

## Revised variation of Access Undertakings in relation to digital radio multiplex transmission services

### CBAA Further Comments

- 1.1 The CBAA welcomes the opportunity to submit comments in relation to a revised proposal for formal variation of the Access Undertakings for digital radio multiplex transmission services submitted by the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Adelaide, Brisbane, Melbourne, Sydney and Perth (**Multiplex Licensees**).
- 1.2 Notice of consultation on the revised variation was given by the ACCC on 11 November 2013, following the revised Variation Request lodged with the ACCC on 7 November 2013.
- 1.3 The previous proposed variation, lodged with the ACCC on 19 June 2013, was withdrawn on 4 November 2013.
- 1.4 The CBAA is the peak body for community broadcasting in Australia, representing over 350 licensed community broadcasters. It acts under agency arrangements as a single point of co-ordination with respect to community broadcasting licensees eligible to be digital radio Access Seekers under the Radiocommunications Act 1992 (**Radiocommunications Act**).
- 1.5 The CBAA provided a submission to the ACCC on 9 August 2013. It made some general points and focused on the substantive amendments proposed for the Access Undertaking and incorporated Access Agreement.
- 1.6 In the preparation of that submission the CBAA drew on its expertise and experience of co-ordinating and implementing digital radio services with 37 Access Seekers and on advice from Minter Ellison Lawyers.
- 1.7 Webb Henderson, acting for the Foundation Category 1 Digital Radio Multiplex Licensees in Adelaide, Brisbane, Melbourne Perth and Sydney (each a **JVC** and together the **JVCs**) provided the ACCC a response to the CBAA submission on 6 September 2013.
- 1.8 Following the JVC's response, the CBAA provided a further submission to the ACCC on 11 October 2013.
- 1.9 A revised proposal for formal variation of the Access Undertakings for digital radio multiplex transmission services was submitted by the Multiplex Licensees on 7 November 2013.
- 1.10 The CBAA notes and agrees with the ACCC observation that the Revised Variation Request lodged on 7 November 2013 is substantively similar to the Original Variation Request lodged on 19 June 2013.
- 1.11 Accordingly, the CBAA makes comments herein on the Revised Variation Request and, for completeness, has attached copies of its previous two submissions, as comments made in those submissions remain relevant and still stand.
- 1.12 The CBAA notes that the ACCC has not yet formed a view as to whether the variations proposed by the Multiplex Licensees should be accepted.

- 1.13 The ACCC has provided an expedited consultation period limited to one week, 11 - 18 November 2013, to allow for further submissions, prior to concluding its assessment of the proposed variations.
- 1.14 In limiting its comments in this submission, the CBAA nevertheless encourages the ACCC to give full consideration to the CBAA's previous comments, including in regard to processes around changes to the means by which the underlying transmission services are delivered.
- 1.15 It may be that some of the issues raised are better dealt with in a broader review context rather than as part of assessing a specific Variation Request.
- 1.16 The CBAA notes that the Revised Variation Request provides for the additional sub-clause 9.6 (d) proposed by the CBAA for the new clause 9.6.
- 1.17 The CBAA notes, and is disappointed, that the Revised Variation Request does not include an amended Clause 1.4.
- 1.18 The CBAA reiterates its proposal that the Access Agreement be amended so that if the Multiplex Licensee proposes to change the means by which they deliver the underlying transmission services, then there should be a separate consultation process. The proposed amendment is attached.
- 1.19 Reiterating its previous submissions, the CBAA supports all other proposed amendments.

### **Attachments**

1. Proposed amendment to Attachment 1 clause 1.4 of the Access Undertaking and clause 9.7 of the Access Agreement
2. Submission by the Community Broadcasting Association of Australia, 9 August 2013
3. Submission by the Community Broadcasting Association of Australia, 11 October 2013

## Attachment 1

### Proposed amendment to the Access Undertaking and Access Agreement

The CBAA proposes:

- (a) Attachment A, sub-clause 1.4 be revised to read:

*"The Multiplex Licensee modulates one or more transmitters using the OFDM symbols produced by the Modulation Service to form the RF Service. The Multiplex Licensee may additionally transmit the RF Service using repeater multiplex transmitters which form a Single Frequency Network (SFN). If the Multiplex Licensee wishes to establish repeater multiplex transmitters in addition to those listed below, the Multiplex Licensee must first conduct a consultation with Access Seekers in accordance with the Access Agreement. The transmitter/s characteristics conform to the radiocommunications apparatus license/s held by the Multiplex Licensee.*

*The following schedule of transmitter sites, together with their apparatus licences, form the RF Service.*

*Schedule of transmit sites forming the RF Service*

*Main Site: <Insert main site location>*

*<insert main site Apparatus Licence number>*

*Repeater Site: <insert repeater site location>*

*<insert repeater site Apparatus Licence number>"*

- (b) The following new clause 9.7 be inserted in the Access Agreement

**"9.7 Consultation for establishment of new repeater multiplex transmitter**

(a) *The Multiplex Licensee may determine that it is operationally desirable to establish a new repeater multiplex transmitter for the provision of the RF Service. In the event that the Multiplex Licensee wishes to establish a new repeater multiplex transmitter and intends that it will be necessary to review the fixed recurring charges payable by Access Seekers who acquire the Multiplex Transmission Services in order to recover the costs of the establishment and operation of those fixed recurring charges in accordance with the Pricing principles, then the Multiplex Licensee shall initiate a review for the purpose of providing the Access Seekers with technical and commercial information about the proposed new repeater multiplex transmitter and seeking their comments on the proposed new repeater multiplex transmitter and any adjustment in the fixed recurring charges proposed by the Multiplex Licensee as a result of the establishment and operation of the proposed new repeater multiplex transmitter.*

(b) *For the purposes only of a review pursuant to clause 9.7(a), the Multiplex Licensee will provide all Access Seekers with notice of the following:*

(i) *a detailed description of the site location and design of and technical information relating to the new repeater multiplex transmitter;*

(ii) *an estimate of the adjustment to the fixed recurring charges that it reasonably considers should apply following the establishment of the new repeater multiplex transmitter;*

(iii) *the reasons for any proposed changes in the level of the fixed recurring charges, as described in clauses 5.2(a)(i)-5.2(a)(iv) of Schedule 2, as applied to the proposed new repeater multiplex transmitter;*

(iii) *such data that the Multiplex Licensee, acting reasonably and in good faith, considers is reasonably necessary for Access Seekers to:*

(A) *assess and verify the technical and operational solution the proposed new repeater multiplex transmitter provides for the RF Service; and*

(B) *verify that the fixed recurring charges estimated by the Multiplex Licensee are consistent with the Pricing Principles, including but not limited to data setting out the various cost elements described in clauses 3.2 and 3.4 of Schedule 2 as they apply to the new repeater multiplex transmitter; and*

(iv) *any other information that the Multiplex Licensee considers appropriate.*

- (c) *Within 30 days of receipt of the information described in clause 9.7(b), each Access Seeker may (but is not obliged to) provide the Multiplex Licensee with any views or comments it may have in respect of:*
- (i) *the operational and technical aspects of the proposed new repeater multiplex transmitter; or*
  - (ii) *the fixed recurring charges applying in respect of proposed new repeater multiplex transmitter estimated by the Multiplex Licensee.*
- (d) *The Multiplex Licensee will consider any views or comments received from each Access Seeker under clause 9.7(c) in good faith. The Multiplex Licensee may:*
- (i) *abandon the proposed new repeater multiplex transmitter;*
  - (ii) *revise the site location, design or technical and operational parameters of the proposed new repeater multiplex transmitter;*
  - (iii) *revise the fixed recurring charges,*
- if, after having considered any such views or comments in good faith, it forms the opinion that it is necessary to do any of those things to provide the RF Service in a manner that is operationally efficient and consistent with the needs of Access Seekers and in doing so to ensure consistency with the Pricing Principles in respect of any adjustment to the fixed recurring charges.*
- (e) *Within 30 days of the expiry of the 30 day period described in clause 9.7(c), the Multiplex Licensee will provide all Access Seekers with written notice of its consideration and the opinion it formed under clause 9.7(d) and its determination of whether the proposed new repeater multiplex transmitter will proceed and if so, the fixed recurring charges that are to apply as a consequence of the completion of the review under this clause. Such fixed recurring charges will take effect from the billing period (Price Adjustment Date) specified in the notice. For the avoidance of doubt, a review is deemed to have been completed on the date that the Multiplex Licensee issues a notice under this clause 9.7(e).*
- (f) *If the Multiplex Licensee fails to undertake a review under this clause before establishing a new proposed new repeater multiplex transmitter, then it shall not be entitled to recover from the Access Seeker any adjustment to the fixed recurring charges resulting from the establishment and operation of such new repeater multiplex transmitter."*

## Proposed variation of Access Undertakings in relation to digital radio multiplex transmission services

### Submission by the Community Broadcasting Association of Australia in response to the ACCC consultation

#### 1. Introduction

- 1.1 The CBAA welcomes the opportunity to submit comments in relation to the request for formal variation of the Access Undertakings for digital radio multiplex transmission services sought by the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Adelaide, Brisbane, Melbourne, Sydney and Perth (**Multiplex Licensees**).
- 1.2 Notice of consultation on the proposed variation was given by the ACCC on 3 July 2013, following a Variation Request lodged with the ACCC on 19 June 2013.
- 1.3 The CBAA is the peak body for community broadcasting in Australia, representing over 350 licensed community broadcasters. It acts under agency arrangements as a single point of co-ordination with respect to community broadcasting licensees eligible to be digital radio Access Seekers under the Radiocommunications Act 1992 (**Radiocommunications Act**).
- 1.4 There are currently 37 community broadcasting licensees eligible to be Access Seekers. All 37 have current status as Access Seekers with on-air digital radio services. There are currently 42 commercial Access Seekers.
- 1.5 The provision of community broadcasting services on digital radio is an important aspect of and contribution to free-to-air media diversity. The legislative framework in the Radiocommunications Act reserves two-ninths of the total capacity of each Foundation Category 1 digital radio multiplex for eligible licensed community broadcasting services.
- 1.6 The Radiocommunications Act gives each digital community radio broadcasting representative company (**DRC**) a first right of refusal to acquire a shareholding in the Joint Venture Company that holds the digital radio multiplex transmission licence (ie, each Multiplex Licensee). No digital community radio broadcasting representative companies elected to take up a shareholding.
- 1.7 Irrespective of shareholding status, the intention of the Access Undertaking and access regime administered by the ACCC is to allow eligible broadcasters to obtain access to digital radio transmission services on reasonable terms and conditions.
- 1.8 Access is not to discriminate between Access Seekers in terms of technical and operational quality of the multiplex transmission service.
- 1.9 The terms and conditions of access specified in the Access Undertaking are to include access prices or pricing methodologies which are fair and reasonable.
- 1.10 The ACCC notes that the proposed variation to the Access Undertaking and incorporated Access Agreement consists of six substantive amendments. The CBAA's comments focus on these matters and are collated under headings tabulated below.

## **Assessment of and comment on proposed variations**

### **2. Term of the Access Agreement and Access Undertaking**

- 2.1 The CBAA has no objection to alignment of the term of the Access Agreement with the term of the Access Undertaking. Access Undertakings would then remain in force while the multiplex licence remains in force, with no specific date for expiry of the Access Agreement.

### **3. Service description - Access Undertaking**

- 3.1 The CBAA has no objection to deletion of the sentence in Attachment A, sub-clause 1.2 (a) referring to PAD X information.
- 3.2 The CBAA has no objection to amending Attachment A, sub-clause 1.2 (a) and (b) to cite ETSI standard EN 300 401.
- 3.3 The CBAA has commented previously<sup>1</sup> on the definition of the RF Service in Attachment A, Clause 1.4. It has raised the issue of whether the RF Service ought be described more specifically.
- 3.4 The CBAA argued that, while there may be only one main transmitter site in each city initially, it would be likely that multiple transmitter sites would be established, and that there ought be a process to enable on-going re-definition of the basic RF Service, coupled with an ability for Access Seekers to opt in or opt out for additional service levels.

#### *On-channel repeaters*

- 3.5 In practice, the first step in provision of digital radio services has been to implement a high power main transmitter site in each of Adelaide, Brisbane, Melbourne, Sydney and Perth. To address signal deficiency in central Melbourne, this main site was quickly augmented by a lower power on-channel repeater.
- 3.6 The Variation Request notes that the current Access Undertaking RF Service description contemplates the use of a single transmitter site only in each city. The Multiplex Licensees flag upcoming deployment of further on-channel repeaters in each capital city to improve the quality and coverage of digital radio services.
- 3.7 The CBAA fully supports that deployment of on-channel repeaters be considered part of the basic RF Service, provided that each repeater deployment is agreed as being a necessary and efficient measure to ensure adequate quality and coverage of digital radio services.
- 3.8 The CBAA agrees that, using only the main transmit site, there are areas of signal deficiency within the total Licence Area for which the RF Service is intended to provide coverage, including:
- (a) inner city areas where high rise buildings block the propagation of the signal from the main transmit site; and / or
  - (b) areas of significant population, that do not receive a signal from the main transmit site but which still fall within the total Licence Area.

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<sup>1</sup> Submissions made by the CBAA leading to the determination by the ACCC of the ACCC-modified Access Undertakings that currently apply. 2008 - 2009

- 3.9 If counted as part of the basic RF Service, the deployment of each on-channel repeater adds capital and operational costs, thus increasing the total cost of operating the multiplex.
- 3.10 It is noted that the current suite of on-channel repeaters being rolled out is being funded by the net proceeds of the auction of excess capacity access entitlements. It has been argued that to rectify areas of signal deficiency contributes to promoting the digital radio platform.
- 3.11 While use of the one-time auction funds minimises shareholder contributions being required for the capital cost of further infrastructure deployment, it does not reduce the on-going depreciation cost impact of that infrastructure, nor does it address on-going leasing, maintenance and electricity costs incurred by each on-channel repeater.
- 3.12 As a point of information, the operational cost impact of on-channel repeaters tabulated in the Annual Report tabled with the ACCC in August 2012<sup>2</sup> has formed part of the total operational costs for each multiplex and, accordingly, has increased Access Fees during 2012-13. These on-channel repeater sites were to be commissioned on-air during the last half of calendar year 2012. However, none actually operated during 2012-13 due to various licensing and national broadcaster related delays. The CBA expects unspent 2012-13 funds to be carried forward by each JVC to offset some 2013-14 costs with a concomitant offset to Access Fees.
- 3.13 It is arguable whether the selected number of on-channel repeater sites, their priority in terms of timing of deployment, or their exact choice of location, is, or can always be, optimal<sup>3</sup>.
- 3.14 In some cases an otherwise optimal location may not be available or be not efficient in terms of cost. In some cases there may be alternative and equally optimal options to rectify areas of signal deficiency, including re-configuration of the main site. In some cases there may not be agreement about priority or timing of deployment. In some cases there may be demographic reasons why an Access Seeker or small subset group may prefer one location over another.
- 3.15 The build of each on-channel repeater presents, in itself, options that must balance cost, efficiency and practicalities. For example, an on-channel repeater site could be built with full internal redundancy. Given that would increase costs, is that efficient or necessary? As it happens, the proposed on-channel repeaters do not have full internal redundancy and so the answer to that question has not yet been tested. The issue is necessarily case-by-case, and the answer may change over time as coverage demands change; for example, as digital radio receivers become more prevalent in cars and/or more generally adopted.
- 3.16 The build of each on-channel repeater has been scoped to include repeating the national broadcaster Category 3 multiplex as well as the community/commercial Foundation Category 1 multiplex. This has an additional capital and operation cost impact. While this may be an efficient overall approach, it presupposes that the national broadcasters are in agreement.
- 3.17 A fair and reasonable mechanism is required by which to negotiate that agreement. Whether that mechanism is administered as part of the ACCC access regime is a point for consideration.
- 3.18 Alternatively, the ACCC access regime should at least reference a side-mechanism, most likely by requiring that ACMA consult all affected parties, including all Access Seekers.

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<sup>2</sup> 2011-12 Annual Report to the ACCC pursuant to section 118PN of the Radiocommunications Act. Page 5.

<sup>3</sup> *ibid.* Page 6.



- 3.19 In the meantime, it is of concern that costs incurred in relation to repeating each national broadcaster multiplex have not been, and are not being, re-couped. These costs might be viewed as being outside of the efficient costs of operating each multiplex and they are costs that should not be borne by commercial and community Access Seekers. At the moment they are embedded in overall costs and so cause increased costs to all commercial and community Access Seekers. If costs are re-couped from the national broadcasters then any income should be offset against the total cost of operating each multiplex.
- 3.20 It is understood that the prevailing view from ACMA is that each multiplex re-transmitted by each on-channel repeater site requires an individual licensing process, even though operating on the same frequency and within the Licence Area of the main transmit site service. ACMA treat each multiplex as a separate entity to be licensed.
- 3.21 Conceivably, there could be a situation where an on-channel repeater is established by an entity other than the Multiplex Licensee.
- 3.22 This might be initiated by an entity concerned to improve reception in an area that has been accorded low priority by the Multiplex Licensee. Implementation of such an on-channel repeater would obviously require co-ordination with the Multiplex Licensee but would sit outside of what constitutes the set of sites that make up the basic RF Service.
- 3.23 Such an on-channel repeater, having obtained the necessary licensing approval after a consultation administered by ACMA, would incur costs that would be borne by the initiating entity. Its costs would not form part of the costs that make up the total operating cost of the Foundation Category 1 Digital Radio Multiplex as reflected in Access Seeker fees.
- 3.24 As a final point regarding on-channel repeaters: the proposed amended wording of Attachment A, sub-clause 1.4 of the Access Undertaking can be read to exclude the costs of on-channel repeater multiplex transmitters from the RF Service. In that case the unintended consequence would be to exclude their costs from the total cost of the Multiplex Transmission Service.

*Augmentation of a main transmitter site with a redundant transmitter site*

- 3.25 The Access Undertaking, Attachment A, sub-clause 1.4, as currently drafted, can be read to mean an Access Seeker has right of access to a RF service provided over a single multiplex transmission site only.
- 3.26 There is a high level of redundancy built into each main transmission site. However, without full main site redundancy, unavoidable outages of the RF service remain a possibility.
- 3.27 The matter of whether to augment the main site with a redundant site is unlikely to arise for several years. However, where digital radio becomes the primary radio broadcast platform the matter may arise.
- 3.28 The issue this presents for Access Seekers is one of risk versus cost. Duplication of a main multiplex transmission site would significantly increase the cost of supplying the RF Service.
- 3.29 Faced with this cost, an Access Seeker may prefer an option to bear the risk of an outage should the main multiplex transmission site fail in its entirety or require unavoidable maintenance. Removal of the option, if coupled with a hike of cost, would act to hinder access. Government funding for community broadcasting may well exclude costs for site redundancy if it were to mean a steep increase.

- 3.30 While this issue is particularly acute for not-for-profit community broadcaster Access Seekers, commercial broadcaster Access Seekers may also operate with business models of different scales and so have varying views about whether the extra cost of main site redundancy represents an efficient cost of supplying the Service.
- 3.31 It is understood that there are complexities in providing multiplex services that have a different composition of Access Seekers, depending on whether the main transmit site is in use or whether a redundant site is in use. Even so, a more sophisticated approach to defining the RF Service is needed.
- 3.32 If the ACCC determines to leave resolution of this aspect for the future, then, at the very least, the current Access Undertaking should include process to require a Variation Request be lodged should the nature of the Service change materially in scope or expected cost.
- 3.33 The Access Agreement provides for Multiplex Licensee Initiated Reviews and Access Seeker Initiated Reviews of fixed recurring costs. Establishment of an on-channel repeater inevitably results in an increase in fixed recurring costs. Either mechanism provides an opportunity for consultation in relation to an adjustment of those costs which are reflected in Access Fees – this is too late if the new on-channel repeater has been established – it is unlikely that any such review would alter the Multiplex Licensee's desire to increase Access Fees to cover the costs. The CBAA suggests that the Access Agreement should be amended so that if the Multiplex Licensee proposes to establish an on-channel repeater, then there should be a separate consultation process, as proposed below.
- 3.34 Taking all of the above-mentioned points into account, the CBAA proposes:

- (a) Attachment A, sub-clause 1.4 be revised to read:

*"The Multiplex Licensee modulates one or more transmitters using the OFDM symbols produced by the Modulation Service to form the RF Service. The Multiplex Licensee may additionally transmit the RF Service using repeater multiplex transmitters which form a Single Frequency Network (SFN). If the Multiplex Licensee wishes to establish repeater multiplex transmitters in addition to those listed below, the Multiplex Licensee must first conduct a consultation with Access Seekers in accordance with the Access Agreement. The transmitter/s characteristics conform to the radiocommunications apparatus license/s held by the Multiplex Licensee.*

*The following schedule of transmitter sites, together with their apparatus licences, form the RF Service.*

*Schedule of transmit sites forming the RF Service*

*Main Site: <Insert main site location>*

*<insert main site Apparatus Licence number>*

*Repeater Site: <insert repeater site location>*

*<insert repeater site Apparatus Licence number>"*

- (b) The following new clause 9.7 be inserted in the Access Agreement

**"9.7 Consultation for establishment of new repeater multiplex transmitter**

(a) *The Multiplex Licensee may determine that it is operationally desirable to establish a new repeater multiplex transmitter for the provision of the RF Service. In the event that the Multiplex Licensee wishes to establish a new repeater multiplex transmitter and intends that it will be necessary to review the fixed recurring charges payable by Access Seekers who acquire the Multiplex Transmission Services in order to recover the costs of the establishment and operation of those fixed recurring charges in accordance with the Pricing principles, then the Multiplex Licensee shall initiate a review for the purpose of providing the Access Seekers with technical and commercial information about the proposed new repeater multiplex transmitter and seeking their comments on the proposed new repeater multiplex transmitter and any adjustment in the fixed recurring charges proposed by the Multiplex Licensee as a result of the establishment and operation of the proposed new repeater multiplex transmitter.*

(b) *For the purposes only of a review pursuant to clause 9.7(a), the Multiplex Licensee will provide all Access Seekers with notice of the following:*

(i) *a detailed description of the site location and design of and technical information relating to the new repeater multiplex transmitter;*

(ii) *an estimate of the adjustment to the fixed recurring charges that it reasonably considers should apply following the establishment of the new repeater multiplex transmitter;*

(iii) *the reasons for any proposed changes in the level of the fixed recurring charges, as described in clauses 5.2(a)(i)-5.2(a)(iv) of Schedule 2, as applied to the proposed new repeater multiplex transmitter;*

(iii) *such data that the Multiplex Licensee, acting reasonably and in good faith, considers is reasonably necessary for Access Seekers to:*

(A) *assess and verify the technical and operational solution the proposed new repeater multiplex transmitter provides for the RF Service; and*

(B) *verify that the fixed recurring charges estimated by the Multiplex Licensee are consistent with the Pricing Principles, including but not limited to data setting out the various cost elements described in clauses 3.2 and 3.4 of Schedule 2 as they apply to the new repeater multiplex transmitter; and*

- (iv) *any other information that the Multiplex Licensee considers appropriate.*
- (c) *Within 30 days of receipt of the information described in clause 9.7(b), each Access Seeker may (but is not obliged to) provide the Multiplex Licensee with any views or comments it may have in respect of:*
  - (i) *the operational and technical aspects of the proposed new repeater multiplex transmitter; or*
  - (ii) *the fixed recurring charges applying in respect of proposed new repeater multiplex transmitter estimated by the Multiplex Licensee.*
- (d) *The Multiplex Licensee will consider any views or comments received from each Access Seeker under clause 9.7(c) in good faith. The Multiplex Licensee may:*
  - (i) *abandon the proposed new repeater multiplex transmitter;*
  - (ii) *revise the site location, design or technical and operational parameters of the proposed new repeater multiplex transmitter;*
  - (iii) *revise the fixed recurring charges,*  
  
*if, after having considered any such views or comments in good faith, it forms the opinion that it is necessary to do any of those things to provide the RF Service in a manner that is operationally efficient and consistent with the needs of Access Seekers and in doing so to ensure consistency with the Pricing Principles in respect of any adjustment to the fixed recurring charges.*
- (e) *Within 30 days of the expiry of the 30 day period described in clause 9.7(c), the Multiplex Licensee will provide all Access Seekers with written notice of its consideration and the opinion it formed under clause 9.7(d) and its determination of whether the proposed new repeater multiplex transmitter will proceed and if so, the fixed recurring charges that are to apply as a consequence of the completion of the review under this clause. Such fixed recurring charges will take effect from the billing period (Price Adjustment Date) specified in the notice. For the avoidance of doubt, a review is deemed to have been completed on the date that the Multiplex Licensee issues a notice under this clause 9.7(e).*
- (f) *If the Multiplex Licensee fails to undertake a review under this clause before establishing a new proposed new repeater multiplex transmitter, then it shall not be entitled to recover from the Access Seeker any adjustment to the fixed recurring charges resulting from the establishment and operation of such new repeater multiplex transmitter."*

#### **4. Safe Operation of Multiplex Transmission Service - Access Agreement**

4.1 The CBAA has no objection to the proposed amendment to the Access Agreement, sub-clause 9.4 deleting the words “*through the Representative Company*”.

4.2 The CBAA has no objection to the insertion of a new sub-clause 9.6 to the Access Agreement. The Clause seeks to ensure safe operation of systems, equipment and facilities; and that systems, equipment and facilities do not negatively impact the operation of the Multiplex Transmission Service or other systems, equipment and facilities used in connection with the Multiplex Transmission Service.

4.3 The CBAA suggests an additional sub-clause (d)

*“Nothing in this Clause prevents an Access Seeker from operating its own systems, equipment or facilities in a manner of its own choosing provided such operation complies with sub-clause 9.6 (c).”*

#### **5. Suspension provisions - Access Agreement**

5.1 The CBAA notes the amendments to Clause 15 to take account of on-channel repeater sites in addition to a main transmit site in each capital city, and to clarify that all or part of the Multiplex Transmission Service may be subject to suspension or powering down.

5.2 The CBAA has no objection to the proposed amendments to Clause 15 in their entirety.

#### **6. Invoicing in advance - Access Agreement**

6.1 The Variation Request notes that the existing Access Agreement contemplates invoicing will occur on a monthly basis in arrears.

6.2 The Variation Requests seeks to amend invoicing arrangements to instead be either monthly or quarterly in advance.

6.3 The CBAA acts as a single point of co-ordination for all community broadcasting Access Seekers and has an Agreement with each Multiplex Licensee to maintain payments quarterly in advance.

6.4 The CBAA has no objection to the proposed amendment to sub-clause 12.3 which reads,

*“The billing period for the Standard Charges is either monthly or quarterly in advance, except where otherwise agreed with the Access Seeker.”*

6.5 The amendment is, in effect, no better and no worse than the current situation in practice.

6.6 The CBAA notes that the Agreement with each Multiplex Licensee requires a financial security to the equivalent to 3 months worth of access fees based on two-ninths of multiplex capacity and grossed up for GST.

6.7 The CBAA maintains this financial security with each Multiplex Licensee on an on-going basis.

6.8 The CBAA notes that financial security has not been required of any commercial radio broadcasters.<sup>4</sup>

6.9 This begs the question as to whether each Multiplex Licensee is applying the financial security provisions in an equitable or fair and reasonable manner.

## **7. Removal of redundant provisions and other amendments - Access Agreement**

7.1 The Variation Request seeks to delete a range of provisions in the Access Agreement on the basis that the provisions no longer have effect or relate to obligations already discharged.

7.2 A number of other amendments are made, seemingly with the intention to tidy and clarify.

7.3 The CBAA has no objection to the deletion of Clause 3.

7.4 The CBAA has no objection to the proposed amendments to sub-clause 6.4.

7.5 The CBAA has no objection to the proposed amendments to Clause 7 and all sub-clauses.

7.6 The CBAA has no objection to the amendment of sub-clause 17.3.

7.7 The CBAA has no objection to the deletion of sub-clause 17.9.

7.8 The CBAA has no objection to the amendment of Effective Date in the Schedule 1 Dictionary.

7.9 The CBAA has no objection to the amendment of Schedule 2, Pricing Principles, sub-clause 5.1.

7.10 The CBAA has no objection to the addition in Attachment A of new sub-clause 1 (c).

7.11 The CBAA takes the opportunity to reiterate that Attachment A sub-clause 1 (b) (C) is in error where it suggests a Digital Representative Company may be an Access Seeker.

## **8. Other matters**

8.1 The CBAA takes the opportunity to reiterate that, in the interests of consumers, it is desirable, should an Electronic Program Guide (EPG) be introduced for digital radio services, that it operate in a multi-lateral basis such that EPG data is displayed in a common manner for all services on all multiplexes broadcasting to each Licence Area.

8.2 The ACCC is encouraged to consider whether the current access regime ensures equal treatment such that an EPG system does not discriminate against any Access Seeker or its services, should an EPG be implemented in some manner.

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<sup>4</sup> 2011-12 Annual Report to the ACCC pursuant to section 118PN of the Radiocommunications Act. Page 3.

## Proposed variation of Access Undertakings in relation to digital radio multiplex transmission services

### Further comments

#### 1. Introduction

- 1.1 The CBAA welcomes the opportunity to submit further comments in relation to the request for formal variation of the Access Undertakings for digital radio multiplex transmission services sought by the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Adelaide, Brisbane, Melbourne, Sydney and Perth (**Multiplex Licensees**).
- 1.2 Notice of consultation on the proposed variation was given by the ACCC on 3 July 2013, following a Variation Request lodged with the ACCC on 19 June 2013.
- 1.3 The CBAA is the peak body for community broadcasting in Australia, representing over 350 licensed community broadcasters. It acts under agency arrangements as a single point of co-ordination with respect to community broadcasting licensees eligible to be digital radio Access Seekers under the Radiocommunications Act 1992 (**Radiocommunications Act**).
- 1.4 The CBAA provided a submission on 9 August 2013. It made some general points and focused on the substantive amendments proposed for the Access Undertaking and incorporated Access Agreement.
- 1.5 In the preparation of that submission the CBAA drew on its expertise and experience of co-ordinating and implementing digital radio services with 37 Access Seekers and on advice from Minter Ellison Lawyers.
- 1.6 Webb Henderson, acting for the Foundation Category 1 Digital Radio Multiplex Licensees in Adelaide, Brisbane, Melbourne Perth and Sydney (each a **JVC** and together the **JVCs**) provided the ACCC a response to the CBAA submission on 6 September 2013.
- 1.7 This further submission from the CBAA follows the JVC's response. It should be read in conjunction with the original submission by the CBAA, and the request by the JVCs for formal variation of the Access Undertakings.
- 1.8 The JVCs note that the CBAA supports nearly all of the proposed amendments to the digital radio access undertaking and looks forward to maintaining a co-operative working relationship with the CBAA.
- 1.9 The CBAA also seeks to maintain a co-operative working relationship. It has always maintained a constructive approach and in making comments to the ACCC is doing nothing more than acting with appropriate and proportionate diligence.
- 1.10 The comments and proposals made in the CBAA's submission on 9 August 2013 stand and further comments made herein are primarily in response to points raised by the JVCs through Webb Henderson on 6 September 2013.

## 2. Definition of RF Service: On-Channel Repeater Services

- 2.1 The CBAA position from the outset, in 2007-2009, has been that, while there may be only one main transmitter site in each city initially, it would be likely that multiple transmitter sites would be established, and that there ought to be a process to enable on-going re-definition of the basic RF Service, coupled with an ability for Access Seekers to opt in or opt out for additional service levels.
- 2.2 The CBAA reiterates that it fully supports deployment of on-channel repeaters (OCRs) be considered part of the basic RF Service, provided each repeater deployment is agreed as being a necessary and efficient measure to ensure adequate quality and coverage of digital radio services.
- 2.3 The CBAA reiterates that it agrees that, using only the main transmit site, there are areas of signal deficiency within the total Licence Area for which the RF Service is intended to provide coverage, including:
- (a) inner city areas where high rise buildings block the propagation of the signal from the main transmit site; and / or
  - (b) areas of significant population, that do not receive a signal from the main transmit site but which still fall within the total Licence Area.

## 3. OCR rollout and fixed recurring charges

- 3.1 It is a matter of fact that, if counted as part of the basic RF Service, the deployment of each on-channel repeater adds to the capital base and increases operational costs, thus increasing the total cost of operating the multiplex, and hence the fixed recurring charges to Access Seekers (Access Fees).
- 3.2 As has been noted, funds received as part of the auction of excess-capacity access entitlements are to be used for specified purposes; activities to promote digital radio. To date, the JVCs have drawn on those funds to cover initial capital expenditure associated with the deployment of OC Rs and so there has been no need for additional JVC shareholder contribution.
- 3.3 While a sensible and productive use of those funds, to say the initial capital costs of the OCR rollout are “essentially being subsidised by the commercial radio broadcasters that acquired excess-capacity access entitlements at auction”<sup>1</sup> does not seem to best characterise the situation. The funds paid those commercial broadcasters were for the extra access entitlements. To say it is a subsidy for OCR rollout costs is to infer the extra access entitlements accorded to those broadcasters have no value.
- 3.4 In any case, whether the funds for the capital costs of the OCR rollout are derived from a call on JVC shareholders or from income derived from some other source is not fully relevant. The effect of JVC expenditure on capital is that an addition to the value of the capital base has occurred. As the capital base is increased, so the return on that capital base - the weighted average cost of capital (WACC) - and the annual depreciation costs are also affected.

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<sup>1</sup> Webb Henderson, 6 September 2013, Section 1.1, paragraph 4



- 3.5 All other things being equal, straight line depreciation of the capital base would see an annual reduction in the total operating cost. Whereas, in fact, the WACC is affected and the allowance for depreciation has been increased to allow for OCR rollout. This accounting for OCR rollout capital is not contested but does run counter to the impression created by the statement that it, “cannot be reasonably argued that the initial OCR related capital costs will be passed through to access seekers”.<sup>2</sup> This comment seems to misunderstand how the cost of capital has already been applied to determine Access Seeker fees.
- 3.6 Access Fees were adjusted as from October 2012 to take account of changes in general multiplex expenditure and also include adjustments to the capital base and depreciation, brought about by the OCR rollout. The Sydney overall costs, for example, increased by 41% as from October 2012.
- 3.7 Part of this increase was to provision for OCR electricity, maintenance, site fees and so forth. Part was to do with depreciation and adjustments to the capital base. A further revision of Access Fees to account for adjustments in OCR rollout timing was flagged for December 2012 but remains pending.
- 3.8 It is accepted that items of OCR expenditure, such as electricity, maintenance and monitoring costs would be managed in an efficient manner and not payable until an OCR is switched on. However, budgeting that underpins the fixed recurring charges that have applied since October 2012 seem to presume operation of OCR sites. Given the OCR sites have not been fully operating, the CBAA would expect carry forward savings to offset some future costs.

#### **4. OCR rollout planning and implementation**

- 4.1 It is accepted that the OCR implementation is complex and that timing and planning targets for OCR site switch-ons have been delayed compared to JVC expectations despite best efforts.
- 4.2 The JVCs state that, “the adopted method for the selection of OCR sites was subject to customer engagement through DTAC. In addition, ACMA has also had visibility of the site selection process from a licensing and technical planning and interference management perspective.”<sup>3</sup>
- 4.3 While the role of DTAC is valuable, useful and productive it is, nevertheless, a committee of the commercial broadcasting industry. Other parties are invited to participate where that seems appropriate to DTAC. It is not a committee of Access Seekers.
- 4.4 Appropriately, DTAC is sometimes used as an internal forum for commercial broadcasters to develop agreement on a range of issues. For example, latterly it has been used for development of commercial radio industry proposals for regional digital rollout. These matters have generally been considered internal commercial broadcaster business.
- 4.5 DTAC has and may operate in some matters in an open and broadly inclusive manner at times, but it has no obligation to do so consistently.

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<sup>2</sup> Webb Henderson, 6 September 2013, Section 1.1, paragraph 5

<sup>3</sup> *ibid*, paragraph 3

- 4.6 As ACMA has visibility of the site selection process perhaps it would be helpful if ACMA were to consult Access Seekers as well as Digital Radio Multiplex Transmitter licensees.
- 4.7 The JVCs “strongly disagree with the suggestion that the number and timing of OCR site deployments is sub-optimal, thereby resulting in the JVCs incurring costs inefficiently”.<sup>4</sup>
- 4.8 This comment slightly misses the intention of raising the matter of site planning. The CBAA stated it is arguable that the exact location of sites and priority in terms of timing of deployment is or can always be optimal.
- 4.9 The CBAA goes on to give examples such as the case where an otherwise optimal site may not be available or may be inefficient in terms of cost; that there may be delays in terms of deployment timing; and that there may be reasons why an Access Seeker or a subset of group of Access Seekers may prefer one site location be prioritised over another.
- 4.10 These examples are meant to illustrate that, in practice, the process of planning and implementing sites is likely to have to accept compromises. In fact, the delays compared to the expected timing for the current OCR site rollout is a case in point.
- 4.11 There is also a larger, long term, point to be made. The technical model to provide coverage of the Licence Area using a high power main site with supplemental low power OCR sites is not the only model. Other future models might not rely on a single main site so heavily but a number of medium power sites working together to provide coverage across a Licence Area.
- 4.12 Which model is preferred is a matter for detailed consideration, open consultation with all affected parties and forward planning. It is not a matter where “conjecture about alternative locations is always possible in hindsight”.<sup>5</sup> Hindsight is not the preferred methodology.
- 4.13 While not specifically relevant to the current OCR implementation reiterating the need for consultative forward planning and canvassing of all approaches in prospect is mentioned here as it is anticipated that digital radio services will be rolled out across further Licence Areas and the precepts of this access regime will no doubt be referenced.

## 5. Amendment to RF Service

- 5.1 It is noted that the Access Agreement provides for Multiplex Licensee Initiated Reviews and Access Seeker Initiated Reviews of fixed recurring costs. Establishment of an on-channel repeater inevitably results in an increase in fixed recurring costs.
- 5.2 The CBAA reiterates that while either mechanism provides an opportunity for consultation in relation to an adjustment of those costs which are reflected in Access Fees – this is too late if the new on-channel repeater has been established – it is unlikely that any such review would alter the Multiplex Licensee's desire to increase Access Fees to cover the costs.
- 5.3 The CBAA reiterates its proposal that the Access Agreement be amended so that if the Multiplex Licensee proposes to establish an on-channel repeater, then there should be a separate consultation process. The proposed amendment is attached.

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<sup>4</sup> Webb Henderson, 6 September 2013, Section 1.1, paragraph 1

<sup>5</sup> *ibid*, paragraph 2

## **6. No retrospective challenge**

- 6.1 In putting forward the proposed amendment there was never a suggestion of a retrospective challenge to the OCR site deployments that have already been undertaken and scoped.
- 6.2 The intention of the proposed amendment is to accept what has been done to date and to suggest that the method for determining future changes could be improved.

## **7. National broadcasters**

- 7.1 The CBAA notes that the JVCs confirm that OCRs have been scoped to support the supply of OCR services to commercial broadcasters, community broadcasters and the national broadcasters and that, if full power OCR services are supplied to the national broadcasters then, the national broadcasters will be required to contribute and those contributions will be offset against the costs.

## **8. Safe operation**

- 8.1 The CBAA notes that the JVCs confirm no objection to an additional clause to the proposed new clause regarding safe operation. Accordingly, the CBAA suggest the ACCC request the JVCs submit a revised Variation Proposal or use whatever is the simplest process to effect the inclusion of this clause.

## **9. Electronic Program Guide**

- 9.1 The CBAA is pleased to note that, “if the JVCs decide to consider introducing an EPG, this decision will be taken in consultation with all Access Seekers”.<sup>6</sup>
- 9.2 There are various methods for introduction of an EPG and the CBAA is also pleased to note that where an EPG is implemented as part of the Multiplex Transmission Service the JVCs consider that the “no hindrance of access” and “non-discrimination” requirements of the Access Agreement will apply to EPG services and will ensure all Access Seekers, including community broadcasters, are given the opportunity to participate in an EPG on an equal basis.
- 9.3 The CBAA is comforted also to note that the JVCs consider any exclusionary arrangements in relation to an EPG against community broadcasters would not be compliant with the requirements of the Competition and Consumer Act.

## **Attachments**

1. Proposed amendment to Attachment 1 clause 1.4 of the Access Undertaking and clause 9.7 of the Access Agreement.

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<sup>6</sup> Webb Henderson, 6 September 2013, Section 3, paragraph 3