26 October 2016

Ms Nicole Ross
Director, Market Evolution and Access Section
Infrastructure Regulation Division
Australian Competition and Consumer Commission
360 Elizabeth Street
Melbourne VIC 3000

By email: superfastbroadbandinquiry@accc.gov.au
cc: nicole.ross@accc.gov.au

Dear Nicole,

Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination Joint Inquiry – Discussion Paper

nbn welcomes the opportunity to comment on the ACCC's discussion paper on the Superfast Broadband Access Service (SBAS) and Local Bitstream Access Service (LBAS) Final Access Determination Joint Inquiry (the Discussion Paper).

Our comments, as set out below, are largely focussed on the price-related terms and conditions for the LBAS and SBAS FADs (the FADs).

- Overall, the benchmarking approach used by the ACCC in the 2012 LBAS FAD remains appropriate, and is appropriate for both SBAS and LBAS – that is, with the possible exception of Telstra's FAB product (discussed further below), the FADs should set ceiling prices that are benchmarked off **nbn**'s pricing of comparable products. **nbn** notes that it continues to price its services on a consistent basis across access technologies (FTTP, FTTB, FTTN, HFC, fixed wireless and satellite) and also across geographies (metro and regional). Also, the relevant context for LBAS and SBAS services continues to be new developments and some brownfield deployments in metropolitan areas. As such, the analysis[1] that informed the ACCC's views in 2012 is still relevant and applicable.
- In regard to how such an approach should be implemented (except possibly in relation to Telstra's FAB product), **nbn** suggests the following:

[1] ACCC, Local Bitstream Access Service Final Access Determination, Explanatory Statement, October 2012, pp.20-23.

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- The FADs should reflect **nbn**'s two part (AVC/CVC) price structure. It is important to note in this regard that **nbn**'s AVC and CVC are not defined with respect to any intermediate point between the UNI used to serve a Premises and the NNI used to serve that Premises. It is incorrect to interpret the AVC as contributing only to cost recovery over some 'local access' portion of the network and the CVC as contributing only to cost recovery over some 'aggregation' portion of the network. Rather, the AVC/CVC price structure is used to contribute to cost recovery over the whole network, from the UNI through to the NNI, and allows **nbn** to balance, over time, the competing needs of maintaining high rates of take-up of the **nbn**™ network (through affordable AVC prices) with high rates of usage of the network (through affordable CVC prices).
- For AVC, an anchor product approach is appropriate in the circumstances – this should be based on a product (or products if necessary) that is expected to be the most popular with access seekers (and their end-users) and can effectively constrain an SBAS/LBAS provider's pricing of other (e.g. higher speed tier) LBAS/SBAS products. For the time being, it would seem appropriate for the LBAS/SBAS FADs to use the 25/5 Mbps AVC product as specified in the 2012 LBAS FAD (being a residential-grade product with a voice capability). Over the course of the FADs, however, the ACCC should monitor whether this anchor product continues to serve its intended purpose and consider varying the FADs if an update or expansion of the anchor product appears appropriate (including, for example, if there is a need to also specify a business-grade anchor product).

  The price point for the anchor product should be benchmarked on the comparable **nbn** product. Currently, **nbn**'s 25/5 Mbps AVC (TC-4) is priced at $27.00 per month in the WBA2 Price List. Consistent with **nbn**'s Special Access Undertaking (SAU), as accepted by the ACCC on 13 December 2013, the FADs should also include some provision for indexing the AVC price point over the term of the FADs, for example with reference to the SAU's CPI-1.5% Individual Price Increase Limit.
- For CVC, an anchor product approach is also appropriate in the circumstances – this should be based on the (voice and data) traffic classes necessary to support the AVC anchor product. In nbn's context, these are referred to as CVC TC-1 and CVC TC-4.

  Noting the ACCC's 2012 comments on the difficulty of adjusting for each provider's circumstances[2], rather than a particular price point being specified for CVC, the FADs should provide some guidance on a 'method of ascertaining a price' in the event that the relevant access provider and access seekers cannot agree. The necessary guidance (specified in the form of a pricing principle) could account for the geographic extent to which different access providers' services are aggregated by providing that (if required) the ACCC will determine the CVC charge for a particular access provider (and particular location if relevant) such that an access seeker would be no worse off (all else the same) than if they were able to acquire services to the relevant premises via the **nbn**™ network, after allowing for the cost that would be involved in acquiring backhaul from the access provider's point of interconnection to (in the vicinity) of the relevant **nbn** POI.

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[2] Ibid, p.15.

Note that this guidance would not involve changing the relevant point of interconnection for the LBAS or SBAS access provider; it is just a benchmarking method for ascertaining a CVC price in respect of that provider (and particular location if relevant).

- Although there are likely to be other charges that may be relevant to the supply of LBAS and SBAS by access providers (for example, NNI charges, installation charges and various other ancillary charges), the FADs need not specify such charges except to the extent that there is a manifest need to provide further guidance. The ACCC has the power to vary the FADs in due course if such a need arose during the term of the FADs.
- At this stage, it would be premature for the FADs to incorporate any adjustment for the levy proposed by the Bureau of Communications Research in relation to funding nbn's non-commercial services.[3] As noted above, the ACCC has the power to vary the FADs in due course (however, this may not be necessary if the levy is implemented as proposed).

- As a complement to this approach, **nbn** suggests that the ACCC assess the ongoing effectiveness of the FADs, and the potential need to vary the FADs during their terms, by monitoring the price and non-price terms and conditions of access (including service levels) as offered by LBAS and SBAS providers and impose record keeping rules (and disclosure directions) equivalent to those that currently apply to Telstra and **nbn** in respect of services in operation. This is appropriate generally, and is also important specifically in respect of areas in which there may not be effective infrastructure-based competition (e.g. new developments in greenfield areas).
- There should be no exemptions to the FADs, except on a transitional basis. This is important for promoting the long term interests of end users (LTIE) and is consistent with the principle of regulatory symmetry – why should a small fixed line monopoly be any less of a concern than a large fixed line monopoly in terms of its potential implications for promoting the LTIE?

  If some LBAS/SBAS providers, such as TransAct, are to be provided with a transitional period within which to develop a Layer 2 product that satisfies the relevant declaration, then this period should be as short as possible.
- In regard to Telstra's FAB product, **nbn** notes that the SBAS declaration does not require Telstra to offer the same Layer 2 SBAS product as other SBAS providers. Although this is intended to avoid Telstra having to incur the costs of developing the (standard) Layer 2 SBAS product in the event that Telstra ultimately transfers its fibre access networks in South Brisbane and Telstra Velocity estates to **nbn**, it is important to note that Telstra and **nbn** have not entered into a binding agreement for any such transfers.

[3] See, Bureau of Communications Research, NBN non-commercial services funding options, Final consultation paper, October 2015.

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The ACCC should ensure that access seekers and end users are not disadvantaged as a result of the ownership of the infrastructure in these areas. In the near term, and provided that it is consistent with Telstra's legitimate business interests, the SBAS FAD should transition the FAB product to pricing outcomes that are equivalent to those that would apply to non-Telstra SBAS providers. Looking further ahead, the ACCC should consider treating Telstra no differently to TransAct, and change the SBAS declaration to remove the reference to the FAB product.

- Although it is generally appropriate for the term of the FADs to be aligned, as suggested by the ACCC, with the expiry date of the SBAS declaration (28 July 2021), the length of the resulting regulatory period (four to four and a half year) serves to underscore the importance of ongoing monitoring by the ACCC – the FADs should not be regarded as 'set and forget' regulatory instruments.

More generally, **nbn** notes that there have been a number of recent announcements from potential new providers of wireless equivalents to SBAS services. **nbn** suggests that the ACCC consider revisiting the SBAS declaration to make it more technology neutral – there should be no arbitrary distinctions between access providers on the basis of the technology used to provide an otherwise equivalent service.

If you would like to discuss any aspects of this letter, please contact Matthew Cole, General Manager Access Regulation at matthewcole@nbnco.com.au or on (03) 9601 5231.

Yours sincerely

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