

4 December 2012

Mr Michael Cosgrave
Group General Manager
Communications Group
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

By email: michael.cosgrave@accc.gov.au

Dear Michael,

NBN Co's Special Access Undertaking (SAU)

NBN Co welcomes the publication of the ACCC's Consultation Paper on 12 November 2012 (the **ACCC Consultation Paper**) on NBN Co's Special Access Undertaking (**SAU**), and would like to provide additional material on a number of matters that may assist the ACCC and industry respondents in their consideration of the SAU. The comments set out below are not intended to be a comprehensive response to the ACCC Consultation Paper, but rather are provided to address these specific matters that may benefit from further clarification. NBN Co may submit additional material in respect of these and other matters as the ACCC's assessment of the SAU progresses.

The contents of this letter are not commercial-in-confidence, and may be published by the ACCC.

Please do not hesitate to contact me if you have any queries.

Yours Sincerely



Caroline Lovell
Principal, Regulatory Affairs and Industry Engagement

1. Process for assessing replacement module applications (Section 3.1.2 of Consultation Paper)

The first dot-point on page 30 of the ACCC Consultation Paper states that "...some parts of the proposed replacement module ... are deemed to "apply" until the end of the proposed term of the replacement module". NBN Co submits that there are additional matters set out in the SAU which complete the set of arrangements in relation to the replacement modules.

The situation described in the ACCC Consultation Paper where some parts of the proposed SAU are deemed to apply would only occur if the ACCC rejected a replacement module proposal, but did not make an Access Determination (**AD**) or Binding Rule of Conduct (**BROC**) before or within 12 months of the Cycle Expiry Date. If the ACCC made an AD or BROC before the end of the Cycle Expiry Date, the terms of the AD or BROC would apply (to the extent not inconsistent with the terms and conditions of Modules 0 and 2 of the SAU) from the start of the next regulatory cycle. If the ACCC made an AD or BROC within 12 months of the Cycle Expiry Date, the AD or BROC terms would apply (to the extent not inconsistent with the terms and conditions of Modules 0 and 2 of the SAU) for all but the first year of the regulatory cycle, with NBN Co's terms only being deemed to apply for the first 12 months. These arrangements are depicted in Figure 4.2 of NBN Co's Supporting Submission that was lodged with the SAU.

NBN Co would also like to provide clarification on the ACCC's statement that "It appears that NBN Co is proposing that the deemed parts effectively become 'terms of the SAU' for the purposes of the Part XIC hierarchy". NBN Co acknowledges that it will be subject to the commitments made in the 'deemed' elements of the Replacement Module Application, except to the extent that an AD or BROC applies (to the extent not inconsistent with the SAU) in accordance with clause 4.10. Clause 4.10 sets out a set of rules to determine the precedence between the 'deemed' elements of the Replacement Module Application and any relevant AD or BROC made by the ACCC, depending on when the ACCC makes any such AD or BROC. Accordingly, NBN Co considers that the structure of the SAU in this respect should be viewed in its entirety, without dealing with terms in isolation as to whether they "become 'terms of the SAU' for the purposes of the Part XIC hierarchy".

2. Midpoint Review of Module 1 (Section 3.2 of Consultation Paper)

On page 33, the ACCC Consultation Paper states that "The SAU does not appear to specify criteria that the ACCC will have regard to in making this decision [to accept or reject the Engagement Proposal]".

While the SAU does not use the terminology of 'criteria' in respect of the ACCC's decision under clause 1K.2.3, this statement does not take into account the connection between the two aspects of the ACCC's decision in regard to the Engagement Proposal. NBN Co considers that the ACCC's decisions in clauses 1K.2.2(a)(i) and (ii) are linked, and are also to be read in conjunction with 1K.2.2(b).

NBN Co is required to provide the ACCC with information in relation to the operation of the Multilateral Processes and an Engagement Proposal setting out the changes NBN Co proposes to the Multilateral Processes (under clause 1K.2.1).

The first aspect of the ACCC's decision relates to the extent to which the Multilateral Processes are resulting in effective engagement between NBN Co and Access Seekers. The ACCC will make this decision having regard to a number of matters as set out in clause 1K.2.2(b).

The second aspect of the ACCC's decision relates to whether the ACCC will accept or reject NBN Co's Engagement Proposal. This second decision aspect would be informed by the first decision and any rejection (in whole or in part) of the Engagement Proposal would be on the basis that the Proposal did not adequately address any issues identified by the ACCC in regard to the effectiveness of the engagement between NBN Co and Access Seekers.

Accordingly, when determining whether to accept or reject NBN Co's Engagement Proposal, the ACCC would have regard to whether the Multilateral Processes are resulting in effective engagement between NBN Co and Access Seekers and, in so doing, will have regard to the matters in clause 1K.2.2(b).

3. Product withdrawal exemptions (Section 5.3 of Consultation Paper)

The ACCC notes on page 44 of its Consultation Paper that "...the products within the Initial Product Roadmap are also excluded from the product withdrawal requirements of the SAU" and then goes on to discuss the implications of this. NBN Co acknowledges that this is the effect of the drafting in Module 1I (clause 1I.1.3) and 2E (clause 2E.1.3). However, NBN Co had only intended to exempt products on the Initial Product Roadmap from the commitments in relation to development and introduction (for the reasons set out in NBN Co's Supporting Submission), and had not intended to exempt those products from the product withdrawal commitments. Accordingly, NBN Co intends to propose amended drafting for the SAU to remove this exemption.

4. Updating of Reference Offers (Table 1 – page 49)

The ACCC Consultation Paper states that "...NBN Co can, *if it chooses*, seek to change the reference offers" (emphasis added). This statement does not accurately represent the commitment being made by NBN Co, because clause 4.7(a) of the SAU *requires* NBN Co to make a Reference Offer Proposal as part of a Replacement Module Application that is in accordance with Schedule 2B (Reference Offers). As such, NBN Co submits that it does not have any discretion over whether or not to update the product composition of a Reference Offer (noting that some Reference Offers may remain unchanged after applying the criteria in Schedule 2B).

5. Introduction of a new Price for Zero-Priced Reference Offers, Zero-Priced Non-Reference Offers and Zero-Priced Other Charges (Table 1 – page 50)

In relation to introducing a new Price for a previously Zero-Priced Reference Offer or Zero-Priced Other Charge associated with a Reference Offer, the ACCC Consultation Paper states that "NBN Co can introduce a new price under certain circumstances. If NBN Co introduces a price for a zero-priced reference offer (or an 'other charge' that is associated with a reference offer) and the ACCC subsequently makes an Access Determination or Binding Rules of Conduct relating to that price, the SAU commits NBN Co to including the regulated price in the next SFAA. This is the case in both Module 1 and Module 2".

NBN Co believes that this statement needs to be clarified, as follows:

- The SAU provides in clause 1C.4.5(b)(ii) that if an AD or BROC is made by the ACCC within a 3 month period after NBN Co notifies Access Seekers of the intention to introduce a new Price for a Reference Offer that is Zero-Priced, the new Price determined by the ACCC in the AD/BROC will apply.
- If the ACCC chooses to intervene within the 3 month period, then the new Price determined in the AD or BROC will become the Maximum Regulated Price for the Reference Offer (or Other Charge associated with a Reference Offer) in that Financial Year. These arrangements apply immediately (at the end of the notice period for the new Price) rather than only flowing through into the next SFAA.

In relation to introducing a new Price for a previously Zero-Priced Non-Reference Offer or Zero-Priced Other Charge not associated with a Reference Offer, the ACCC Consultation Paper states that "NBN Co can introduce a price under certain circumstances. That new price must be set having regard to certain

'pricing principles' in the SAU, as above. If NBN Co introduces a price for a zero-priced non-reference offer (or an 'other charge' for a non-reference offer), and the ACCC subsequently makes regulated terms relating to that new charge, the SAU does not commit NBN Co to including the regulated price in the next SFAA. This is the case in both Module 1 and Module 2".

NBN Co believes that this statement needs to be clarified, because different arrangements apply in regard to Non-Reference Offers and Other Charges not associated with a Reference Offer:

- For a Zero-Priced Non-Reference Offer, NBN Co can introduce a new Price (in *any* circumstances, rather than only under *certain* circumstances), and in determining that new Price *must* have regard to the Initial Pricing Principles and publish a pricing rationale statement.
- For a Zero-Priced Other Charge not associated with a Reference Offer, NBN Co can introduce a new Price under certain circumstances (the same as apply in regard to Zero-Priced Reference Offers and Zero-Priced Other Charges associated with Reference Offers). Clause 1D.4.3(c) commits NBN Co to introducing the new Price consistent with clause 1D.6, which is the intended operation of the SAU. However, NBN Co acknowledges that this is not clear from the drafting of 1D.6. NBN Co intends to propose revised drafting for 1D.6 that clarifies this intention, which will then mean that a new Price introduced for a Zero-Price Other Charge not associated with a Reference Offer would need to have regard to the Initial Pricing Principles and for NBN Co to publish a pricing rationale statement.
- In relation to a Zero-Priced Non-Reference Offer or Zero-Priced Other Charge not associated with a Reference Offer, any new Price notified by NBN Co is not subject to regulatory recourse.

In addition, on page 50, the ACCC makes a statement about how Prices for Reference Offers are set in Module 2 - "In Module 2, if the reference offer is changed, the new reference offer's price will be that product's price before it became a reference offer."

This statement needs to be clarified – the *Maximum Regulated Price* for the new Reference Offer will be determined by applying the *Individual Price Increase Limit* to that product's Price in the financial year *before* it became a Reference Offer. That is, if the product that becomes the Reference Offer was priced at \$30 in the financial year before it became a Reference Offer, the Maximum Regulated Price for that product when it becomes a Reference Offer would be $\$30 \times (1 + \text{CPI}) \times (1 - 1.5\%)$. NBN Co could continue to charge \$30 for the product as a Reference Offer, less than \$30, or up to $\$30 \times (1 + \text{CPI}) \times (1 - 1.5\%)$.

6. Dispute Management (Section 7.4 of Consultation Paper)

The ACCC Consultation Paper (page 89) states that only NBN Co can terminate a Resolution Advisor or Pool Member, and that the ACCC may veto a termination. For completeness, NBN Co notes that the ACCC must also be notified of appointments of new Resolution Advisors and Pool Members (Schedule 1H Annexure 1, clauses 11.1(d)(iii) and 12.1(d)(iii)), and that the ACCC is able to veto such appointments (Schedule 1H Annexure 1, clauses 11.1(e) and 12.1(e)).