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NBN Co Limited 2012 Special Access Undertaking

Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**") in relation to its consultation paper concerning the above.¹ The ACCC is undertaking an assessment of NBN Co's Special Access Undertaking ("**SAU**") and must decide on the basis of statutory criteria to either accept or reject the SAU.

Macquarie notes that the current version of the SAU, i.e., the document of 18 December 2012 has many changes which have been made following the ACCC's assessment of SAUs dated December 2011 and September 2012. In Macquarie's view such changes have made considerable improvements to the SAU. Despite these improvements, Macquarie is of the view that the SAU has several deficiencies which are sufficiently material to necessitate that it be rejected by the ACCC. However, Macquarie considers that the changes which are required to the SAU to make it acceptable are not insurmountable and can be readily overcome.

Macquarie's key concern with the SAU is essentially the degree to which the ACCC is locked-out of providing any effective oversight over a wide range of inherently uncertain processes and situations. Macquarie understands that this "regulatory lock-out" is essentially a result of a perception that without such a lock-out, retail service providers ("**RSPs**") would inundate the ACCC with a wide range of non-essential and non-material complaints.

Put simply, in an uncertain environment where NBN Co holds a clear advantage in relative bargaining strength, RSPs require the assurance that if a situation arises which is materially detrimental to them there is recourse to an independent arbiter, i.e., the ACCC, to resolve the situation. In particular, Macquarie submits that RSPs have cause to be concerned by the potential for NBN Co to engage in unfair market behaviour over the next 30 years given that:

- NBN Co has no explicit incentive to promote competition;
- NBN Co has an incentive to discourage RSPs from potentially competing with it in wholesale markets;
- NBN Co's incentives would be likely to change if it were to be privatised; and

¹ ACCC, NBN Co Limited 2012 Special Access Undertaking, Consultation Paper, November 2012 ("**Consultation Paper**")



- NBN Co has been established to be the industry's monopoly supplier of ubiquitous wholesale fixed broadband access services without which RSPs cannot participate in a large variety of current and future markets.

Against this background, Macquarie has concerns with many aspects of the SAU which have the potential for situations to arise which are detrimental to the interests of RSPs and for which there is no independent regulatory oversight. Macquarie considers these situations to be unreasonable. As appropriate, such situations are identified in Macquarie's responses to the ACCC's consultation questions which are addressed in the following section of this submission.

Responses to Consultation Questions

In this section, Macquarie has addressed each of the consultation questions as set out in the Consultation Paper. For ease of reference, each consultation question has been reproduced in a shaded text box which is then followed by Macquarie's response.

1. Are there any provisions of the SAU that are not sufficiently clear, such that for the purposes of section 152AY of the CCA there may be ambiguity as to:

- *the matters that those provisions relate to (in which case the terms and conditions in an Access Determination or Binding Rules of Conduct on the matter will not have effect); and*
- *the matters that those provisions do not relate to (in which case the terms and conditions in an Access Determination or Binding Rules of Conduct on the matter will have effect)?*

Macquarie is of the view that the SAU is inherently complex and will inevitably have provisions that contain ambiguity and uncertainty particularly given that the SAU has a term of 30 years and will be applied in a dynamic environment. As such, Macquarie submits that it is inevitable that the SAU, given its scope, will contain provisions which are not sufficiently clear when applied to unforeseen future market conditions in the decades to come.

Macquarie considers that the SAU must balance the desire for certainty with a need for flexibility as circumstances change. In particular, Macquarie is of the view that the inevitable ambiguities and uncertainties in the SAU must be counterbalanced by more frequent reviews and greater regulatory oversight than that which is currently provided for in the SAU.

2. Would access seekers be able to effectively invoke NBN Co's obligations to comply with Access Determinations and Binding Rules of Conduct in the absence of specific SAU commitments about how NBN Co will do so? Why/why not?

There is a fundamental shortcoming in the framing of the SAU as it seeks to remove the ACCC from the ability to ever regulate prices for services on the NBN for decades. This in turn essentially removes the ICT sector from the scope of on-going regulatory oversight.

Macquarie notes the following statement made by NBN Co:

"NBN Co will have discretion to set initial prices for new products and ongoing prices for



existing products (with no conferral of powers on the ACCC to determine such prices), subject to the combined effect of the:

- individual pricing commitments ...; [and]
- broad pricing commitments that:
 - in Module 1 are applied as an annual revenue constraint ...; and
 - in Module 2 are applied in a similar manner ...”²

This makes quite clear that the structure of the SAU is intended to exclude any ACCC price setting power throughout the entire term of the SAU for both new products and existing products. In other words, the only constraints on NBN Co would be the CPI-1.5% price cap commitment in relation to individual prices and the broad pricing commitments (that its own projections do not anticipate kicking in for the duration of the term of the SAU).

The history of broadband plans over the last five years or so has clearly shown a trend of increasing speed and download limits with no or limited increases in price. So, for example five years ago a customer might have had a retail broadband connection running at 2Mbps with a download limit of 5GB per month at a charge of \$50. The same customer might now be getting a connection with a download speed of 25Mbps with a download limit of 100GB per month and be paying \$60. This would represent a dramatic reduction in the price of the service on a speed or data basis. It is difficult to see what incentive NBN Co would have to continue to price in accordance with this trend in the absence of competitive constraints.

Macquarie does not believe that access seekers would be able to effectively invoke NBN Co’s obligations to comply with Access Determinations (“**ADs**”) and Binding Rules of Conduct (“**BROC**”) in the absence of specific SAU commitments about how NBN Co will do so as it clearly seeks not to have to comply with any such regulatory action as per its submission above. Macquarie is of the view that specific commitments in the SAU are required to ensure that NBN Co would comply with ADs and BROC and give effect to such regulatory oversight in standard form access agreements (“**SFAAs**”).

Macquarie does not, however, consider that NBN Co’s obligations to comply with ADs and BROC over the full term of the SAU are in any way meaningful given the carve out of effective regulatory oversight. This is because NBN Co’s commitment to ensure that new SFAAs are consistent with ADs and BROC applies only in Module 1, i.e., for the initial regulatory period. Moreover, there is evidently discretion for NBN Co to interpret how it would make changes to SFAAs and NBN Co can make such changes without having to satisfy the ACCC regarding how it has done so. Macquarie submits that the SAU should commit NBN Co to immediately pass-through ADs and BROC to access agreements and to SFAAs for the full term of the SAU.

Macquarie is also concerned that the duration of BROC is limited to a maximum of 12 months under section 152BDC of the *Competition and Consumer Act 2010* (“**Act**”). This would allow for the possibility that during the two year cycle of publishing new SFAAs, the ACCC could make BROC, the BROC could expire and the intended effect of the BROC could then be ignored by NBN Co in the next SFAA publication. Macquarie submits that this situation is not reasonable and should be addressed such that NBN Co commits to ensuring that all ADs and BROC are immediately passed-through to access agreements and to SFAAs.

² NBN Co, Supporting Submission – NBN Co Special Access Undertaking”, 28 September 2012, 4.1.5, page 47



Macquarie reiterates its position on ADs and BROCs which it has previously expressed to the ACCC.³ That is, Macquarie is strongly of the view that ADs or BROCs must immediately flow through to access agreements. In Macquarie's view, NBN Co's position which delays the effect of BROCs would be contrary to the provisions of the Act and its underlying policy intent, i.e., BROCs are for use in circumstances where, for reasons of urgency, there is insufficient time to make or vary an AD.

3. Would the regulatory recourse commitments in Module 1 lead to effective negotiation between NBN Co and access seekers? Does the combination of these commitments and NBN Co's other obligations to comply with Access Determinations and Binding Rules of Conduct under Part XIC make effective negotiations more likely to occur?

Macquarie does not believe that the regulatory recourse commitments in Module 1 of themselves would lead to effective negotiation between NBN Co and access seekers. Fundamentally, there is an imbalance in bargaining strength between NBN Co and access seekers and this of itself constrains effective negotiation. As also noted in its response to the previous question, Macquarie considers NBN Co's regulatory recourse commitments provide no comfort that NBN Co will pass-through ADs and BROCs to SFAAs over the full term of the SAU.

Macquarie is particularly concerned that the regulatory recourse mechanism is limited to non-price terms and conditions such that NBN Co has absolute price setting power in relation to both new products and existing products for the entire term of the SAU. Macquarie considers that it is essential for the LTIE that the ACCC has the power to intervene in relation to pricing issues where necessary. Absent this power, Macquarie considers that the SAU is unreasonable.

4. Does the proposed Facilities Access Decision process provide for the ACCC to determine all the terms and conditions necessary for the Facilities Access Service? What are the advantages of the SAU including this process to establish these terms and conditions?

It is evident that under Schedule 1B, clause 1B.2.3 of the SAU that the ACCC's powers to decide terms and conditions in relation to the Facilities Access Decision are limited to those concerning NBN Co's interconnection obligations under section 152AXB(4) of the Act in connection with the NBN Access Service and Ancillary Services. As such, the proposed Facilities Access Decision process does not provide for the ACCC to determine all the terms and conditions necessary for the Facilities Access Service.

Macquarie does not understand how NBN Co can take the position that despite setting out terms and conditions for the Facilities Access Service in the SAU, the service is not being "declared". That is, NBN Co's position appears contrary to the provisions of section 152AL of the Act.

³ Macquarie, *NBN Co Special Access Undertaking*, Letter to ACCC (reference IP 071201) 20 July 2012



5. Does the ACCC's role in the midpoint review mean that the regulatory recourse arrangements are likely to remain reasonable during Module 1?

As part of the midpoint review of Module 1, the SAU requires NBN Co to provide the ACCC with a regulatory recourse mechanism to amend, replace or let stand the prevailing regulatory recourse mechanism. Macquarie is concerned that the review of the regulatory recourse mechanism and any proposal to amend, replace or let stand is solely undertaken by NBN Co itself. As such, the review process excludes a key stakeholder group, i.e., access seekers.

Macquarie notes that the role of the ACCC in this review process is to accept or reject (on the basis of reasons) a relevant proposal put forward by NBN Co. While the ACCC's role provides a safeguard insofar as it should prevent an inappropriate regulatory recourse mechanism from being adopted for the remainder of Module 1, it does not ensure that there is an efficient and effective review and proposal development process. That is, there is a likelihood that an imbalanced review would result in an imbalanced proposal being put forward to the ACCC as NBN Co seeks to review itself.

Macquarie is also concerned that NBN Co has limited obligations arising from the midpoint review outcomes, i.e., the ACCC's decisions. That is, NBN Co commits only to complying with the review outcomes for the remainder of Module 1 but is not committed to make appropriate changes to the SAU or to access agreements or failing that to ensure pass-through of review outcomes to the next round of SFAAs. (See discussion in Macquarie's response to question 15 below). Macquarie considers that NBN Co's limited commitments in relation to this matter are unreasonable.

6. Does the absence of the Module 1 regulatory recourse commitments in Module 2 raise concerns that Access Determinations and Binding Rules of Conduct will not be able to adequately address matters that arise for the remainder of the SAU term?

Yes. Macquarie is concerned that there is no regulatory recourse commitment in the SAU beyond Module 1, i.e., such commitments apply only for the first ten years of the SAU's 30 year life. Macquarie acknowledges that the pass-through of ADs and BROCs to SFAAs has limited practical effect. That is, ADs and BROCs apply only to non-price matters and have no effect if they are inconsistent with the SAU. Given the scope of the SAU and the breadth of possible services caught by the service descriptions, there is little chance that a matter would in fact be dealt with by ADs or BROCs. As such, the value and impact of ADs and BROCs is essentially to provide the ACCC's guidance on the interpretation of provisions set out in the SAU or to address matters not covered by the SAU. Macquarie considers that the operation of the SAU without the pass-through of ADs and BROCs to SFAAs during Module 2 denies access seekers the mechanism to resolve ambiguities which may arise in the interpretation of the SAU. Accordingly, this situation is detrimental to the interests of access seekers, unreasonable and should be rectified.

7. Regarding the SAU commitments about NBN Co including certain terms and conditions in SFAAs, is it important for the SAU to also require NBN Co to comply with the substance of these terms and conditions?

Yes. Macquarie notes that Schedule 1B, clause 1B.2.2 of the SAU, requires NBN Co to give effect to a Regulatory Determination, i.e., ADs and BROCs, by ensuring that the next



published SFAA is consistent with such a Regulatory Determination. Macquarie considers that access seekers would have greater comfort with NBN Co's obligation concerning this matter if NBN Co explicitly committed to comply with the substance of a Regulatory Determination as opposed to simply being consistent with a Regulatory Determination.

8. Are matters in the SAU locked-in for the appropriate time period? Are there elements that should be locked-in for longer or shorter periods? Should there be more or less frequent review of particular matters?

Macquarie considers that the regulatory recourse mechanism and the product development forum ("PDF") should be locked-in for the full term of the SAU. Both are *prima facie* confined to Module 1. Macquarie believes that both are important in their own right and assist in ensuring that the products provided by NBN Co and the terms of their supply remain appropriate in a dynamic operating environment.

As noted in Macquarie's response to question 23 there is evidently no mechanism within the SAU for the ACCC to periodically review NBN Co's prices and pricing structures with a view to ensuring that the key requirements of the pricing structure are on track. Macquarie believes that a detailed review of such matters is necessary to protect the LTIE and the absence of such a review is of itself unreasonable.

9. Should all the matters specified in Modules 0 and 2 be a fixed principles term and condition? Are the specified notional fixed period and qualifying circumstances for the fixed principles term and condition appropriate? Should there be any other qualifying circumstances?

Macquarie notes that there is a broad range of matters specified in Modules 0 and 2 of the SAU. The implication of this is that the matters addressed in Modules 0 and 2 are locked-in for the full term of the SAU. While the desire for certainty is appreciated this must be balanced against the reality that the communications sector is subject to constant change.

Some of the matters locked-in for the full term of the SAU which are of particular concern to Macquarie include the price control which limits price increases for all products by more than CPI-1.5% per annum and NBN Co's control of the setting of prices for new products. Macquarie submits that locking-in a pricing control for such a lengthy period in an uncertain environment is inappropriate and may prove to be disadvantageous to either NBN Co or to access seekers.

Macquarie also submits that the pricing of new products should be subject to some form of regulatory recourse. This does not mean that the ACCC should approve NBN Co's pricing of new products *per se*. Rather should NBN Co's pricing of new products appear to be inappropriate, i.e., anti-competitive, there should be an opportunity for the ACCC to intervene. Accordingly, Macquarie considers that the price control and NBN Co's control of the setting of prices for new products should not be considered to be a fixed principle term and condition. If the ACCC were to agree with Macquarie's view on this matter, it would be obliged to reject the SAU in accordance with section 152CBD of the Act.



10. Does the proposed replacement module process adequately balance the objectives of regulatory certainty with regular reviews of the SAU terms and conditions? What are the problems with the operation of the replacement module process (if any)? Are there any specific issues relating to the interaction with the ACCC's powers to make Access Determinations and Binding Rules of Conduct?

Macquarie does not believe that the proposed replacement module process adequately balances the objectives of regulatory certainty with regular reviews of the SAU terms and conditions. This view is based on the concerns that Macquarie has with both the replacement module process and the process for the review of the SAU. With regard to the replacement module process, Macquarie is concerned by:

- the automatic 12 month extension of the term of Module 1 under clause 4.3(a)(i) of the SAU by merely lodging a replacement module, i.e., without justification of the need for an extension;
- the potential for NBN Co to abuse the process under which it can update its proposed replacement module 20 business day prior to the expiry of the previous module, e.g., by making substantial “last minute” changes; and
- the deemed acceptance of some parts of a replacement module if not accepted by the ACCC prior to the expiry of the previous module, i.e., the existing terms should be presumed to apply if no decision has been made within the timeframe allowed.

With regard to the “regular” review of the SAU terms and conditions, Macquarie is concerned by:

- the limited scope of the midpoint review of Module 1, i.e., the review is limited to non-price terms and multi-lateral processes thus excluding reviews of NBN Co's products, service quality and prices;
- the fact that such reviews are solely undertaken by NBN Co itself (as noted in Macquarie's response to question 5 above); and
- the absence of any mechanism within the SAU for the ACCC to periodically review NBN Co's prices and pricing structures with a view to ensuring that the key requirements of the pricing structure are on track.

11. Do the processes for submission of proposed replacement modules provide sufficient time for interested parties to participate in ACCC consultation processes about the making of regulated terms?

Macquarie understands that the ACCC's review of proposed replacement modules is undertaken in accordance with section 152CBG of the Act. This section provides *inter alia* that the ACCC has six months to make a decision and must invite the public to make submissions on the proposed module. *Prima facie*, these provisions seem reasonable. However, given the complex nature of the SAU and Macquarie's concern with the deemed acceptance of a replacement module as discussed above in Macquarie's response to the previous question, Macquarie considers that it would appropriate for the ACCC to have the discretion to extend its decision making time beyond six months if it considered an extension necessary.



12. Do the processes for submission of proposed replacement modules provide an incentive for NBN Co to submit reasonable terms and conditions in proposed replacement modules?

Macquarie is concerned that the processes for submission of proposed replacement modules may not provide an incentive for NBN Co to submit reasonable terms and conditions in proposed replacement modules. In particular, Macquarie is concerned that the deemed acceptance of some parts of the proposed replacement module, e.g., proposed reference offers and the LTRCM proposal would provide NBN Co with an incentive to submit a proposal skewed in its favour. For example, if NBN Co sought to have a LTRCM mechanism skewed in its favour it could submit a complex proposal which would not allow the ACCC sufficient time to decide whether to accept or reject the proposal which would then enable the LTRCM part of the proposal to be deemed accepted. Macquarie is strongly of the view that the deemed acceptance provisions are not reasonable.

13. Are there any aspects of Module 1 that are not proposed to be reviewed, but which should be? Are there aspects of Module 1 that are proposed to be reviewed but which should not be?

As noted in its response to question 10, Macquarie is concerned by the limited scope of the midpoint review of Module 1, i.e., that the review is limited to non-price terms and multi-lateral processes thus excluding reviews of NBN Co's products, service quality and prices. Macquarie is particularly concerned that prices for business grade services which are scheduled for release in 2013, 2014 and 2015 are not subject to ACCC scrutiny *per se*. Moreover, they are not subject to NBN Co's (limited) review at this time.

For the avoidance of doubt, Macquarie does not believe that the scope of the midpoint review should be made any narrower. As per its response to question 8, Macquarie considers that the SAU should allow the ACCC to periodically review NBN Co's prices and pricing structures with a view to ensuring that the key requirements of the pricing structure are on track.

14. Do the review timeframes and criteria, particularly the processes surrounding acceptance or rejection of NBN Co's proposals, provide sufficient time for interested parties to participate in ACCC consultation processes about the reviews?

Macquarie understands that under Schedule 1K, clause 1K.2.3(a) and clause 1K.3.3(a) the ACCC has 60 business days (or approximately three elapsed months) to review NBN Co's proposals in respect of customer engagement and non-price terms, service levels and regulatory recourse, consult with relevant persons and to decide whether or not to accept proposals. Macquarie is concerned that this may not provide sufficient time for the ACCC to adequately complete these tasks. Accordingly, Macquarie considers that the SAU should allow the ACCC to have the discretion to extend its decision making time beyond 60 business days if it considered an extension necessary.



15. *Is it clear how the ACCC's decisions apply when the ACCC does not accept NBN Co's proposals and makes substitute terms?*

Macquarie understands that on the ACCC's acceptance of NBN Co's proposals under Schedule 1K whether or not such acceptance includes the ACCC's own decision on substitute terms, NBN Co undertakes only to comply with the review outcomes for the remainder of Module 1. This means that NBN Co does not commit to make appropriate changes to the SAU or to access agreements or failing that to ensure pass-through of review outcomes to the next round of SFAAs. Accordingly, Macquarie considers the absence of NBN Co commitment concerning these matters to be unreasonable.

16. *Are there any elements of NBN Co's service descriptions that are unclear or incomplete?*

Macquarie notes that NBN Co's service descriptions are very broadly defined. This means that NBN Co will effectively have the discretion to define the services provided over the NBN to the exclusion of ACCC power to determine such services. Given NBN Co's monopoly position, it is essential that the ACCC retains the power to require NBN Co to amend existing service definitions or to add new services if NBN Co is failing to respond to changes in technology or market demand.

Macquarie notes that the description of the NBN Co Access Service includes references to other "components". It is unclear to Macquarie if the broadly defined service descriptions may provide an opportunity for NBN Co to exploit. For example, could NBN Co change the features of a certain component to the disadvantage of access seekers and argue that the change in the component is not a change to the service *per se*?

Macquarie notes that the Standard NFAS Installation as set out in Schedule 1D Annexure 1 is defined as comprising a Drop Fibre of no more than 60 metres. Macquarie considers this to be too limiting particularly in respect of end-users who are located in multi-rise buildings. The impact of this is that it is likely to place all installations in such locations into the non-standard installation category which carries a charge defined as "Hourly Labour Rate plus cost of materials". This compares to a standard installation charge of \$0.

Macquarie also notes with some concern that while the SAU sets out non-reference prices for the AVC TC2 and TC3 there is as yet no technical specification for these services. Macquarie considers this unreasonable.

17. *Does NBN Co's proposed service description for the NBN Access Service describe a service that is 'end-to-end' across the NBN?*

Macquarie believes that NBN Co's proposed service description for the NBN Access Service does indeed describe a service which is 'end-to-end' across the NBN. That is, the NBN Access Service provides a pathway between the end-users' premises and a point of interconnection ("**POI**") which defines the boundaries of the NBN.



18. Are there Ancillary Services supplied by NBN Co which should be included but fall outside the scope of the service descriptions included in the SAU?

At this time, Macquarie is not aware of any Ancillary Services supplied by NBN Co which should be included but fall outside the scope of the service descriptions included in the SAU.

19. Is it clear which commitments in the SAU do and do not apply to Ancillary Services and the Facilities Access Service?

At this time, Macquarie is not aware of any concerns with the SAU's commitments to Ancillary Services and the Facilities Access Service.

20. Do NBN Co's proposed service descriptions meet the minimum elements previously specified by the ACCC for a bitstream access service?

It would appear to Macquarie that NBN Co's proposed service descriptions meet the minimum elements previously specified by the ACCC for a bitstream access service. The key cause for concern in the SAU in this context is the very broad field that NBN Co seeks to cover in its service descriptions. That is, ALL access services are caught by the 30 year lock-in which means regulatory oversight of ALL of these services is neutralised.

21. Do the product development and withdrawal requirements in the SAU encourage the efficient use of, and investment in, the NBN and do they promote downstream competition and downstream investment? In your response, please consider:

- whether the product development requirements are likely to encourage NBN Co to develop products that align with customer preferences over the SAU term;*
- whether the PDF Processes provide for effective and transparent engagement between, and appropriately balance the interests of, NBN Co and its customers (including access seekers);*
- whether the product withdrawal requirements provide sufficient certainty as to the availability of products over the SAU term;*
- the effect of excluding products on the Initial Product Roadmap from the product development and withdrawal requirements; and*
- the interaction with the other SAU commitments relating to the development of terms and conditions for products, and the broader Part XIC regulatory regime (including the declaration provisions and the ACCC's powers to make Access Determinations and Binding Rules of Conduct).*

Macquarie has various points of concern with the product development and withdrawal provisions in the SAU. These include:

- the apparent exclusion of end-users and consumer advocacy groups from the PDF given that the fundamental policy objective for the telecommunications sector is to promote the LTIE; and



- the exclusion of products on the Initial Roadmap from the PDF given that this includes products which are yet to be fully defined, e.g., “Enterprise Ethernet Services”.

Macquarie notes that NBN Co is of the view that the SAU does not preclude the participation of end-users and consumer advocacy groups from the PDF. In the absence of any such commitment in the SAU, Macquarie is of the view that the participation of end-users and consumer advocacy groups in the PDF is purely at NBN Co’s discretion.

22. Should the SAU require NBN Co to consider the views of end-users in the PDF and before withdrawing products?

Macquarie understands from Schedule 11 that NBN Co will only permit customers to participate in the PDF. *Prima facie* this means that end-users and consumer advocacy groups are not able to participate. Macquarie notes that NBN Co is of the view that the SAU does not preclude the participation of end-users and consumer advocacy groups from the PDF. Macquarie believes that end-users and consumer advocacy groups should have the opportunity to participate in the PDF and this opportunity should be explicit in the SAU. This would be consistent with the fundamental policy objective for the telecommunications sector of promoting the LTIE.

23. Do NBN Co’s proposed price structures promote efficient use of and investment in infrastructure and do they promote competition in downstream markets? In your response, please have regard to:

- the nature of NBN Co’s costs, which are largely fixed and shared costs;
- the initial under-recovery and subsequent over-recovery of costs; and
- the effect of the proposed price structures on NBN Co’s ability to recover its efficient costs.

Macquarie appreciates the complex nature of NBN Co’s price structure and the need to balance multiple and often competing requirements including recovering NBN Co’s costs over the long-term, offering services at affordable prices, providing services efficiently and providing long-term pricing stability and certainty. Macquarie, does, however, have significant concerns with key aspects of NBN Co’s proposed price structures.

Macquarie has several concerns with the pricing of the CVC. These include:

- the CVC (TC2 and TC3) is available in 50 Mbps increments only which means that an access seeker who only wants 20 Mbps must acquire and be charged for a 50 Mbps service. Accordingly, there should be more flexibility in the pricing structure which allows the service to be offered in smaller increments;
- a similar but not as pronounced situation applies to CVC (TC1 and TC4) which is only available in 5 Mbps increments; and
- NBN Co’s “statement of intent” to annually review CVC pricing in Module 1 should be a firm commitment to review and such review should extend into Module 2.

In addition, other concerns that Macquarie has with NBN Co’s proposed price structures include:



- there is no regulatory oversight of NBN Co's pricing of new products. This is particularly concerning given that NBN Co's business services, medium services and enterprise Ethernet services are yet to be fully developed and because they are on NBN Co's Initial Roadmap they are excluded from the PDF;
- there is no regulatory oversight of the operation of the CPI-1.5% price control;
- there is no regulatory oversight in the situations where NBN Co increases the price of \$0 non-reference offers or introduces "other charges" for a non-reference offer;
- there is evidently no mechanism within the SAU for the ACCC to periodically review NBN Co's prices and pricing structures with a view to ensuring that the key requirements of the pricing structure are on track; and
- the AVC (TC1) pricing for voice services puts ISDN and SIP trunk pricing above current market levels for equivalent services.

24. Do the initial set of reference offers in Module 1 represent the products required to allow access seekers to provide entry-level residential and business grade services to end-users?

Macquarie considers the initial set of reference offers in Module 1 are sufficient to allow access seekers to provide entry-level residential and business grade services to end-users.

25. Is the process for updating the reference offers throughout Module 2 likely to ensure that NBN Co's reference offers continue to represent those products that are required to provide entry-level residential and business grade services to end-users?

Macquarie understands that the reference offers as set out in Module 1 are effectively locked-in for the Initial Regulatory Period. That is, they are not subject to the Module 1 midpoint review. For Module 2, the reference offers will be reviewed by NBN Co alone and updated reference offers submitted to the ACCC for approval. While Macquarie appreciates the need for price stability, it would prefer that the reference offers were subject to the Module 1 midpoint review and that access seekers were involved in such review.

26. Does NBN Co's proposed approach strike an appropriate balance between locking-in price paths to provide certainty and allowing for price levels and structures to be reviewed over time?

Macquarie does not believe that NBN Co's proposed approach strikes an appropriate balance between locking-in price paths to provide certainty and allowing for price levels and structures to be reviewed over time. The reasons underlying Macquarie's view on this matter are many and include:

- the effective absence of any formal commitment to review NBN Co's prices over the term of the SAU;
- the absence of any regulatory oversight on NBN Co's discretion to set prices for new products;
- NBN Co's failure to "commit" to a review of CVC pricing, i.e., NBN Co only offers an "intention" to review; and



- the AVC (TC1) pricing for voice services puts ISDN and SIP trunk pricing above current market levels for equivalent services (as noted in Macquarie's response to question 23 above).

27. Does the level of the initial prices for reference offers provide for a smooth migration of access seekers to the NBN?

In general, Macquarie has no concerns with the level of the initial prices for reference offers as set out in Module 1. However, Macquarie is concerned with:

- the pricing of the AVC (TC2 and TC3) as noted in Macquarie's response to question 16 above;
- the pricing of the AVC (TC1) as noted in Macquarie's response to question 23 above; and
- the lack of any effective regulatory oversight of initial products, especially the services that are not focussed on the transition from copper to fibre.

28. Does the level of the CPI-1.5% price control raise any concerns?

Macquarie reserves its position on this matter.

29. Should there be an opportunity for NBN Co's maximum regulated prices to be 're-balanced' over time as customer preferences change?

Yes. Given the inherent uncertainty of NBN Co's operating environment Macquarie believes that there should be an opportunity for NBN Co's maximum regulated prices to be 're-balanced' over time as customer preferences and other market features change. This could be achieved as part of an ACCC task to periodically review NBN Co's prices and pricing structures as noted in Macquarie's response to question 23 above.

30. Does the statement of intention on CVC prices provide access seekers with sufficient certainty over price paths over time? Should there be an opportunity for CVC prices to be reviewed as part of a broader 're-balancing' of prices?

As noted in its response to question 23 above, Macquarie does not believe that NBN Co's statement of intent on CVC prices provides access seekers with sufficient certainty over price paths over time. That is, Macquarie believes that NBN Co's "statement of intent" to annually review CVC pricing in Module 1 should be a firm commitment to review and such review should extend into Module 2. After all, the SAU is meant to be a statement of commitments and obligations rather than a statement of intentions.



31. Does the SAU provide NBN Co with incentives to set prices for new products that are both reflective of customers' willingness to pay and allow NBN Co to recover its efficiently incurred costs?

Macquarie notes NBN Co's mission statement which refers to NBN Co "operating a wholesale-only, open-access network, and making wholesale services available to retail service providers on non-discriminatory terms".⁴ While Macquarie supports this mission statement in general terms, there is nothing in NBN Co's Statement of Corporate Intent which requires NBN Co to either:

- promote competition in downstream markets; or
- promote the LTIE.

In the absence of such requirements it would appear that NBN Co would have some flexibility and incentive to favour some RSPs over other RSPs. Given the diversity among RSPs in terms of market size, market segmentation and service differentiation etc there is every possibility that NBN Co would favour some RSPs over other RSPs where there might be a mutual interest or self interest to do so. The existence of the non-discrimination provisions are not effective in this context and are therefore not sufficient to deal with such competition issues.

32. Do the initial pricing principles provide an appropriate constraint on NBN Co in its setting of initial prices for new products?

No. NBN Co must have regard to a range of pricing principles when it sets prices for new services. Macquarie notes that these pricing principles do not include requirements to:

- promote competition in downstream markets; or
- promote the LTIE.

In the absence of pricing principles which reflect such requirements, Macquarie has some doubt that the initial pricing principles provide an appropriate constraint on NBN Co in its setting of initial prices for new products. That is, NBN Co would appear to have some flexibility and possible incentive to favour some RSPs over other RSPs. Macquarie would prefer to see the pricing principles expanded to include the requirements noted above. As noted in its response to question 2 above, Macquarie is very concerned that the SAU excludes the ACCC from exercising any oversight over NBN Co's pricing of services and the pricing of new services in particular over the 30 year life of the SAU. Macquarie considers this situation to be unreasonable.

33. Will the processes by which NBN Co will consult with customers on prices for new products ensure that prices are set reasonably over the proposed term of the SAU?

Macquarie understands that the processes by which NBN Co will consult with customers on prices for new products is essentially confined to the PDF. This means that:

⁴ NBN Co, Statement of Corporate Intent 2012 2015, 9 October 2012



- products on the Initial Roadmap are excluded from the PDF process;
- participation of end-users and consumer advocacy groups in consultation appears to be excluded;
- the ACCC has no role whatsoever in the PDF process; and
- NBN Co itself is the final decision maker.

On the basis of the above factors and given that NBN Co has no incentive to promote competition or the LTIE Macquarie cannot be confident that prices for new products are likely to be set reasonably over the proposed term of the SAU.

34. Is the process by which NBN Co may increase prices above what is permitted under the price controls in response to a tax change event reasonable?

Prima facie the process by which NBN Co may increase prices above what is permitted under the price controls in response to a tax change event appears reasonable. That is, it would seem reasonable that NBN Co would be able to pass on to its customers the effect of a change in tax over which NBN Co itself has no control. However, there are some relevant factors which give rise to some concerns including:

- the uncertain nature of a tax change event;
- the uncertain affect on NBN Co arising from such an event; and
- the assumption of asymmetry, i.e., that a tax change event necessarily results in an increase in NBN Co's costs, i.e. a decrease in cost does not seem to be contemplated.

Given these factors, Macquarie is of the view that an NBN Co proposal to give effect to a tax change event should be subject to ACCC oversight.

35. Are there any concerns with NBN Co's ability to change prices of individual products more than once in a single year?

Macquarie understands that the SAU provides a framework within which maximum regulated prices are set. To the extent that NBN Co can set prices for its products below the maximum, NBN Co has a free hand to increase prices to the maximum whenever it chooses. In order to promote price stability within this framework, Macquarie suggests that prices for individual products:

- should not increase by more than five *per cent* in a 12 month period; and
- should not increase on more than one occasion in a 12 month period.



36. Are the methods for calculating the building block components of the annual revenue requirement likely to result in values that reasonably reflect the cost of each component over the term of Module 1? In particular:

- Is it appropriate that the WACC is calculated by applying 350 basis points to the ten-year government bond rate? Is the 350 basis point risk margin likely to reasonably reflect NBN Co's systematic risk over the term of Module 1? Should the WACC methodology be reviewed by the ACCC during Module 1?
- Is the methodology for calculating the tax allowance likely to result in values that reasonably reflect NBN Co's tax liability over the term of Module 1?
- Is the methodology for calculating the annual construction-in-progress allowance likely to result in values that reasonably reflect NBN Co's financing costs associated with assets in construction?

WACC

Macquarie notes the simplicity of NBN Co's approach to the WACC which is calculated as the risk free rate plus a 350 point premium. Macquarie is, however, concerned about the following aspects of NBN Co's approach to the WACC:

- the approach results in a higher WACC than would otherwise apply which seems at odds with NBN Co's public ownership and NBN Co's role as a legislated monopoly which suggest a low WACC; and
- the absence of a mechanism for the periodic independent review of the WACC.

Tax Allowance

Prima facie, Macquarie has no concerns with NBN Co's methodology for the calculation of the tax allowance. However, Macquarie would suggest that the tax allowance should be periodically adjusted to the extent that there is any difference between NBN Co's and the Australian Taxation Office's respective calculations of NBN Co's assessable income and allowable deductions.

Construction in Progress

Macquarie has no concerns with NBN Co's methodology for the calculation of construction in progress.

37. Is it appropriate for NBN Co to calculate annual revenue requirements without any explicit role for the ACCC to review or approve these calculations?

No. Macquarie is strongly of the view that the ACCC should have an explicit role to review or approve NBN Co's calculations of its annual revenue requirements. Without such independent oversight, access seekers cannot be confident that NBN Co's calculations are necessarily reasonable. That is, without any process for testing NBN Co's calculations, NBN Co has little incentive to ensure that they are reasonable and appropriately calculated.

At a more general level, Macquarie is concerned that there is insufficient protection within the SAU to ensure that NBN Co operates efficiently over the full term of the SAU. In particular,



the incentive mechanisms and prudency provisions provided in the SAU are not subject to on-going ACCC oversight.

Macquarie's concern that NBN Co may not operate efficiently is based on the following considerations:

- NBN Co is a Government owned entity and has certain responsibilities to undertake non-commercial activities;
- NBN Co is provided with legislative protection from competition and has made commercial deals with Telstra and SingTel Optus to remove their respective fixed access network services; and
- NBN Co's management will change over the 30 year term of the SAU such that different management teams will have little incentive to deal with issues that may arise in the future or may have arisen in the past, for example, NBN Co's current management team tasked with building the NBN is unlikely to still be around in ten year's time when the task of recovering the cost of the network begins.

38. Should the reporting requirements provide the ACCC with any additional information to help assess NBN Co's compliance with these methodologies?

Yes. Macquarie understands that NBN Co's Module 1 reporting requirements could be very narrowly interpreted resulting in minimal information flow to the ACCC. For example, NBN Co could simply report single values for forecasts of its operating expenditure, the risk free rate, regulated revenue etc. Macquarie submits that it is not reasonable for NBN Co to report forecast financial information to the ACCC without (i) an explanation of the assumptions made to arrive at such single values and (ii) a statement from NBN Co's Chief Financial Officer that such values and assumptions are of themselves reasonable and appropriately calculated.

39. Are there any elements of the processes contained in Modules 0 and 2 for developing, submitting and assessing revenue forecasts that raise concerns?

Macquarie has concerns with key aspects of the overall forecasting process, including:

- the deemed acceptance of the LTRCM proposal if the ACCC has not made a decision on NBN Co's replacement module within the required timeframe; and
- the absence of any overall review of NBN Co's progress at the end of Module 1 and consideration of whether or not the circumstances at that time remain appropriate for a LTRCM proposal to proceed as is currently contemplated.



40. Are the criteria contained in Module 2 for developing forecasts of each building block component and the forecast RAB reasonable? In your response, please consider:

- the criteria for developing capital and operating expenditure forecasts (discussed in section 6.3.2);
- the criteria for developing forecast depreciation, including the use of a straight-line approach;
- the criteria for determining the forecast WACC, including the use of the capital asset pricing model and a benchmarking approach; and
- the criteria for determining the tax allowance.

Macquarie wishes to reserve its position in relation to this matter.

41. Is NBN Co's proposed approach to determining expenditure levels during the network rollout period reasonable? In your response, please consider:

- the nature and strength of the incentives on NBN Co created by its operating environment (for example, revenue uncertainty) and the effect of SAU price controls; and
- whether the prudence requirements in Module 1 achieve the appropriate balance between prescription and flexibility.

Macquarie understands that NBN Co will essentially accumulate its capital and operating expenditure during the Module 1 network rollout period. To the extent that this expenditure has been efficiently incurred, NBN Co will recover this over the subsequent period of the SAU. *Prima facie* this appears to be reasonable. However, Macquarie is concerned that the final arbiter of whether NBN Co's expenditure has been efficiently incurred is essentially NBN Co itself. While NBN Co does face revenue uncertainty, this would appear to have limited effect on dampening its expenditure given that NBN Co is fully funded by the Federal Government in line with its policy objectives. Moreover, deeming potentially large categories of expenditure as prudent seems contrary to the notion that NBN Co's recoverable expenditure is confined to that which is "efficient". That is, the threshold of determining "efficiency" in this context appears to be too low.

It is possible that if the ACCC considered that NBN Co's expenditure was not efficient it could seek enforcement action against NBN Co for a breach of the SAU. However, any such action would only be likely to be pursued by the ACCC if there was a material cost blow out and if the ACCC considered that it was appropriate to pursue such action with regard to the likely costs of action, its impact and the likelihood of success etc. Macquarie would have more confidence that NBN Co's expenditure was efficiently incurred if all of its expenditure categories were subject to some form of independent assessment.



42. Does the proposed approach in Module 2 and the replacement modules encourage efficient investment in, and the economically efficient operation of, the NBN? In your response, please consider:

- the criteria and process for developing forecasts of capital and operating expenditure, including NBN Co's incentives to inflate forecasts;*
- the strength of the incentives created by the RAB roll-forward methodology, including NBN Co's ability to recover its actual capital expenditure;*
- the implications of NBN Co determining the length of the regulatory cycle; and*
- any additional incentives created by the SAU and NBN Co's operating environment.*

Macquarie notes NBN Co's proposed approach in Module 2 for developing forecasts and the implications arising from NBN Co's incentives. That is, the approach appears consistent with a utility-style regulatory approach of which the consequences are that a regulated firm's behaviours and incentives are well understood and therefore predictable. This does, however, require that effective regulatory oversight of these processes is in place and is ongoing.

43. Do the Network Design Rules reflect prudent and efficient network design? In your response, please consider:

- the network design requirements specified by the Government;*
- whether the scope of the Network Design Rules is appropriate, including whether it contains all the network elements necessary to provide a reasonable basis for assessing all of NBN Co's capital expenditure during the network rollout; and*
- whether the Network Design Rules are described in sufficient detail that an independent person can determine whether NBN Co's capital expenditure complies with these rules.*

Macquarie is not able to provide significant comment on this matter at this time. Concerns with the Network Design Rules and the processes by which they may be updated by NBN Co will most likely arise during the early years of the NBN Co's operation. This again highlights the uncertainty around the possible events and issues with which RSPs may be presented.

Notwithstanding the above, Macquarie has some concern with Figure 25 of the Network Design Rules which concerns Point-to-Point Standalone Links. In particular, it is not clear to Macquarie why NBN Co needs capacity on this router given that (i) all Tasmanian connections are delivered to Hobart and Launceston POIs and (ii) RSPs are responsible for capacity across Bass Strait.

44. Are the various circumstances in which NBN Co can update the Network Design Rules reasonable?

Refer to Macquarie's response to the previous question.



45. Are there deemed prudent and permitted variations categories that should not be included in the SAU?

Macquarie considers that NBN Co's proposal to simply assume that certain categories of its operating and capital expenditure are efficient is not reasonable. In particular, such categories include potentially large expenditures such as the Telstra Arrangements and the Optus Arrangements. It would appear somewhat futile to confine consideration of efficiency to limited categories of expenditure if material expenditure items are exempt from such consideration. Such concern is exacerbated to the extent that the deemed prudent categories include expenditure that directly concerns two of NBN Co's largest customers.

46. Are the categories sufficiently defined to ensure that they encompass only efficient expenditure?

No. Macquarie does not believe that the deemed prudent categories are sufficiently defined. For example, clause 1F7.2(j) of Schedule 1F specifies as deemed prudently incurred operating expenditure "a requirement specifically imposed on NBN Co by law or by the Shareholder Ministers". This seems to be a particularly broadly defined expenditure category capable of including almost any item of NBN Co's operating expenditure.

47. The SAU requires NBN Co to include the terms and conditions in Annexures 1 to 3 of Schedule 1H and Annexure 1 of Schedule 1J into SFAAs. Should the SAU require NBN Co to comply with the substance of these terms and conditions? That is, should the terms in these Annexures be enforceable under the SAU as well as under contract?

Macquarie is of the view that the SAU should require NBN Co to comply with the substance of the terms and conditions in Annexures 1 to 3 of Schedule 1H and Annexure 1 of Schedule 1J. As currently drafted, the SAU commits only to including such terms and conditions into SFAAs as opposed to a commitment to comply which means that a breach of the terms and conditions by NBN Co would not be a breach of the SAU but rather treated as a contractual matter between NBN Co and RSPs. Macquarie considers that NBN Co's approach is disingenuous as it deliberately shields NBN Co from possible action that the ACCC could take if NBN Co were to breach these terms and conditions.

Macquarie is particularly concerned that the SAU sets out a service level regime in Annexure 1 of Schedule 1J. Macquarie does not consider it reasonable that the SAU set outs a detailed service level regime for the following reasons:

- by their nature, service level regimes are dynamic and should not be locked-down in a long-term SAU;
- service level regimes are more appropriately set in the context of commercial negotiation; and
- NBN Co's products and performance levels are largely untested and need not be locked-down at this time.

Macquarie would prefer that the SAU sets out a commitment to include a service level regime in SFAAs and the key principles and features of such a regime. Macquarie also notes in its



response to question 49 below that there are many concerns with the effectiveness of NBN Co's proposed service levels.

48. Does the ACCC's role in the midpoint review and in approving changes arising out of the multilateral SFAA forum provide assurance that the non-price terms and conditions are likely to remain reasonable during Module 1?

No. In line with its responses to questions 5 and 15 above, Macquarie is concerned by the limited commitment that NBN Co is prepared to make to the outcomes of the Module 1 midpoint review. That is, while NBN Co undertakes to comply with the review outcomes for the remainder of Module 1, NBN Co does not commit to make appropriate changes to the SAU or to access agreements or failing that to ensure pass-through of review outcomes to the next round of SFAAs. Macquarie considers that NBN Co's approach is disingenuous as it deliberately dilutes the effectiveness of the ACCC's role as an independent arbiter.

49. Would the proposed service level commitments enable access seekers to offer services to end-users of the same (or better) quality as they are being supplied today, for a comparable price? In your response please consider both residential and business grade services, and all dimensions of service levels.

Macquarie notes that the service levels documented in the SAU should only be read in conjunction with the reference consumer services offer. These service levels are insufficient for business services outlined in the Medium Business and Enterprise categories in the Initial Roadmap, e.g., Platform Interfacing Service Availability targets for 2012 accommodates approximately 9.6 days of accumulated downtime per quarter before targets are breached. In Macquarie's view, this is totally unacceptable for meeting the needs of any business end-user.

50. Do the proposed remedies create sufficient incentives for NBN Co to meet its proposed service level commitments and address issues that arise in a timely manner?

No. Refer to Macquarie's response to the previous question. In addition, Macquarie disagrees with clause 26 of Schedule 1J regarding pass-through of commercial rebates to end-users. Macquarie considers that it is not reasonable for NBN Co to dictate such terms concerning RSP relationships with end-users.

51. Is each metric expressed in a manner that is sufficiently clear? Is the manner in which each metric is measured clearly described?

Macquarie wishes to reserve its position in relation to this matter.

52. Will the commitments enable access seekers to meet their downstream regulatory obligations?

Macquarie wishes to reserve its position in relation to this matter.



53. Is the midpoint review process likely to ensure that the service level regime remains reasonable during Module 1?

Refer to Macquarie's response to question 48.

54. Will NBN Co's commitments in Module 2, and the service level regimes that will be included in replacement modules, result in the development of a service level regime that promotes the long-term interests of end-users and is reasonable over time?

Macquarie understands that NBN Co's Replacement Modules must include a service level proposal. In addition, NBN Co's Module 2 commitments include a requirement that service levels and service level rebates must apply to new services introduced during a regulatory cycle. As such, arrangements exist for ensuring that a service level regime will be in place for the duration of Module 2. However, it is not clear whether a service level regime for new services introduced during a regulatory cycle would continue from one regulatory cycle to the next.

In addition, Macquarie is concerned by:

- whether the ACCC has sufficient time to make a decision on a replacement module; and
- the deemed acceptance of the service level proposal if the ACCC has not made a decision on NBN Co's replacement module within the required timeframe.

As noted in its response to question 47, Macquarie is concerned in principle with the SAU setting out a detailed service level regime.

55. Do the risk management terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?

Macquarie wishes to reserve its position in relation to this matter.

56. Is it clear to whom and in what circumstances the risk management provisions in Annexure 3 to Schedule 1H apply?

Refer to Macquarie's response to the previous question.

57. Is the midpoint review process likely to ensure that the risk management terms remain reasonable during Module 1?

Refer to Macquarie's response to question 48.



58. Do the confidentiality terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?

At this time, Macquarie has no evident concerns with the confidentiality terms as set out in the SAU.

59. Is it clear to whom and in what circumstances the confidentiality provisions in Annexure 2 to Schedule 1H apply?

Refer to Macquarie's response to the previous question.

60. Is the midpoint review process likely to ensure that the confidentiality terms remain reasonable during Module 1?

Refer to Macquarie's response to question 48.

61. Do the IPR terms balance the parties' interests and enable them to efficiently operate and invest in their respective networks, services and facilities?

At this time, Macquarie has no evident concerns with the IPR terms as set out in the SAU.

62. Is it clear to whom and in what circumstances the IPR provisions in Annexure 2 to Schedule 1H apply?

Refer to Macquarie's response to the previous question.

63. Is the midpoint review process likely to ensure that the IPR terms remain reasonable during Module 1?

Refer to Macquarie's response to question 48.

64. Does the SAU ensure that customers will have access to a dispute resolution process for resolving contractual disputes that is independent and free from bias?

Macquarie considers that the SAU lacks a satisfactory dispute resolution process for resolving contractual disputes with NBN Co given that:

- NBN Co has greater opportunity to commence court proceedings than access seekers under Schedule 1H Annexure 1 clause 9.1;
- only NBN Co can nominate members of the Pool;
- only NBN Co can nominate a candidate for the role of Resolution Advisor; and
- only NBN Co can terminate the appointment of a Resolution Advisor or Pool member.



65. Are the Dispute Management Rules sufficient to resolve disputes between NBN Co and its customers? Should the parties have full access to court proceedings to resolve disputes?

Macquarie supports in principle the proposition that the parties have full access to court proceedings to resolve disputes as this is a basic right. This means that the dispute resolution process in the SAU should be put forward as a practical, convenient and timely alternative to court proceedings. To the extent that the SAU limits the scope for access seekers to commence court proceedings and thereby deny them a basic right, Macquarie considers the Dispute Management Rules to be unreasonable.

66. Is the midpoint review process likely to ensure that the dispute management terms remain reasonable during Module 1?

Refer to Macquarie's response to question 48.

67. Do the timeframes for the processes surrounding ACCC approval of changes to POIs give stakeholders sufficient opportunity to make submissions to the consultation process?

Macquarie does not consider there to be any significant concerns with the processes surrounding ACCC approval of changes to POIs.

68. Is the midpoint review process likely to ensure that the terms relating to the changing of POI locations remain reasonable during Module 1?

Refer to Macquarie's response to question 48.

69. Are NBN Co's proposed practices for providing information adequate for access seekers, particularly in regard to the notice periods for the closure of temporary POIs?

Macquarie does not consider there to be any significant concerns with NBN Co's proposed practices for providing information for access seekers.

70. Will the rollout information commitments assist access seekers in planning for the efficient operation of, and investment in, downstream services, networks and facilities? Is the specified information and frequency of publication of this information sufficient for these purposes?

At this point of the deployment of the network, Macquarie does not consider there to be any significant concerns with NBN Co's rollout information commitments. However, this situation may well change under changed roll-out conditions.



71. Is the midpoint review process likely to ensure that the terms relating to publication of rollout information remain reasonable during Module 1?

Refer to Macquarie's response to question 48.

Closing

Macquarie welcomes the opportunity to make this submission. Macquarie believes that the SAU does not pass the test of reasonableness and as such must be rejected by the ACCC. Macquarie's key concern with the SAU is the extent to which the ACCC is essentially locked-out of providing any oversight over a wide range of inherently uncertain processes and situations in a dynamic environment. Specific areas of concern include:

- ineffective pass-through of ADs and BROCs to access agreements and SFAAs over the full term of the SAU;
- the absence of any process by which NBN Co's products, service quality or prices are independently reviewed;
- the absence of any regulatory oversight on the pricing of new NBN Co products;
- deemed acceptance of parts of a replacement module where the ACCC has not made a decision in the allowed time;
- the absence of any regulatory oversight on NBN Co's annual revenue requirements;
- the absence of any regulatory oversight on NBN Co's calculations of its expenditure;
- the likelihood that material categories of NBN Co's expenditure will be deemed prudent; and
- the limited extent to which access seekers have rights to commence court proceedings.

Macquarie would welcome an opportunity to discuss the matters raised in this submission with you. Please do not hesitate to contact me should you have any queries.

Yours sincerely

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