failing to produce outcomes that promote the LTIE. Based on the lack of such evidence to date (both prior to and during this current inquiry), NBN Co does not consider that the current environment justifies the making of comprehensive NPTCs in FADs.

Practical difficulties associated with setting comprehensive NPTC FAD terms

NBN Co considers that the ACCC's potential 'methods' for setting a comprehensive set of minimum terms would raise numerous issues. For example, the Discussion Paper notes that one option could be for the ACCC to make a FAD that includes specific clauses dealing with contentious issues, while stating that all other terms and conditions of access are those set out in another document, e.g. the relevant access provider's supply contract for the declared services.⁶ The ACCC considers that such a process is unlikely to involve significantly more resources than the targeted approach to setting NPTCs.⁷ NBN Co considers such an approach is likely to face a number of problems, including the following:

- Even if the FAD referred to NPTCs set out in a different document, such as the relevant access provider's supply contract, this method would be, in effect, incorporating the terms and conditions of that document into the FAD. As such, the ACCC would presumably still need to be satisfied that the incorporated terms (and their interaction with the express terms of the FAD) meet the relevant statutory criteria in subsection 152BCA(1) of the CCA. This would require extensive consultation with industry and would likely be a highly iterative process. Accordingly, this approach would still require significantly more resources than a targeted FAD approach.
- A number of the declared services in this combined inquiry (for example DTCS) have multiple access providers. These providers are not individually or collectively (for a particular declared service) required to offer standard contracts for the supply of declared services. Therefore it is not entirely clear what 'standard document' the ACCC would refer to in FADs. The existence of multiple access providers (and therefore multiple sets of contracts for supply) is likely to create undue confusion around applicable terms.
- There are strong interdependencies between various NPTCs, as well as between NPTCs and price terms. This means that there is high regulatory risk in specifying a targeted set of NPTCs in the FAD, and then cross-referencing to a different document(s) to 'fill in the gaps'. This may result in a combination of price and non-price terms and conditions that is, overall unworkable for industry.

Please do not hesitate to contact me or Matthew Cole in our regulatory team on (03) 9601 5231 if you have any queries in relation to anything contained in this submission.

Kind regards



Caroline Lovell
Chief Regulatory Officer

⁶ Discussion Paper p. 21

⁷ Ibid