



**Nextgen submission on the
“Telecommunications Final Access
Determination inquiries — non-price terms
and conditions and supplementary prices,
Discussion Paper”**

December 2014

Introduction

The Nextgen Group (Nextgen) welcomes the opportunity to make this submission on the ACCC's Discussion Paper "Telecommunications Final Access Determination inquiries — non-price terms and conditions and supplementary prices" (NPTCs).

Below we set out our views on the key issues raised in the paper, touching upon the various questions asked by the ACCC.

Scope of NPTCs

In our earlier submission to the Position Paper¹ Nextgen:

- Noted that we are primarily involved in the provision of transmission services, and accordingly that our comments reflected this perspective;
- Indicated our support for the ongoing use of regulated terms as a fall-back option for facilitating the supply of declared services where agreement between the parties concerned cannot be reached;
- Indicated that we felt the currently regulated NPTCs were an appropriate starting point for considering which NPTCs are included in the new FADs;
- Outlined the general reasons we associated with carrying forward the existing categories of the NPTCs to the current setting;
- Suggested that the area of 'liability and risk allocation' could be addressed in the renewed NPTCs to support consistency with current commercial practice;² and
- Indicated that we supported the aspiration to develop a set of NPTCs which are common — to the extent practical — for each of the declared services for which FAD's will shortly be determined.

While Nextgen has been reasonably happy with the operation of the NPTCS to date, we support the current proposal to develop a comprehensive set of terms on account of the potential for this to be a more effective regulatory fall-back option than a targeted set of terms.

In terms of the relationship between the NPTCs and the criteria specified in subsection 152BCA(1) of the Competition and Consumer Act 2010 (CCA), Nextgen is comfortable with the discussion in Appendix A of the Discussion Paper. In our view, the most relevant considerations which the ACCC should have regard to as part of the NPTCs FAD are:

- Promoting the long term interests of end users (LTIE), especially via the promotion of competition in relevant markets (in this case, markets for each of the various declared fixed line services) and encouraging the efficient use of and investment in infrastructure;
- The legitimate business interests of a carrier or carriage service provider who supplies (or is capable of supplying) the declared service; and
- The interests of all persons who have rights to use the declared service.

The above considerations clearly straddle end users, access seekers and access providers meaning, in practice, that the ACCC needs to balance the interests of these distinct parties in the course of making its decisions.

¹ See: <https://www.accc.gov.au/system/files/Nextgen%20NPTCS%20submission%20-%20Final.pdf>

² The main sentiment here is that access providers can bear a substantive amount of risk in a supply agreement, especially if complementary capital works have been undertaken — accordingly care is needed in the framing of any liability terms. Linking liability terms, in the event of a dispute, to fees paid or payable may not appropriately compensate the access provider for the costs they have incurred in availing the service in the first instance.

Role in commercial settings

In relation to the role of the existing NPTCs in commercial settings:

- In our experience the regulated NPTCs are only used occasionally by access seekers we deal with as an access provider, and are used less frequently by us in our periodic capacity as an access seeker;
- The existing access agreements which we are a party to do not provide for recourse to regulated terms during the life of the agreement;
- We would expect any access seeker who was interested in invoking regulated terms to do so at the time of contract negotiations; and
- Of the various categories within the NPTCs, the area where agreement — generally speaking — is least likely to be reached is ‘billing and notification’.

In terms of how any future NPTCs might interact with commercial settings, it is our understanding that the second and third points above reflect standard commercial practice. Indeed, the sentiments here appear to be somewhat analogous to the way in which aspects of Schedule 1 of the *Telecommunications Act 1974* operate — due to the presence of clause 36(8) in that Schedule for example, an access seeker cannot enter into a commercial agreement with an access provider and then initiate a dispute process in order to obtain recourse to regulatory intervention (in this case, arbitration by the ACCC). In this context Nextgen recognises that the capacity for fallback terms to be a viable, alternative option for access seekers is correlated with their exhaustiveness, meaning a comprehensive set of terms is more likely to constitute an effective regulatory fallback option than a targeted set of terms. Whether or not they are used in any given commercial setting is largely a decision for the access seeker to make.

We note that our Standard Form of Agreement, used for the majority of instances in which we are an access provider, is available on our website.³

Dealing with uneven bargaining power

In the Discussion Paper the ACCC seeks the views of respondents as to how it should take account of the relative bargaining power of parties in its assessment of the mandatory criteria in s.152CBA of the CCA, when considering the approach to take in regulating NPTCs.

The presence or otherwise of uneven bargaining power in a commercial negotiation appears to be a consideration tangential to the mandatory criteria in s.152CBA of the CCA, as it is not directly related to the making of a FAD per se (although it may well be a factor in a preceding declaration). Generally speaking, we would expect uneven bargaining power to be held by (or favor) an access provider as opposed to an access seeker.

In Nextgen’s view it may be difficult for the ACCC to make provision for the existence of uneven bargaining power in its assessment of the mandatory criteria as this would seemingly entail attaching more weight to those criteria perceived as being associated with the interests of access seekers (based on the view as to normal incidence expressed above).

In terms of the bargaining power held by NBN Co and recommendation 11 in the Vertigan Committee’s Statutory review report — which proposed that there should be a mechanism for access seekers to approach the ACCC if they feel third party intervention is required to help address NBN Co’s bargaining power — Nextgen sees this as a constructive development in terms of there being a fall-back option for access seekers when faced with a ‘take it or leave it’ situation. That said, NBN Co is clearly a special case when it comes to questions of regulatory oversight given the role assigned to it in legislation (i.e. wholesale provider of monopoly local access network services), its publicly owned status and its use of complex cross-subsidisation arrangements.

³ See: <http://nextgengroup.com.au/resources/policies/standard-form-of-agreement/>

Noting that the current legislative hierarchy influences what can be possible in terms of regulatory oversight, and that broad changes to this hierarchy were not considered appropriate by the Vertigan Committee, Nextgen recognises that — to a certain extent — there are ongoing challenges in dealing with the presence of uneven bargaining power in a regulatory context. While a comprehensive set of NPTCs will not offset uneven bargaining power, they may do so to a greater extent than the alternative, namely a targeted set of NPTCs.

Targeted or comprehensive

As noted above, despite a history of limited recourse to the regulated NPTCs Nextgen recognises that comprehensive NPTCs could have a role in helping to address uneven bargaining power simply by virtue of being an outside option for the supply of a regulated service, where agreement on terms and conditions cannot otherwise be reached.

That said, Nextgen is also of the view that considerable care will need to be exercised in the development of comprehensive NPTCs should the ACCC elect to pursue this option.

We note, for example, that the quality of any given service (in terms of service availability, repair time and service credits for example) can be differentiated by price, so if a regulated service is acquired at a regulated price that service may well be of a lower quality than what could be acquired through commercial negotiation. This sentiment aligns with our view that, in regulated settings, it is desirable for some incentive for commercial agreement to be retained (viz-a-viz the regulated fallback option).

If the ACCC is inclined to consider the practicality of developing a comprehensive set of NPTCs in more detail Nextgen cautions against seeking to use a previous contract which involved the access provider in question as the basis for supply of the relevant declared service — it is overly simplistic to contend that because something was agreed to in one setting it can be transplanted to any other setting. A reference offer model or the approach adopted in NZ may be easier to implement. Our initial assessment of the Commerce Commission's 'Standard Terms Determination for Chorus' unbundled bitstream access backhaul service' is that they appear to have a number of parallels to (both the DTCS and) the proposed areas of NPTCs in Australia, although their length suggests that could be some iteration and time required were a similar approach to be adopted by the ACCC before final (regulated) terms could be established.⁴ To this end there could be value in consulting on a comprehensive set NPTCs before the release of a draft decision.

Process moving forward

Nextgen agrees with the ACCC's indicative approach to the commencement, expiry, and review of NPTCs as set out in section 7.3.3 of the Position Paper, as this approach appears logical and also includes provision for changes to the NPTCs should circumstances in the forward years change from current expectations.

Contact details

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⁴ See: <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/unbundled-bitstream-access-uba-services/unbundled-bitstream-access-uba/>