



8 October 2015

Mr Grahame O'Leary  
Director, Convergence and Mobility Branch  
Infrastructure Regulation Division  
Australian Competition and Consumer Commission  
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Dear Grahame,

## Public Inquiry to make a Final Access Determination for the Domestic Transmission Capacity Service – Draft Decision

**nbn** welcomes the opportunity to comment on the ACCC's draft decision on the Public Inquiry to make a Final Access Determination for the Domestic Transmission Capacity Service – Draft Decision (**Draft Decision**).

As noted in our previous submission to this inquiry, the DTCS Final Access Determination (FAD) is relevant to **nbn** in terms of its effects on:

- the cost of **nbn**'s interim transit arrangements – **nbn** currently purchases managed transmission services on a large number of routes that variously link greenfield and brownfield sites with relevant interim and permanent POIs. Many of these routes are covered by the current DTCS declaration and are therefore covered by the regulated pricing in the current DTCS FAD; and
- the cost of Access Seekers' backhaul from **nbn**'s 121 (permanent) POIs – only a small number of Access Seekers will own their own fibre backhaul networks from all of **nbn**'s POIs, so all other Access Seekers will need to buy backhaul services directly (as wholesale transmission) or indirectly (as part of a wholesale aggregation service). Many of the relevant backhaul routes are covered by the current DTCS declaration (and therefore the DTCS FAD).

**nbn** welcomes the ACCC's Draft Decision to reduce pricing in the DTCS FAD, consistent with the outcomes from the ACCC's domestic benchmarking exercise. We note in particular the substantial proposed reduction in FAD prices for higher capacity services on regional routes.

**nbn** has a number of specific comments on the proposed FAD terms, as set out below.



## Accounting for price trends over time

In its Draft Decision, the ACCC does not propose to incorporate a dynamic pricing trend into the FAD pricing, noting that its consultants Economic Insights were unable to develop an appropriate method for this given the inherent limitations with the data available<sup>1</sup>.

This is unfortunate given that, as noted in our previous submission<sup>2</sup>, **nbn** understands that prices on competitive routes have been decreasing over time on a like-for-like basis and that this is likely to continue into the future.

**nbn** notes that in the Draft Decision the ACCC has:

- sought feedback<sup>3</sup> on a proposal to collect pricing data from transmission service providers on a more regular basis to overcome the data limitations identified by Economic Insights (however, the ACCC states that it does not support such a proposal at this stage for reasons that are not fully explained in terms of the potential benefits and costs from such an exercise);
- proposed that the FAD have a duration of four years (until 31 December 2019) with no formal mid-term review<sup>4</sup>; and
- announced a plan to “monitor the transmission market and may undertake market inquiries to ensure that regulated prices remain within an expected range when compared with competitive routes”.<sup>5</sup>

**nbn** supports the ACCC collecting pricing data from service providers on a more regular basis, rather than on an intermittent basis when the Final Access Determination is due to expire. Collecting this information will enable the ACCC to actively monitor trends and changes in transmission pricing over time, enable it to more quickly respond to changes in market conditions as appropriate (subject to appropriate consultation), and build up a dataset that may in future be used to incorporate a dynamic pricing trend in the FAD pricing.

In regard to how pricing data should be collected, **nbn** considers that a more well-defined and formalised approach may be appropriate, particularly in light of the 27 July 2015 request by Optus and VHA for the ACCC to consider additional pricing information that had not been included in the original benchmarking data.<sup>6</sup> A relevant and substantially complete dataset is necessary to be able to implement price benchmarking in a robust, timely and accountable manner, and it is important to ensure that the data collection approach is designed and implemented with this in mind.

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<sup>1</sup> ACCC, Public Inquiry to make a Final Access Determination for the Domestic Transmission Capacity Service – Draft Decision, 4 September 2015, p.28.

<sup>2</sup> **nbn**, Submission to the ACCC’s DTCS FAD Discussion Paper – Primary Prices, September 2014, pp. 4-5.

<sup>3</sup> ACCC, Public Inquiry to make a Final Access Determination for the Domestic Transmission Capacity Service – Draft Decision, 4 September 2015, p.28.

<sup>4</sup> *ibid*, p.62.

<sup>5</sup> *ibid*, p.62.

<sup>6</sup> *ibid*, p.28.





The ACCC's proposed plan to monitor transmission pricing via market inquiries over the term of the proposed new FAD would appear to provide a much less useful base of information for future decision making, and **nbn** considers that it should only be pursued if the proposal to collect pricing data from transmission service providers on a more regular basis has potential costs that are likely to outweigh the potential benefits.

**nbn** notes that in June 2012 the ACCC proposed to monitor transmission prices over the term of the DTCS FAD that then being made (and is still in effect). Specifically, the ACCC noted in its Explanatory Statement to the DTCS FAD that

the ACCC is able to monitor prices through market observation, market inquiries and through access agreements lodged with the ACCC and will consider an FAD variation inquiry if necessary or issue a BROCC if there is an urgent need for regulatory intervention.<sup>7</sup>

Over the period since 2012, **nbn** is not aware of ACCC having advised interested parties that it was undertaking market inquiries into transmission pricing or of having disclosed the findings of any such inquiries.

If a monitoring approach does end up being implemented the ACCC should state a much clearer intention as to the nature of market inquiries that will be undertaken and the precise timing or frequency of these inquiries. In this regard, **nbn** proposes that the ACCC publish annually the findings of its market inquiries in the interests of promoting transparency and certainty. A particular focus on **nbn** POI backhaul routes would also be appropriate in the transition to the **nbn**, noting the ACCC's comments in its 2010 'Advice to the Government' recommending a semi-distributed approach on the **nbn** Points of Interconnect:

An additional safeguard is the ACCC's ongoing regulation of particular transmission services (i.e. the domestic transmission capacity service) which provides the mechanism for the ACCC to set price and non-price terms of access on regulated routes which serve the NBN POIs.<sup>8</sup>

### Duration of the FAD

The ACCC's Draft Decision proposes that the 2015 DTCS FAD expire on 31 December 2019 with no formal mid-term review. Consistent with our comments above in regard to transmission pricing trends, **nbn** considers that it would be appropriate for the ACCC to either include a mid-term review in the DTCS FAD or to shorten the duration of the new FAD to a two year period (rather than four years). This would, when combined with collection of pricing information on a more regular basis from transmission providers, achieve an appropriate balance between providing pricing certainty for access seekers and access providers, and committing to keeping the regulated pricing reasonably consistent over time with the evolution of pricing on competitive routes (on a like-for-like basis).

### Capacity

In our previous submission, **nbn** highlighted that demand for and availability of higher capacity transmission services is likely to increase, that the FAD should include pricing for higher capacity services where there is

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<sup>7</sup> ACCC, Final Access Determination for the Domestic Transmission Capacity Service – Explanatory Statement, June 2012, p.15.

<sup>8</sup> ACCC, ACCC Advice to Government – National Broadband Network Points of Interconnect, November 2010, p.4.



sufficient data available to support robust estimates, and that the FAD pricing may be inadequate if it only applies up to and including 1Gbps<sup>9</sup>.

**nbn** notes that, although the Draft Pricing Calculator accompanying the Draft DTCS FAD states that prices may be calculated for capacities up to and including 2500Mbps<sup>10</sup>, the Draft FAD Instrument states that the DTCS pricing formula will only calculate prices for capacities up to 1000Mbps.<sup>11</sup> **nbn** requests that the ACCC confirm the DTCS FAD will cater for capacities up to at least 2500Mbps, and submits that it would be desirable to provide for even higher capacities if possible, noting that **nbn** now offers CVC (TC-4) speed tiers up to 10Gbps.

### Regulatory recourse

Consistent with the ACCC's Final Report on NPTCs for the FADs, the Draft Decision proposes to include terms on regulatory recourse for the first time. In this regard, **nbn** observes (as we did in our May 2015 submission on the ACCC's draft decision on NPTCs<sup>12</sup>) that the ACCC's proposed approach to regulatory recourse differs to the arrangement it accepted in **nbn**'s context as part of the ACCC's assessment of **nbn**'s Special Access Undertaking.

If you would like to discuss any aspect of this letter, please contact Mathew Cole, General Manager Access Regulation.

Yours sincerely

A handwritten signature in blue ink, reading 'Caroline Lovell'.

Caroline Lovell  
Chief Regulatory Officer

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<sup>9</sup> **nbn**, Submission to the ACCC's DTCS FAD Discussion Paper – Primary Prices, September 2014, p.8.

<sup>10</sup> ACCC, DTCS Draft FAD – draft pricing calculator, 4 September 2015.

<sup>11</sup> ACCC, Attachment B: DTCS draft FAD instrument, 4 September 2015, p.10.

<sup>12</sup> **nbn**, Submission to the ACCC's Telecommunications Final Access Determination inquiries – Non-price terms and conditions and connection charges for fixed line services – draft decision, 11 May 2015, p.1.