NBNCo
Bringing broadband to life

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.

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.