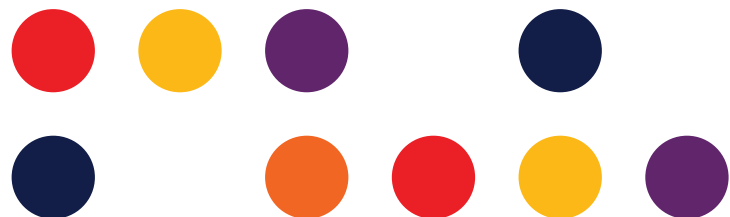


Superfast Broadband Access Service – access determination inquiry

ACCC

December 2021

Public submission



Submission

TPG Telecom Limited (**TPG**) welcomes the opportunity to respond to the ACCC's discussion paper titled "Superfast broadband access service – access determination inquiry" (November 2021) (**Discussion Paper**) regarding the final access determination (**FAD**) for the superfast broadband access service (**SBAS**). The SBAS is a declared Layer 2 wholesale access service that access seekers can use to supply fixed line superfast broadband services to end-customers.

TPG's responses to the specific questions raised in the ACCC's Discussion Paper are annexed.

In the Discussion Paper, the ACCC states that it does not favour applying an exemption framework to specific providers. The ACCC's view is that (at page 24-25):

If an exemption framework were to apply to a network provider, it may have networks in multiple areas with competing networks in some areas but not others. Similarly, the competitive dynamics could change through mergers and acquisitions or changes in the number of (or treatment of) RSPs on the network. An exemption framework to a particular provider would need to have provision for scenarios where an exempt provider purchases a non-exempt provider and vice versa.

TPG considers that it would be in the long-term interests of end-users (**LTIE**) for the ACCC to grant an exemption to the Standard Access Obligations (**SAOs**) to specific providers, including PIPE Networks Pty Limited and TransACT Capital Communications Pty Limited, which are carriers owned by TPG.

[c-i-c]

The ACCC's consideration of the SBAS FAD must be viewed against this fact. NBN Co is present in virtually every customer location and the extent of NBN Co's overbuild of TPG's network is indisputable given it is a Government mandated monopoly with all the associated regulatory privileges and advantages.

Given NBN Co has already overbuilt and has strong incentives to continue overbuilding TPG's network, TPG does not have the ability or incentive to raise prices above that set by NBN Co because wholesale customers and end-users can easily switch to the NBN if the price provided by TPG is uncompetitive. The presence of NBN Co (or another superfast fixed line provider) places a significant competitive constraint on TPG and means that TPG does not have any market power. TPG also does not have the ability or incentive to charge unreasonable terms and prices, and this would run contrary to TPG's ambitions to grow its wholesale business.

Where there are multiple competing operators, including NBN Co, it logically follows that there is an absence of significant market power, at least with respect to the non-NBN networks. Accordingly, the presence of either NBN or another fixed line provider should be sufficient for the ACCC to provide an exemption to the SAOs for non-NBN networks, including TPG's PIPE and TransACT networks.

However, if the ACCC decides to adopt a competition based or geographic based exemption that only involves an assessment of whether NBN (or another superfast fixed line provider) is present, then the result is that different parts of TPG's fixed line network will be subject to different regulation. TPG considers there would be commercial and operational difficulties involved in attempting to implement different regulatory requirements for different parts of TPG's network, or to have different access conditions and prices for different areas for the same Layer 2 access service.

As the ACCC is aware, on 8 November 2021, TPG submitted a joint functional separation undertaking

(FSU) to the ACCC for consideration. The FSU would enable TPG to have greater flexibility to expand its fixed-line network footprint and compete in wholesale and retail markets for the supply of superfast broadband services to residential customers.

The FSU would bolster TPG's ability to compete because it will enable TPG to integrate its various networks and simplify the web of complex regulatory requirements that it must currently comply with. The FSU would in turn reduce compliance costs which could otherwise be used to expand TPG's network footprint, and therefore promote the efficient investment in and use of infrastructure. If the result of the SBAS FAD is that TPG's networks are again subject to different regulations depending on whether NBN or another superfast fixed line provider is present, then this would have the effect of unwinding some of the benefits from the reduced regulatory burden that TPG intends to achieve through the FSU.

Further, TPG does not consider it is necessary for a network to be 100% overbuilt by NBN Co for the ACCC to provide an exemption to the SAOs. The dynamics of the fixed line market and presence of NBN Co as a mandated monopoly means that TPG has a clear standalone commercial imperative to maximise wholesale supply. Where NBN or another provider is not present, it would not be commercially rational for TPG to seek to charge monopoly rents to wholesale customers to supply services to a very small subset of end-customers. [c-i-c] To attempt to charge unreasonable prices or terms would stymie any efforts by TPG to expand its wholesale business and attract new wholesale customers.

The presence of NBN Co means that if TPG does not supply competitive wholesale services, then wholesale customers will simply ask that NBN Co extend its network, which NBN Co has strong incentives to do. For example, although in December 2020, the Minister for Communications declared that NBN Co should be treated as 'built and fully operational', NBN Co continued to rollout and expand its network. Between October 2020 and October 2021, NBN Co added 200,000 premises to its network that are 'ready to connect' (increase from 11.8 million to 12 million).¹ NBN Co connected an additional 500,000 services (increase from 7.8 million to 8.3 million) over the same period.

It is also clear that NBN Co has every incentive to promote uptake of NBN services and its monopoly position means it is well positioned to do this. This has been seen, for example, in NBN Co's use of promotions such as its 'Illuminate' and 'Take 2' initiatives, which provide significant rebates/discounts for resellers to connect unconnected customers to the NBN.

TPG further notes that TPG does not have the ability to treat its own retailers any differently to other wholesale customers, given the non-discrimination obligations enforced by the ACCC, which places further regulatory constraints on TPG. There is also no incentive to engage in any conduct that is anti-competitive, noting that the ACCC has ex-post powers to intervene, including under section 46 and Part XIB, along with the ability to regulate anti-competitive outcomes caused by mergers and acquisition through section 50 if the ACCC had concerns about a merger.

For the reasons set out above, we consider it would be appropriate and in the LTIE for the ACCC to provide an exemption from the SAOs to TPG's PIPE and TransACT networks.

¹ See <https://www.nbnco.com.au/corporate-information/about-nbn-co/updates/dashboard-october-2021>.

Response to ACCC questions

1. *Should regulated SBAS prices be set in line with NBN wholesale access prices and, if not, what alternative price approaches should we consider? For example, should we consider using the retail minus methodology?*

TPG supports the ACCC continuing with its current approach of anchoring SBAS prices to NBN wholesale access prices. TPG considers this approach is appropriate as anchoring SBAS prices to NBN Co is consistent with the 'level playing field' provisions and provides a simple means for non-NBN networks to ensure compliance with the SBAS FAD.

TPG considers the limitations with a BBM and 'retail minus' approach expressed by the ACCC in 2017 are still relevant, i.e. it would be complex and resource intensive to determine a BBM or to determine retail costs for a number of non-NBN networks that involve different technology, systems and costs.

TPG notes that the ACCC is currently reviewing NBN's regulatory framework in the context of a variation of NBN Co's Special Access Undertaking. TPG suggests the regulated price for the SBAS FAD be the same as "*the NBN Co AVC TC-4 25/5 Mbps and CVC TC-4 product components (if applicable), as amended from time to time (including discounts)*" to provide sufficient flexibility in the event NBN Co adopts AVC-only pricing for this speed tier.

2. *If SBAS prices continue to be set directly in line with NBN wholesale access prices, should the regulated price continue to be inclusive of NBN Co's intertemporal bundling/discount offers, or based on prices published in NBN Co's Price List excluding such offers?*

Consistent with the current approach, TPG considers the regulated prices should continue to reflect NBN Co's bundled/discounted offers, because these are the costs that NBN Co charges access seekers.

3. *Should the Regional Broadband Scheme (RBS) levy continue to be able to be passed through to RSPs and users or absorbed by SBAS providers?*

TPG believes that SBAS providers should continue to have the opportunity to pass on the RBS levy to wholesale customers, as is currently the case.

4. *How should we approach regulated wholesale access pricing for the FAB service for the period while the service is still operating and regulated under the 2022 SBAS FAD?*

N/A.

5. *Do you support the regulated access price for the FAB service being set at the same level as the equivalent regulated SBAS and NBN services? Please explain why in detail, including the appropriate speed tier at which to set the regulated access price for the FAB service.*

N/A.

6. *Should we take a different approach to the product components that are price regulated and/or to the structure of regulated charges in the 2022 SBAS FAD? We recognise that some SBAS providers may want to recover the costs of providing the service from charges other than access and usage, or potentially through other charging structures.*

TPG does not propose any changes to the product components that are price regulated and/or to the structure of regulated charges in the SBAS FAD.

7. *Should only the current anchor price points be regulated, or should prices be set for a range of additional speed tiers above and / or below (e.g., at 12 Mbps) the current anchor points?*

TPG supports the current approach of setting regulated prices for the 25 Mbps tier only. This speed tier provides a sufficient constraint on higher speed tier products and is consistent with the obligations in the SIP regime, which requires carriers to provide a 25 Mbps service.

TPG notes that it only recently introduced a 50 Mbps wholesale product in October 2021 for the FTTB network [c-i-c] Given this, TPG considers it would be appropriate for the ACCC to continue regulating the 25 Mbps product.

8. *If prices continue to be regulated at a single anchor point for the SBAS, is 25/5 Mbps still an appropriate anchor point for (non-FAB) prices?*

See response to question 7 above.

9. *Should any non-recurring charges be regulated under the SBAS FAD? If so, please explain why and how the regulated charges should be set.*

TPG does not consider any non-recurring charges should be regulated.

In October 2021, TPG's wholesale business refreshed its pricing for the FTTB network to ensure it is competitive and reasonable. TPG does not consider there is any basis for the ACCC to regulate any non-recurring charges.

10. *Should all the non-price terms for the SBAS continue in the same form? If not, how should they be changed and why?*

TPG does not propose any changes to the non-price terms.

11. *Should SBAS and FAB service network providers be required to disclose key network service quality and reliability indicators to current or potential RSPs? If so, which indicators would promote competition and improve quality and reliability of service outcomes for RSPs and end-users? For example, connection times, fault rectification and outages.*

TPG is not aware of any concerns about network service quality that would warrant the ACCC requiring SBAS providers such as TPG to disclose this information to wholesale customers. TPG intends to grow its wholesale business and therefore is incentivised to provide quality and reliable services.

12. *Should the small network exemption remain, be changed, or removed and why?*

N/A

13. *Have changes in the costs or number of small network operators changed since 2017 in a way that should impact the future of such an exemption?*

N/A.

14. *Do you support a framework to provide an exemption from the Standard Access Obligations where*

there is effective competition with or between fixed line networks?

As detailed above, TPG supports the ACCC providing a network-specific exemption from the SAOs to PIPE and TransACT.

15. *Would a framework that included localised network areas or developments being eligible for exemption once it meets a competition threshold be workable?*

See response to question 14.

16. *If a competition threshold is introduced, what number and type (i.e., NBN and non-NBN) of competing networks would be appropriate to give rise to an exemption?*

See response to question 14.

17. *Would defined geographic areas (e.g., by postcode, local government area or another type of geographic boundary) be appropriate for an ex-ante exemption and, if so, in which areas are you aware of a sufficient degree of competition now or in the foreseeable future?*

See response to question 14.

18. *Would you prefer a threshold-based exemption or a geographic area-based ex ante exemption?*

TPG has responded to this question in its submission above.

19. *Are there likely to be practical issues from implementing a competition-based exemption that would arise once an area becomes exempt from SBAS? If so, please explain why.*

TPG has responded to this question in its submission above.

20. *Would the application of SBAS to some areas of a providers' network and not others be costly for the infrastructure owner to implement or manage?*

TPG has responded to this question in its submission above.

21. *If we implement a competition-based exemption framework, should we only do it during the more standard inquiries prior to the expiry of a declaration or FAD; or rely on an ad hoc variation inquiry process for exemptions during a FAD period?*

If the ACCC does not favour a network-specific exemption, then TPG supports an ad hoc variation inquiry process, which will enable the ACCC to take into account expansion of the NBN network from time to time.

22. *Do you support the term for the 2022 SBAS FAD aligning with the expiry of the SBAS declaration (28 July 2026)?*

TPG considers it is appropriate to align the expiry of the SBAS FAD with the expiry of the SBAS declaration.