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7 November 2013

Louise Hird
Acting Director, Regulatory Strategy, Digital Economy and Coordination
NBN Engagement and Group Coordination Branch, Communications Group
Australian Competition & Consumer Commission
Level 35, 360 Elizabeth Street
Melbourne VIC 3000

By email

Revised application to vary digital radio access undertaking under section 118NH of the Radiocommunications Act 1992

Dear Louise,

We act for the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Adelaide, Brisbane, Melbourne, Perth and Sydney (each a **JVC** and together the **JVCs**).

We refer to our letter dated 4 November 2013 withdrawing our previous application to vary the digital radio access undertaking dated 19 June 2013.

The purpose of this letter is to request a formal variation to the digital radio access undertaking pursuant to section 118NH of the Radiocommunications Act 1992 (**Radiocommunications Act**). A copy of the variations sought by the JVCs to the digital radio access undertaking and associated access agreement is attached.

The variations sought by the JVCs to the digital radio access undertakings can be broadly categorised as follows:

- variations to reflect changes to the Multiplex Transmission Service arising from the upcoming deployment of on-channel repeaters in each capital city to improve the coverage and quality of digital radio services;
- variations to allow the JVCs to put new access agreements in place with access seekers;
- variations that seek to reflect the operational experience gained by the JVCs in the supply of the Multiplex Transmission Service to access seekers since the official launch of digital radio services in July 2009;

- variations to remove redundant provisions that no longer have effect or which are no longer required; and
- variations to reflect additional terms which the JVCs have agreed to incorporate into the digital radio access undertakings in response to the ACCC's consultation process in relation to the original application to vary dated 19 June 2013.

The information required by the ACCC under section 9 of the *Digital Radio Multiplex Transmitter Licences Procedural Rules 2008 (Procedural Rules)* is set out in Annexure 1.

1 Proposed amendments to access undertaking

1.1 Term of access agreements to be linked to term of access undertaking

The access agreement that forms part of the access undertaking and which serves as the basis for the legal relationship between the JVCs and access seekers expired on 31 December 2012.

While the JVCs and access seekers continue to act in accordance with the terms of their original access agreements, the JVCs propose to enter into new access agreements with access seekers.

The JVCs propose a variation to the access undertaking that would establish a term for each access agreement which is linked to the length of the digital radio access undertaking itself. If this variation is approved by the ACCC, the JVCs will enter into access agreements with access seekers on this basis.

Such an approach would provide increased contractual certainty for the JVCs and access seekers. Going forward, it will also reduce the administrative costs associated with the implementation of periodic extensions to the large number of access agreements that are currently administered by each JVC.

The JVCs propose to retain the existing termination rights in clause 16 of the access agreement. Therefore, notwithstanding the establishment of an extended term for access agreements, access seekers will still have the flexibility to terminate their access agreement for convenience on 30 days' notice.

The key variations proposed by the JVC to give effect to the extended term include amendments to clause 5 of the main body of the access agreement and the definition of "Effective Date". The proposed amendment to the definition of "Effective Date" would result in new access agreements that are executed with existing access seekers being backdated to 1 January 2013. This approach is supported by access seekers (including community broadcasters represented by the CBAA), is legally permissible¹ and has the effect of largely codifying the existing implied agreement that has existed between the JVCs and access seekers since 1 January 2013.

¹ For example, *Trollope & Colls Ltd v Atomic Power Constructors Ltd* [1963] 1 WLR 333. 61004947.1

1.2 Amendments to service description of Multiplex Transmission Service

To improve the coverage and quality of digital radio services, the JVCs are currently deploying on-channel repeaters in each capital city.²

The utilisation of on-channel repeaters will, amongst other things, result in each JVC transmitting the RF Service (i.e. a component of the Multiplex Transmission Service) using repeater multiplex transmitters as part of a single frequency network. This is not currently contemplated in the service description of the Multiplex Transmission Service, which currently assumes the use of a single main transmitter in each capital city.

To this end, the JVCs have proposed amendments to the service description of the Multiplex Transmission Service in Attachment A of the access undertaking to reflect the changed nature of the underlying transmission service that the JVCs will deliver following the rollout of on-channel repeaters in each capital city. The JVCs have also proposed some minor corrections or improvements to the service description.

In addition, the JVCs have proposed a new clause 9.6 in the access agreement which requires each party to ensure the safe operation of systems, equipment and facilities used by that party in connection with the Multiplex Transmission Service. It also creates an obligation on the parties to take reasonable steps to not damage, interfere with, or degrade the performance of the Multiplex Transmission Service or the systems, equipment and facilities that are used in connection with the Multiplex Transmission Service.

Based on feedback provided by the CBAA during the consultation process on the original application to vary, the JVCs have also included an additional clause 9.6(d) in the access agreement to clarify that nothing prevents an access seeker from operating its own systems, equipment and facilities in a manner of its own choosing provided that access seeker otherwise complies with clause 9.6.

1.3 Amendments to suspension provisions to take account of on-channel repeater rollout

The JVCs have entered, or will shortly enter, into site access agreements with various tower and facility owners to support the installation and operation of on-channel repeaters in each capital city. The entry by the JVCs into these downstream agreements will entail some further refinements to the suspension provisions of access agreements.

In particular:

- as the Multiplex Transmission Service will be delivered from a main transmission site and one or more on-channel repeater sites in each capital city, the suspension provisions need to clarify that it may be the all or part of the Multiplex Transmission Service that may be subject to suspension in certain circumstances (e.g. if supply from an on-channel repeater site is impacted but the main signal remains unaffected, this will be a part suspension of the service);
- as on-channel repeaters will typically be installed on multi-tenanted facilities that are owned or operated by third parties, the JVCs have had to agree to powering

² See the JVC Annual Report for FY 2011-2012 for further information. <http://transition.acc.gov.au/content/index.phtml/itemId/82288161004947.1>

down or suspending their services where the owner, operator or other tenant of a site needs access to the site and it is not otherwise feasible to access the site without powering down or suspending the Multiplex Transmission Service; and

- as an alternative to suspension of all or part of the Multiplex Transmission Service, the JVC may be able to power down the service in certain circumstances to address the relevant issue – our proposed amendments to clause 15 clarify that powering down can be used by the JVC as an alternative and in some cases is likely to constitute a more proportionate response than suspension.

1.4 Invoicing in advance

The access agreement currently contemplates that invoicing will occur on a monthly basis in arrears, unless agreed otherwise with Access Seekers. The JVCs have agreed to alternative invoicing arrangements with all access seekers (i.e. both commercial radio broadcasters and community broadcasters (represented by the CBAA)).

The Sydney JVC currently invoices on a monthly basis in advance, while the other JVCs invoice on a quarterly basis in advance. The JVCs have proposed an amendment to clause 12.3(b) of the access agreement to reflect these changes.

1.5 Removal of redundant provisions

The JVCs also propose removing redundant provisions from the access agreement. This includes provisions that no longer have effect (e.g. in respect of which the relevant obligation has already been discharged).

In particular:

- Clause 3 of the access agreement provides a simplified outline – these provisions are not intended to have operative effect and duplicate substantive provisions in other parts of the access agreement. As the access agreement is now well understood by access seekers, there is little, if any, utility in maintaining this clause;
- Clause 6.3 of the access agreement set out the process for incumbent commercial broadcasters to initially claim standard access entitlements as contemplated under section 118NQ of the Radiocommunications Act. The deleted provisions are no longer required as standard access entitlements have already been allocated to incumbent commercial broadcasters. Further, clause 6.3(d), which provides for a transfer of a standard access entitlement in accordance with section 118NQ(7) of the Radiocommunications Act, largely duplicates the relevant provisions of the Radiocommunications Act and may not necessarily reflect how transfers of standard access entitlements occur in practice between licensees in such a situation.³ The JVC considers it should be deleted from the access agreement.
- Clause 7 of the access agreement sets out the process for the allocation of excess-capacity access entitlements as contemplated under section 118NT of the Radiocommunications Act. Clauses 7.3(a) and 7.4(b) are no longer applicable and

³ For example, a transfer of a standard access entitlement may be addressed through the termination of an access agreement and entry into a separate access agreement with the licensee to which a standard access entitlement has been transferred. This is not contemplated by the current drafting.

were discharged by the JVC as part of the initial process that led to the auction of excess-capacity access entitlements in late 2009. The remaining provisions of clause 7 remain relevant and are required to address situations where excess multiplex capacity still remains (e.g. the Brisbane area) and other circumstances where an existing access seeker surrenders an existing excess-capacity access entitlement. Some additional refinements have also been made to clause 7.

- Clause 17.9 of the access agreement provides that the JVC may, subject to the ACCC's approval, propose changes to the liability regime to take account of changes in the JVC's upstream supply arrangements or the manner in which the JVC supplies the Multiplex Transmission Service. This clause is no longer required and any amendments to the access agreement would need to be made through a variation of the access undertaking under section 118NH of the Act in any event. Accordingly, the JVCs propose that this clause be deleted.

2 ACCC decision-making criteria

Section 6 of the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008 (ACCC Decision Making Criteria)* provides that, in deciding whether to accept an access undertaking, the ACCC must have regard to the matters in section 5 of the determination.

Section 5 of the ACCC Decision Making Criteria provides that, in deciding whether to accept an access undertaking, the ACCC must have regard to the following matters:⁴

- (a) whether the access undertaking complies with Division 4B of Part 3.3 of the Act;
- (b) whether the access undertaking unduly restricts competition in related markets;
- (c) whether the terms and conditions of access specified in the access undertaking are reasonable;
- (d) whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable;
- (e) whether the access undertaking includes an obligation on the licensee to not hinder access to services;
- (f) whether the terms and conditions of access specified in the access undertaking provide for a reasonable dispute resolution mechanism.

The JVCs submit that the proposed variations to the access undertaking are consistent with section 5 of the ACCC Decision Making Criteria. The proposed variations do not substantively alter the terms of access to the Multiplex Transmission Service previously approved by the ACCC.

The proposed variations have also been subject to consultation with the CBAA as part of the original application to vary. The CBAA has agreed or accepted changes that have been sought by the JVCs in this application to vary.

⁴ Section 5(1) does not, by implication, limit the matters to which regard may be had by the ACCC (section 5(2)).
61004947.1

Please feel free to contact us if you have any questions.

Yours sincerely

Webb Henderson

A handwritten signature in black ink, appearing to read 'Ara Margossian', with a long horizontal flourish extending to the right.

Ara Margossian
Partner

Annexure 1: Licensee details

| Procedural Rules requirement | Licensee details |
|--|--|
| The name of the licensee(s) | <ol style="list-style-type: none"> 1. Digital Radio Broadcasting Adelaide Pty Ltd (ACN 128 742 772) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901330; 2. Digital Radio Broadcasting Brisbane Pty Ltd (ACN 1280742 950) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901423 and 1901424; 3. Digital Radio Broadcasting Melbourne Pty Ltd (ACN 128 742 898) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901421 and 1901422; 4. Digital Radio Broadcasting Perth Pty Ltd (ACN 128 742 638) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901331; and 5. Digital Radio Broadcasting Sydney Pty Ltd (ACN 128 742 978) – Foundation Category 1 Digital Radio Multiplex Transmitter Licence Number 1901419 and 1901420. |
| The names of each member of the licensee that constitutes the eligible joint venture company | <ol style="list-style-type: none"> 1. Digital Radio Broadcasting Adelaide Pty Ltd: <ul style="list-style-type: none"> ▪ 5AD Broadcasting Company Pty Limited ▪ Austereo Pty Limited ▪ Festival City Broadcasting Pty Limited ▪ Nova 91.9 Pty Limited ▪ Southern State Broadcasters Pty Limited ▪ Triple M Adelaide Pty Limited 2. Digital Radio Broadcasting Brisbane Pty Ltd: <ul style="list-style-type: none"> ▪ ARN Communications Pty Limited ▪ Brisbane FM Radio Pty Limited ▪ Broadcasting Station 4IP Pty Limited ▪ Nova 106.9 Pty Limited ▪ Radio 4BH Brisbane Pty Limited ▪ Radio 4BC Brisbane Pty Limited |

| Procedural Rules requirement | Licensee details |
|------------------------------|---|
| | <ul style="list-style-type: none"> ▪ Today FM Brisbane Pty Limited ▪ Triple M Brisbane Pty Limited <p>3. Digital Radio Broadcasting Melbourne Pty Ltd:</p> <ul style="list-style-type: none"> ▪ 3UZ Pty Limited ▪ ARN Broadcasting Pty Limited ▪ Austereo Pty Limited ▪ Double T Radio Pty Limited ▪ Malbend Pty Limited ▪ Nova 100 Pty Limited ▪ Radio 1278 Pty Limited ▪ Radio 3AW Melbourne Pty Limited ▪ Triple M Melbourne Pty Limited ▪ Classic Rock 91.5FM Pty Limited ▪ Victorian Radio Network Pty Limited <p>4. Digital Radio Broadcasting Perth Pty Ltd:</p> <ul style="list-style-type: none"> ▪ Consolidated Broadcasting System (W.A.) Pty Limited ▪ DMG Radio (Perth) Pty Limited ▪ Perth FM Pty Limited ▪ Radio 6PR Pty Limited ▪ Radio 96FM Perth Pty Limited ▪ Radio Perth Pty Limited <p>5. Digital Radio Broadcasting Sydney Pty Ltd:</p> <ul style="list-style-type: none"> ▪ 2KY Broadcasters Pty Limited ▪ ARN Communications Pty Limited ▪ Commonwealth Broadcasting Pty Limited ▪ Harbour Radio Pty Limited ▪ Nova 96.9 Pty Limited |

| Procedural Rules requirement | Licensee details |
|--|---|
| | <ul style="list-style-type: none"> ▪ Radio 2cH Pty Limited ▪ Radio 2SM Pty Limited ▪ Radio 2UE Sydney Pty Limited ▪ Today FM Sydney Pty Limited ▪ Triple M Sydney Pty Limited ▪ Classic Rock 95.3 FM Pty Limited |
| The name of a person who is the contact for the licensee (the nominated person) | Mr Ara Margossian Partner Webb Henderson |
| The nominated person's contact details | Level 18, 420 George Street Sydney NSW 2000 Australia E: ara.margossian@webbhenderson.com P: +61 8214 3503 |
| Details of the services to which access is to be provided under the access undertaking (if applicable) | Multiplex Transmission Service, as described in Attachment A of the digital radio access undertaking. |
| Details of the services to which the variation relates (if applicable); | The variations relate to the Multiplex Transmission Service, as described in Attachment A of the digital radio access undertaking. |
| The reasons for which the licensee requires a variation to the access undertaking (if applicable). | <p>The proposed variation to the term of access agreement (clause 5) to align with the length of the access undertaking will provide increased contractual certainty for the JVCs and access seekers. It will also reduce the administrative costs associated with the implementation of periodic extensions to access agreements.</p> <p>The proposed variation to the service description for the Multiplex Transmission Service is necessary to reflect changes in the manner in which the JVC will deliver the underlying transmission service following the rollout of on-channel repeaters in each capital city.</p> <p>New clause 9.6 of the access agreement seeks to ensure that a party to the agreement cannot engage in conduct that negatively impacts on the operation of the Multiplex Transmission Service or the systems, equipment and facilities that are used in connection</p> |

| Procedural Rules requirement | Licensee details |
|------------------------------|--|
| | <p>with the service. New clause 9.6(d) clarifies the position of access seekers in relation to their own equipment, systems and facilities.</p> <p>The proposed amendments to the suspension provisions (clause 10) take account of the upcoming launch of on-channel repeater services in each capital city. This includes a right to power down services (instead of suspension), the right to suspend part of a service only and additional rights of suspension to take account of the downstream arrangements that the JVC will put in place with site owners.</p> <p>The proposed change to the invoicing provision (clause 12.3(b) of the access agreement) seeks to align the invoicing obligations of JVCs with that which has been agreed between the JVCs and access seekers.</p> <p>The proposed deletion of redundant provisions (including clause 3 and parts of clauses 6.3, 7.3 and 7.4, as well as clause 17.9 of the access agreement) is intended to remove provisions that no longer have operative effect or which have been discharged.</p> |