

An abstract background image featuring a bright, glowing light source on the left, with numerous blue and white light streaks radiating outwards across a dark blue sky. The streaks create a sense of motion and energy.

Submission to ACCC Consultation Paper

Public version (18 January 2013)

NBN Co Special Access Undertaking (SAU)

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Introduction

Nextgen welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (ACCC) November 2012 Consultation Paper (ACCC Consultation Paper) on the Special Access Undertaking (SAU) lodged by NBN Co.¹

The SAU specifies matters relating to the supply of the 'NBN Access Service', 'Ancillary Services' and commitments to the 'Facilities Access Service'. It contains commitments with respect to price and non-price terms within an overall modular framework. The SAU term is until 30 June 2040 (hereafter referred to as the '30 year term' consistent with NBN Co's supporting submission).

The rollout of a wholesale-only NBN is designed to transform the structure of the communications sector in Australia, and promote competition, innovation and superior end-user outcomes based on a level playing field for all access seekers. The design and detail of the forward-looking regulatory regime that will govern NBN Co's future activities remains important to the achievement of these objectives.

An SAU can provide upfront certainty on the terms and conditions of supply for declared services for the access provider and access seekers. Such certainty is understandably important to NBN Co given its range of objectives, including the establishment of a long term framework under which it can recover its costs and delivery of uniform national wholesale pricing (UWNP).² This SAU is also important for ensuring that NBN Co operates under a regime which provides it with sufficient incentives to operate efficiently and to set terms which promote competition and the efficient use of, and investment in, infrastructure, and therefore the long-term interests of end-users (LTIE). A key question is whether this SAU strikes the appropriate balance between these matters.

There have been improvements made to this SAU since the previous version (lodged in December 2011) including the adoption of a modular structure and introduction of review mechanisms for some matters. However, Nextgen submits that further adjustments are required to ensure the appropriate balance is reached and the proposed arrangements meet the "reasonableness" criteria in Part XIC. In particular, given the proposed 30-year term of this SAU, this includes ensuring there is more adequate provision for oversight and review of key matters (within an overall modular framework) to ensure the detailed terms within the SAU remain reasonable and the framework will promote the LTIE.

¹ This SAU was lodged by NBN Co on 28 September 2012. A revised version submitted on 18 December 2012 updates key non-price terms (arising from the completion of NBN Co's CDP process) and other amendments to "clarify the operation of the SAU".

² NBN Co states (NBN Co Supporting Submission, p. 16) that the objectives of this SAU include: (i) To provide an appropriate degree of certainty to Access Seekers, their End-Users and NBN Co about the services being offered, and how the price and non-price terms and conditions of access (including the framework for long-term cost recovery) will be regulated over the short, medium and long-term; and (ii) to provide the long-term framework reasonably necessary to achieve UNWP of eligible services supplied by NBN Co to access seekers.

This submission highlights some of these areas and proposed adjustments, including in response to questions in the ACCCs Consultation Paper.

Structure of this submission

In line with the structure of the ACCC Consultation Paper, this submission focuses on certain matters within the following categories:

- A. Modular structure and operation of the SAU (dealing with matters raised in Chapters 2 and 3);
- B. Services to which the SAU relates (dealing with matters raised in Chapter 4);
- C. Price Related Matters (dealing with matters raised in Chapter 6); and
- D. Non-Price Related Matters (dealing with matters raised in Chapter 7).

A: Relationship of SAU to other matters and Modular Structure

This section deals collectively with issues raised in Chapters 2 and 3 of the ACCC's Consultation Paper:

- Chapter 2 deals with the relationship between this SAU, access agreements, the SFAA, other ACCC powers and the regulatory recourse commitments; and
- Chapter 3 deals with the operation of this SAU, including the proposed modular structure, fixed principles, replacement modules and the mid-point review.

As noted in the ACCC Consultation Paper, the SAU does not contain comprehensive terms and conditions for access to services supplied by NBN Co. Given this and the 30 year term it is important to test and understand the implications for future regulatory decisions that may be made by the ACCC and adjustment of the SFAA and access agreements.

One of the main issues raised by stakeholders throughout development of this SAU has been ensuring there is adequate scope for independent and ongoing ACCC oversight of NBN Co's future activities, either within the SAU and/or via the ACCC's broader set of regulatory tools under Part XIC.

Adjustments have been incorporated into this SAU which have relevance to these matters. This includes the adoption of a 'modular structure', a mid-point review of Module 1, a regulatory recourse mechanism and periodic reviews of some matters in a replacement module phase in Module 2. Key aspects of the modular structure and the SAU interaction with other matters include:

- Module 0 contains foundational SAU clauses³ that will apply for the 30-year term;
- Module 1 contains detailed terms for the first 10 years, the regulatory recourse mechanism⁴ and commitments for NBN Co to initiate a 'mid-point review';⁵
- Module 2 contains a set of terms that will guide long term cost recovery and pricing arrangements once Module 1 ceases. This module will be locked in upfront for the full SAU term but will operate in practice after Module 1 where NBN Co submits 'replacement modules' for ACCC review; and
- Every term in Module 0, 2 (collectively) is a 'fixed principles term and condition'.⁶

NBN Co indicates that the modular structure is designed to strike a better balance between providing certainty on the long-term cost recovery arrangements and some flexibility for the other regulatory terms and conditions to evolve as required over time (including with potential for some ACCC oversight).⁷

In principle, Nextgen welcomes the adoption of a modular structure given a 30 year term. It provides scope to strike an appropriate balance between providing NBN Co with necessary certainty on key matters within an overarching long-term framework, while allowing scope for adequate review/oversight of detailed terms to ensure they continue to promote the relevant matters in Part XIC (including the LTIE) in a future dynamic market environment. However, Nextgen submits that aspects of this modular structure need to be carefully reviewed and adjustments made, including given that:

- The regulatory recourse arrangements in 1B.1.2 will apply to a limited range of non-price terms and conditions (not 'pricing matters' or non-price terms in 1H⁸) and there is no commitment they will transition into Module 2;
- The scope of the mid-point review is narrow in the broader context of Module 1;
- The 10 year timeframe for Module 1 is a significant period in its own right and it is difficult to predict whether detailed terms set now will remain appropriate over this period given the dynamic nature of communications markets, and the evolving needs of customers and end-users;

³ Module 0 includes the main body of SAU, Attachment A: Service Descriptions, Attachment B: Facilities Access Service, Attachment C: Dictionary.

⁴ NBN Co (p. 45 of its Supporting Submission) is proposing that to the extent not inconsistent with the terms of the SAU and otherwise in accordance with Part XIC of the CCA, ACCC terms (in and AD or BROCC) would be given effect to in the SFAA's when the terms of those SFAA's expire. The SAU also commits that NBN Co will offer co-terminus SFAA's with a term of no longer than 2 years.

⁵ The mid-point review will be initiated by NBN Co prior to 1 July 2018 and it will consider matters including the customer engagement processes associated with multilateral processes and a sub-set of non-price terms.

⁶ In the Module 2 phase this means the ACCC cannot reject a replacement module for "a reason that concerns" the fixed principles term or condition.

⁷ NBN Co Supporting Submission, p. 44.

⁸ The exception to this are the Dispute Resolution Terms.

- The ACCC's future use of its Part XIC regulatory tools (AD's and BROC's) will be constrained by the fact that its decisions will not take practical effect (in terms of flow through to the NBN Co SFAA) if "inconsistent with the SAU". There are areas of ambiguity about how this will be interpreted and/or administered in practice;⁹
- While the use of fixed principles appears appropriate within an overall modular structure, certain matters in Modules 0 and 2 appear to go beyond what is necessary to provide NBN Co with sufficient certainty to establish a long-term framework for the recovery of its costs and other terms may introduce ambiguity with respect to the ACCC's future decision-making scope; and
- The use of a two-year co-terminus mechanism to flow through 'in scope' regulated terms into the next SFAA may seek to balance NBN Co's ability to meet its non-discrimination requirements while preserving commercial arrangements; however, it appears particularly problematic with respect to BROC's which are designed to allow the ACCC to act quickly on issues of concern (having regard to specified matters in s.152BDAA of the CCA) and have a 12 month duration.

On this basis, Nextgen submits that the adjustments outlined below should be considered to the SAU.

Initial Regulatory Period and Mid-Point Review

- The term of Module 1 should be reduced (between 6-8 years) in order to provide a better balance between providing NBN Co with certainty on the one hand and a mechanism to review detailed terms on the other to ensure they remain reasonable under Part XIC, including promotion of the LTIE.
- Within this, the concept of a 'mid-point review' of Module 1 should be retained but expanded in scope to require NBN Co to consider other key issues, including the impact of the CVC on downstream markets and the relative pricing structure between unicast and multicast.¹⁰ In addition, the ACCC should have the ability to extend its decision-making timeframes in the mid-point review, the review criteria across all matters should include specific reference to the "reasonableness" test in Part XIC and it should be made clear in the SAU how decisions on alternative terms will apply for the remainder of Module 1 and in the next SFAA.

Fixed Principles

- Given the status of 'fixed principles' and the language in s.152CBAA of the CCA, where there is any doubt that acceptance of a fixed principle is not necessary to provide NBN Co with sufficient certainty to meet its objectives or would inappropriately

⁹ [Commercial-in-confidence footnote].

¹⁰ [Commercial-in-confidence footnote].

constrain future ACCC oversight, these matters should be removed from Module 0 or 2, or reflected only in Module 1 at this stage (see response to question 9).

Regulatory recourse mechanism

- The regulatory recourse mechanism in Module 1 should be extended in scope to cover non-price and price terms (the latter which are presently excluded as specified in 1B.1.2 of the SAU). This would effectively bring NBN Co's pricing of new services within the *potential* scope of regulatory oversight under this mechanism. However, alternative terms would not take effect if they were inconsistent with Modules 0 or 2 or certain matters in Module 1.
- A commitment to have a regulatory recourse mechanism should also be extended into Module 2. Nextgen accepts that it is in the interests of all stakeholders to monitor how well these arrangements operate over Module 1 including any refinements made as a result of the mid-point review, in order to improve them in Module 2.¹¹ However, the SAU should contain a commitment Module 2 will contain a regulatory recourse mechanism that will be further enhanced based on the outcomes of the mid-point review. Clarification should also be provided about the ACCC's ability to recommend changes to this regulatory recourse mechanism in the mid-point review given that the SAU outlines an explicit mechanism in clause 1B.2 and the ACCC cannot make a future decision that is inconsistent with the SAU.
- If a two-year co-terminus term is applied, there is a case that BROCs should be treated differently from AD's in that they should flow straight through to the SFAA and be aligned with access agreements immediately rather than at the end of a two-year period. It may also be appropriate from a competition perspective in certain cases for the ACCC to be able to specify that proposed changes to regulated terms under a BROc should flow through to all access agreements.

Replacement modules

- The replacement module process should be adjusted to ensure this process acts as a more robust review of NBN Co's detailed price and non-price terms in this phase. This could be achieved by allowing the ACCC to assess replacement modules from NBN Co and if not considered reasonable under the statutory criteria it would be able to use AD's or BROCs to set substitute terms for price and non-price matters (subject only to matters which are considered reasonable to lock in as fixed principles in Module 0 or 2). This will provide greater confidence that there is an oversight mechanism built into the SAU to ensure the detailed terms continue to promote the relevant matters in Part XIC, including the LTIE, over the entire SAU term. It may also provide NBN Co with stronger incentives to submit a more reasonable proposal in the first instance.

¹¹ NBN Co Supporting Submission, p. 45.

- Further, replacement modules should be assessed by the ACCC every 3 years (the lower bound of that indicated NBN Co) to make this phase of the SAU more consistent with the typical time periods applied by the ACCC under Part XIC.

Response to certain ACCC Questions

Q: 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? (Question 2)

It is not clear whether access seekers would be able to effectively invoke NBN Co's obligations to comply with AD's and BROCs in the absence of specific SAU commitments about how it would do so. The main reason for this uncertainty is that future AD's or BROCs made by the ACCC will not take practical effect (in terms of flow through to the SFAA and subsequently in access agreements) if considered inconsistent with the SAU, and there are areas of ambiguity about how this will be interpreted and/or administered in practice.

Q: 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? (Question 3)

Under the current design of the SAU the regulatory recourse arrangements in 1B.1.2 will apply to a limited range of non-price terms and conditions (not 'pricing matters' or non-price terms in 1H) and AD's or BROCs will not apply to the extent inconsistent with an SAU. This indicates that the impact of the regulatory recourse commitments in Module 1 on commercial negotiations will be limited to those terms which are potentially 'in scope'.

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

While Nextgen welcomes the regulatory recourse mechanism being considered in the mid-point review and ACCC oversight, it appears overly constrained in its review of this aspect. For example, it is required (1K.3.2c) to have regard to the ability of access seekers to avail themselves of a regulatory recourse mechanism in a "manner consistent with the legislative hierarchy" and an alternative proposal will have no effect to the extent the decision is inconsistent with the SAU. This raises the likelihood that the regulatory recourse mechanism will not be able to be fundamentally changed based on an ACCC proposal as part of the mid-point review for the remainder of Module 1. Clarification should be provided about the ACCC's ability to recommend changes to this mechanism in the mid-point review given that the SAU outlines an explicit regulatory recourse mechanism in clause 1B.2 and the ACCC cannot make a future decision that is inconsistent with the SAU.

Q: 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? (Question 6)

Under the current design, the absence of a commitment to a regulatory recourse mechanism in Module 2 means there is a lack of certainty about whether AD's and BROC's will be able to adequately address matters that arise for the remainder of the SAU term. This is notwithstanding the fact that the use of these regulatory powers tools may be necessary to address matters for the remainder of the SAU term. The SAU should contain a commitment that a regulatory recourse mechanism will continue into Module 2 and that this will be further enhanced based on the outcomes of the mid-point review.

Q: 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? (Question 8)

Nextgen submits that the duration of Module 1 should be reduced (to between 6-8 years) in order to provide a better balance between providing NBN Co with certainty and providing a mechanism to review the detailed terms. Within this term, the current scope of the mid-point review should be broadened to require review of other key issues, including the impact of the CVC on downstream markets and the relative pricing structure between unicast and multicast. In the Module 2 phase, Nextgen submits that replacement modules should apply for 3 year periods to align reviews with more with typical timeframes applied by the ACCC under Part XIC. Combined with a broadening of the potential scope of these reviews through the ACCC's potential use of AD's and BROC's (see response to questions 10-12) this will provide greater confidence that there is an oversight mechanism to ensure the detailed terms continue to promote the relevant matters in Part XIC, including the LTIE, over the entire SAU term. Nextgen further submits that some matters in Module 0, 2 are not appropriate to lock in for the full SAU term (see the response to question 9 below).

Q: 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? (Question 9)

The use of fixed principles is appropriate within an overall modular structure. However, certain matters in Modules 0 and 2 appear to go beyond those necessary to provide NBN Co with sufficient certainty to establish a long-term framework for the recovery of its costs, and other terms may introduce ambiguity with respect to the ACCC's future decision-making scope. For example:

- Schedule 2C.2 (in Module 2) carries forward the level of the CPI-1.5% price control for the full 30 year term, not permitting review as to whether it continues to promote the LTIE, and 2C.5 sets the approach towards NBN Co's introduction of new prices and a set of Initial Pricing Principles;

- Clause 4.7 (in Module 0) and Schedule 2B (in Module 2) refer to the “relevant considerations for determining the composition of reference offers”, however it is not clear whether this will preclude the ACCC in its assessment of replacement modules from recommending a broader suite of reference offers or that different factors should guide their determination than those outlined by NBN Co;
- Clause 4.9 (in Module 0) and Schedule 2F (in Module 2) outline principles that will guide the re-setting of service levels in the replacement module phase and it is not clear the extent to which these principles will constrain future opportunities for regulatory recourse (see response to Q.46 below);
- Attachment A (in Module 0) sets out the service descriptions that apply to the ‘NBN Access Service’ and ‘Ancillary Services’ in relatively broad terms. The inclusion of these as fixed principles may inappropriately constrain the future review of service descriptions if this becomes necessary (which historically has occurred and been considered necessary by the ACCC in relation to a range of other declared services) unless this is initiated as a variation to the SAU by NBN Co. The inclusion of these matters as fixed principles may also unreasonably constrain the ACCC’s future ability to declare services that might be provided over the NBN; and
- While it appears reasonable to set up a number of matters in Module 0 or 2 in relation to the establishment of the LTRC, ICRA and the RAB mechanism, careful consideration should be given by the ACCC as to the detail included in this schedule and implications for any future adjustments which may otherwise be required.

Q: 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? (Question 10)

Q: 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? (Question 11)

Q: 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? (Question 12)

The concept of a ‘replacement module’ phase commencing at the end of Module 1 should be retained but elements of this part of this regime adjusted to ensure that it can act as a more robust review of NBN Co’s detailed price and non-price terms if necessary. This includes that replacement modules should apply for 3 year periods, process constraints on the ACCC (including mandatory timeframes) should be relaxed to ensure it can adequately consult interested parties and the scope of these reviews should have the potential to consider a broader set of detailed price/non-price issues. One way to achieve this would be to allow the ACCC to assess replacement modules from NBN Co and if not

considered reasonable under the statutory criteria it would be able to use AD's or BROC's to set substitute terms for certain matters (subject only to matters which are considered reasonable to lock in as fixed principles in Module 0 or 2). This will provide greater confidence that there is an oversight mechanism built into the SAU to ensure the detailed terms continue to promote the relevant matters in Part XIC, including the LTIE, over the entire SAU term and may also provide NBN Co with stronger incentives to submit a more reasonable proposal in the first instance.

Q: 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? (Question 13)

Q: 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? (Question 14)

Q: Is it clear how the ACCC's decisions apply when the ACCC does not accept NBN Co's proposals and makes substitute terms? (Question 15)

The concept of a 'mid-point review' of Module 1 should be retained but expanded in scope to require NBN Co to consider other key issues, including the market impacts of the CVC pricing structure and relative pricing between unicast and multicast. In addition, the ACCC should have the ability to extend its decision-making timeframes in the mid-point review, the review criteria across all matters should include specific reference to the "reasonableness" test in Part XIC and it should be made clear in the SAU how decisions on alternative terms will apply for the remainder of Module 1 and in the next SFAA.

B: Price-related matters

The SAU contains a list of initial prices for products and commitments about how these can vary over time and the long-term cost recovery framework. The initial prices represent the maximum regulated prices that NBN Co will be able to include in any SFAA, and the specific rules around them being adjusted over time depending on whether they are 'reference' or 'non-reference' offers.

NBN Co lists its objectives with respect to pricing matters as the achievement of UNWP, long-term cost recovery, pricing stability and predictability and efficient take-up and usage.¹² Key commitments in the SAU with respect to pricing include:

- *Reference offer* prices 'locked in' for the first five years in nominal terms, after which time the price can be increased subject to the CPI-1.5% annual price control;
- *Non-reference offer* prices specified in the SAU will be subject to the CPI-1.5% annual price control from year 1 to the end of the SAU term;¹³

¹² NBN Co Supporting Submission, p. 99.

- In setting prices for *new services* NBN Co would be required to submit a pricing rationale statement to the ACCC and have regard to a list of principles ('Initial Pricing Principles'). Once the price is introduced it would be subject to the CPI-1.5% annual price control; and
- Price increases for \$0 reference offers (or \$0 'other charge' connected with these) are subject to ACCC oversight, whereas those connected to non-reference offers are treated in similar fashion to new prices from a regulatory perspective.¹⁴

The range of initial prices in this SAU provides more upfront certainty for access seekers about the level and structure of prices and an opportunity for upfront ACCC review. However, some of the prices specified in the SAU relate to services not yet available for purchase and there is a very limited role for ACCC oversight of NBN Co pricing, including new pricing, for the entire term of the SAU.

NBN Co notes that there is no regulatory recourse on initial or ongoing pricing,¹⁵ while the ACCC notes the SAU does not include a formal mechanism for it to review or re-set those prices or pricing structures that are included in the SAU during its term.¹⁶ In effect, the operation of this SAU excludes ACCC use of AD's or BROCs to set a price that NBN Co would be required to reflect in its next SFAA (with the exception of price increases to \$0 reference offers or 'other charges' connected with these) in relation to any aspect of the specified declared services.

These arrangements place significant weight on the ACCC's upfront assessment of the reasonableness of the initial pricing structures, prices and price caps (as adequate for the SAU term), the anchoring effect of existing prices and NBN Co incentives as a wholesale-only operator in setting prices for new services. The price caps are the main regulatory constraint on NBN Co's pricing conduct until the LTRC becomes a constraint. While the scope and balance of the reference offers and associated price caps provide for a transition from legacy services and some certainty on future price paths, inevitably an assessment of their reasonableness is taking place in the absence of empirical information and market experience about how these prices, pricing structures, and price controls (or any adjustments to them in the future) will impact downstream markets, competition and complementary investment decisions (and therefore the LTIE) or how end-user preferences may change over time. This is particularly for products not yet delivered or known.

¹³ With respect to both reference and non-reference offers NBN Co cannot carry-over unused credits to increase prices by more than CPI-1.5% in a given year.

¹⁴ Where NBN Co increases \$0 price connected with a reference offer the SAU commits NBN Co to including any substitute regulated price made by the ACCC in an AD or a BROC in the next SFAA (regulatory recourse). While for price increases to \$0 charges connected with non-reference offers NBN Co would be required to submit pricing rationale statement to ACCC and have regard to the Initial Pricing Principles.

¹⁵ NBN Co Supporting Submission, p, 98 and p.112.

¹⁶ ACCC Consultation Paper, p. 47.

While acknowledging NBN Co's legitimate need for certainty and creating appropriate incentives for its efficient operation, Nextgen submits there are certain matters which require careful consideration and adjustment:

- *Oversight arrangements for new prices* – While NBN Co is a wholesale-only entity with incentives to develop downstream markets in certain cases it will likely balance a range of considerations in setting new prices, including maximising take-up, considering the needs of a diverse customer base and different impacts of its pricing on different customers and different market segments, revenue recovery and limited upwards pricing flexibility for new prices once set. The SAU does not contain an effective independent oversight mechanism for NBN Co's decision around setting the initial level for new prices, including potential examination of whether the anchoring effect of existing prices is weak for new services (e.g. future business services) and extent to which the initial pricing level will promote competition, efficient investment and the efficient use of infrastructure in accordance with the relevant statutory criteria.
- *Oversight arrangements of future adjustments to \$0 'other charges' connected with a 'non-reference' offer* – Many of these (such as standard installation, activation and modification services) will be essential inputs in order to provide services over the NBN without substitutes and the anchoring effect of existing prices will be minimal. While NBN Co may have some natural incentives to limit price increases to reasonable levels so that they do not adversely impact take-up of its services there remains a strong case for independent oversight of these price increases to ensure that future increases continue to promote the relevant criteria, including the efficient use of infrastructure.
- *Review of existing prices* – The SAU does not contain a mechanism to allow review of the initial prices, pricing structures or price caps during the SAU term. Once accepted by the ACCC the initial prices would be subject to the CPI-1.5% price control (which itself will apply for the full SAU term) and are not within scope of the mid-point review or the replacement module process.¹⁷ Given the dynamic nature of communications markets it is difficult to predict how services, usage patterns, consumer preferences and downstream competition may evolve, or to foresee whether pricing structures, initial prices and price caps will remain reasonable (including promoting the LTIE) over this entire SAU period.
- *NBN Co's 'Statement of Intent to review CVC pricing* – The CVC charge is a key element of NBN Co's two-part pricing approach and is likely to have implications for downstream market outcomes. The SAU contains a 'Statement of Intent' which commits NBN Co to an annually review the maximum CVC price with a view to reducing the price as aggregate demand for that Reference Offer increases having regard to the level of aggregate demand for CVC capacity and the forecasts in

¹⁷ With respect to pricing matters, the replacement module process will consider the composition of reference offers and whether these should be updated.

NBN Co's most recent Corporate Plan.¹⁸ NBN Co will have flexibility to increase the CVC price (subject to CPI-1.5% p.a. price control), retain the current price or adjust it downwards in response to market conditions. NBN Co's future decisions on this may have implications for complementary investment decisions by access seekers, and therefore the statement of intent does not provide access seekers with sufficient certainty about how these adjustments may be made over time.

Nextgen submits that the following adjustments should be considered to the SAU to ensure it meets the Part XIC reasonableness criteria.

Oversight of new prices and \$0 non-reference 'other charges'

- There is a strong case for the regulatory recourse mechanism to act as a 'regulatory backstop' with respect to NBN Co new pricing and price adjustments to currently \$0 priced non-reference 'other charges' to ensure that where legitimate concerns are raised they can be considered by the ACCC. This would not amount to ACCC review of all new NBN Co pricing. Rather, it would provide the ability for the ACCC to use its existing regulatory powers, subject only to those matters considered acceptable to lock in under Module 0 and 2, to address an issue if convinced there was a need under its statutory criteria and that these concerns had first been raised directly with NBN Co through the appropriate process.

Review of existing prices during SAU term

- Within the overall modular structure Nextgen submits there is a case for a mechanism to be built into the SAU which allows for periodic review of price terms (prices, pricing structures, price caps) to ensure they continue to be reasonable over the SAU term (including promotion of the LTIE).
- Nextgen submits this should be achieved by broadening the scope of the mid-point review process to enable review of a limited set of pricing matters (see response to question 13) and permitting pricing matters to be reviewed during the replacement module phase through allowing the ACCC to use its Part XIC regulatory powers to make substitute terms if not satisfied with the terms proposed by NBN Co (see response to questions 10-12). The ACCC's ability to propose alternative terms would be subject to being consistent with those matters considered reasonable to incorporate in Modules 0 and 2.
- With respect to the 'Statement of Intent' to review the CVC price, the SAU should incorporate a more substantive commitment with respect to the review and adjustment of CVC pricing over time. As above, this could include incorporating review of aspects of this pricing structure as part of the mid-point review. To provide more pricing stability and certainty the SAU could also include a firmer commitment for NBN Co to reduce the nominal CVC price in line with the forecasts in its Corporate Plan (based on the achievement of certain usage levels) or to

¹⁸ NBN Co SAU, Schedule 1C.4.2(d), p. 69.

submit reasons to the ACCC as to why this pricing path is not being adhered to (i.e. due to potential re-balancing elsewhere) for its consideration.¹⁹

Response to ACCC Questions

Q: 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 (Question 23):

- *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.*

Under the design of this SAU there is a very limited role for ACCC oversight of NBN Co pricing, including new pricing, for the entire term of the SAU. This places significant weight on the ACCC's upfront assessment of the initial prices, pricing structures and price caps as reasonable for the entire SAU term, the anchoring effect of existing prices and NBN Co incentives to set prices for new services. While the scope and balance of the existing prices and services (particularly the AVC reference offers currently being supplied) provide for a transition from legacy services, given the dynamic nature of communications markets it is difficult to predict how services, usage patterns, consumer preferences may evolve, or to foresee whether the proposed pricing structures will remain reasonable over the full SAU term and the impact they will have on downstream competition and the efficient use of and investment in infrastructure.

Q: 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? (Question 25)

Schedule 2B in Module 2 refers to the "relevant considerations for determining the composition of reference offers" in the replacement module phase (including the categories of Basic Access Offer, Enhanced Access Offer and Standard Business Offer). It also contains the principles by which reference offers will be determined for each of these categories. While the factors listed in Schedule 2B.2 may appear reasonable now for establishing which offers become 'reference offers' in the replacement module phase, it is difficult to predict 10 years from now whether other factors would also be more relevant. Further, given that all matters in Module 2 are 'fixed principles' it is not clear whether they would preclude the ACCC in its assessment of replacement modules from recommending a broader suite of reference offers or using different factors to guide their determination.

¹⁹ [Commercial-in-confidence footnote].

Q: 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? (Question 26)

The SAU does not contain a mechanism to allow the independent review of the initial price levels, pricing structures, or price caps during the SAU term. Once accepted by the ACCC the initial prices would be subject to the CPI-1.5% price control (which itself will apply for the full SAU term) and these matters are currently not within scope of the mid-point review or the replacement module process. While NBN Co requires a certain level of certainty to meet its objectives, including the long-term framework under which it will operate, within the modular structure the SAU should establish mechanisms (or opportunities) for potential review of these matters over time.

Q: Does the level of the CPI-1.5% price control raise any concerns? (Question 28)

The operation of Module 1 and Schedule 2C.2 sets this price control for the full SAU term without review. Given the dynamic nature of communications markets it is difficult to predict how services, usage patterns, consumer preferences and downstream competition may evolve, or to foresee whether this long-term price path will remain in the LTIE over this entire SAU period. For this reason, Nextgen submits that this and other detailed pricing matters are matters that should be able to be reviewed by the ACCC in the replacement module phase if considered necessary in accordance with its statutory criteria.

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

Nextgen understands that NBN Co would have the opportunity to seek ACCC approval to go above the maximum price cap for a service via a variation to the SAU. If this decision was part of a 're-balancing' proposal from NBN Co within a broader set of prices in response to a change in consumer preferences then NBN Co would be able to put this case forward to the ACCC. The further question is whether there should be an opportunity for independent consideration of these matters by the ACCC. Nextgen submits that this could be the type of issue considered as part of the ability for the ACCC to review pricing matters over time in accordance with its statutory criteria.

Q: 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? (Question 30)

The Statement of Intention on CVC prices does not provide sufficient certainty over the price path of this service over time and leaves future decisions about adjustments to this price within NBN Co's discretion. NBN Co's future decisions to adjust the CVC price (or not) may have implications for complementary investment decisions by access seekers. Nextgen submits that the SAU should incorporate a more substantive commitment with respect to the review and adjustment of CVC pricing over time. As above, this could include incorporating review of aspects and impacts of this pricing structure as part of the

mid-point review. To provide more pricing stability and certainty the SAU could also include a firmer commitment for NBN Co to reduce the nominal CVC price in line with the forecasts in its Corporate Plan (based on the achievement of certain usage levels) or to submit reasons to the ACCC as to why this pricing path is not being adhered to (i.e. due to potential re-balancing elsewhere) for its consideration.

Q: 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? (Question 31)

The operation of this SAU would mean that NBN Co would have the ability to select the initial starting price of a new product without effective oversight by the ACCC. Notwithstanding its wholesale-only status, NBN Co will likely balance a range of considerations in setting new prices and may be required to consider a range of different views from access seekers and potential impacts on different customers. The operation of the CPI-1.5% price control once a price is determined may also create incentives to set initial new prices high and consider downwards adjustments later. Nextgen submits there is a strong case for a mechanism to act as a 'regulatory backstop' with respect to new NBN Co pricing (such as extension of the regulatory recourse mechanism to these matters) to ensure that where legitimate concerns are raised they can be considered by the ACCC.

Q: Do the initial pricing principles provide an appropriate constraint on NBN Co in its setting of initial prices for new products? (Question 32)

The Initial Pricing Principles list a range of relatively broad matters that NBN Co is required to have regard to in setting prices for new products, and in Nextgen's view do not provide an adequate constraint. In addition, these principles do not explicitly reference the LTIE (incorporating the objectives of promoting competition and the efficient use of and investment in infrastructure) to align this process with the object of the telecommunications-specific access regime in Part XIC and ensure this remains a particular focus in the design and implementation of new pricing proposals.

Q: 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? (Question 34)

Nextgen understands that prior to lodging a pricing rationale statement to the ACCC for new prices NBN Co intends to consult with its customers on new product pricing. While Nextgen welcomes consultation on these matters, further detail around the process of this consultation (including timeframes and provision of a pricing rationale statement) would be useful. It is also notable that even with a clear process for consultation under the current design of the SAU and the PDF, NBN Co remains the ultimate decision-maker on the initial price and pricing structure for new products.

C: Services covered – Treatment of the Facilities Access Service

This SAU contains commitments with respect to NBN Co's Facilities Access Service although this is not intended to become a 'declared' service if the SAU is accepted.

NBN Co characterises its commitments about the Facilities Access Service as relating to how it will comply with the interconnection Standard Access Obligation for the NBN Access Service under ss.152AXB(4) of the CCA, as opposed to being terms and conditions about compliance with the Category B SAO's for a Facilities Access Service in its own right.

The ACCC Consultation Paper highlights a level of disagreement between the NBN Co and ACCC perspective on whether the Facilities Access Service should be considered an "eligible service" in its own right.

Response to ACCC Questions

Q: Is it clear which commitments in the SAU do and do not apply to Ancillary Services and the Facilities Access Service? (Question 19)

Nextgen submits that the practical impact of the Facilities Access Service not being treated strictly as a declared service and the reasons for taking this course should be made clearer, including the implications for NBN Co meeting its non-discrimination requirements, the extent to which commitments in the SAU will (or won't) apply to this service and the ACCC's ability in the future to consider declaration of other facilities access services on NBN Co's network.

D: Non-price related matters

The SAU contains a sub-set of non-price terms (Schedule 1H) and conditions that have been developed as part of the CDP process.

Nextgen understands that the significance of these non-price terms being incorporated in the SAU (in addition to the WBA) is that with the exception of the Dispute Management terms (1H.5) if accepted they will not be subject to regulatory recourse but aspects will be within scope of the mid-point review of Module 1. In contrast, future issues identified by access seekers with respect to other non-price terms (included in the WBA) will be able to be raised in the proposed Multilateral SFAA forum and subject to regulatory recourse if a commercial resolution is not possible. In this section, Nextgen responds to certain questions raised in the ACCC's Consultation Paper in relation to some non-price matters.

Response to certain ACCC questions

General matters

Q: The SAU requires NBN Co to include the terms and conditions in Annexures 1-3 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? (Question 47)

In the event that non-price terms and conditions are included in the SAU then it would appear reasonable for the SAU to require NBN Co to comply with the substance of these terms and conditions, enforceable under the SAU. In the alternative, non-price terms and conditions retained in the SFAA only would be appropriately enforced as part of the contract between NBN Co and its customer.

Q: 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? (Question 48)

There is merit in the ACCC being involved in a mid-point review of aspects of the SAU and its role of approving changes arising out of the proposed Multilateral SFAA forum with respect to some non-price terms. Nextgen understands that the significance of certain non-price terms being incorporated in the SAU (in addition to the WBA) is that with the exception of the Dispute Management terms in 1H.5, once accepted these non-price terms will not be subject to regulatory recourse, however they will be within scope of the mid-point review of Module 1. That said, the scope for the ACCC to make changes to these non-price terms as part of the mid-point review to ensure they remain reasonable remains somewhat unclear given the process is initiated by NBN Co, the inability for the ACCC to extend its decision-making timeframe and the constraint (1K.3.7c of SAU) that a decision on substitute terms made by the ACCC will have no effect to the extent that it is "inconsistent with the SAU".

Service levels

In addition, Schedule 1J of the SAU contains NBN Co's proposed 'service levels' which will apply for the first 10 years, but which will be considered in the mid-point review. Schedule 2F contains the principles by which NBN Co will determine services levels in Module 2 for existing and new services.

Schedule 1J – Service Levels for Initial Regulatory Period

The continued evolution of service levels is important for ensuring that competition and efficient investment in, and operation of, infrastructure is promoted. While acknowledging that service levels for Module 1 will be within scope of the mid-point review, given the dynamic nature of communications markets, the evolving NBN rollout and the needs of customers and end-users it is more appropriate for the service level regime to be more frequently reviewed and updated in order to ensure that it remains reasonable. As an alternative, Nextgen submits that the SAU could contain a set of high level commitments to include a service level regime in the SFAA and clear key principles governing this

regime (including the intention to improve it over time as specified in 2F.2.1(b) of the SAU). Underneath this, the actual detailed service level terms would be subject to continued consultation between NBN Co and access seekers as part of the Multilateral SFAA process.

Schedule 2F – Service level commitments in replacement module phase

Schedule 2F contains commitments about the general principles that NBN Co will apply in setting service levels for existing products and new products (as separate categories) in Module 2. While aspects of this may be reasonable (such as the commitment in 2F.2.1(b) that NBN will maintain service levels on terms the “same or better...” other aspects of this schedule may not be necessary at this stage to provide NBN Co with sufficient certainty, it is not clear whether these principles will remain sufficient in the future and the inclusion of them in Module 2 as fixed principles may introduce ambiguity about the scope of future recourse to the ACCC (and its ability to use an AD or BROCC) given that some of the concepts in Schedule 2F are relatively broad. This includes “to the extent necessary to promote efficient take-up and usage...” (as referred to in 2F.2.1(a) and 2F.2.2(c)) and “having regard to the likely cost impacts on NBN Co and Customers as a result of such changes...” (as referred to in 2F.2.1(c) and 2F.2.2(c)). In addition, there does not appear to be any commitment that NBN Co will use existing service levels as the minimum baseline for those that will apply to new services.

Changes to Points of Interconnect (POIs) and information on POI rollout

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

Q: Is the midpoint review process likely to ensure that the terms relating to the changing of POI locations remain reasonable during Module 1? (Question 68)

Q: 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? (Question 69)

Q: 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? (Question 70)

Q: Is the midpoint review process likely to ensure that the terms relating to publication of rollout information remain reasonable during Module 1? (Question 71)

Mid-point review and POI arrangements

Nextgen considers it appropriate that matters regarding the terms relating to the changing of POI locations and the publication of rollout information are reviewed as part of the mid-point review. Further clarification, however, is required to understand how ACCC

substitute proposals in this regard could flow through to the SFAA for the rest of Module 1 given that an a decision by the ACCC on substitute terms, either within the proposed SAU mechanism or via and AD or BROCC will not have effect if inconsistent with the SAU. In addition, the sections below outline proposed adjustments to these arrangements.

1H.4 – Closure, relocation and new POI's

These provisions make clear that NBN Co decisions are subject to ACCC's prior approval and sets out timeframes for ACCC decisions. Nextgen has two comments on these provisions. First, the SAU should contain commitments from NBN Co that it will consult with its customers/access seekers and provide a statement of reasons on a decision to close, relocate or open a new POI and the types of matters that NBN Co has taken into account. This will provide more certainty for access seekers around the framework under which NBN Co will formulate such decisions and provide clear opportunities for customer feedback prior to ACCC review. Second, clause 1H.4.3(b) should contain more flexibility for the ACCC to extend its decision making process (beyond the proposed 20 days) in circumstances where there may be complex matters and/or significant industry consultation required.

1H.3/1H.4 – NBN Co notification from temporary to permanent POI

In the CDP process Nextgen raised an issue with respect to arrangements regarding NBN Co's decommissioning and replacement of temporary POI's (refer to clause C13.4). As more and more FSA's are connected to permanent POI's this may still occur *prior to* the proposed closure of the relevant temporary POI. If a particular FSA has been notified as being connected to a Temporary POI in the NBN Ready for Service announcements, and at some future time NBN advise the same FSA is then re-homed to the Permanent POI, there appears to be no obligation in the WBA or SAU on NBN Co providing notice to its customers unless the temporary POI is being decommissioned (in which case it is 6 months in accordance with C13.4B). Nextgen submits that that NBN Co should provide adequate notice to Customers before it shifts traffic from a temporary POI to a permanent POI (i.e. 3 months) yet does not decommission the temporary POI. This will enable Customers to undertake the necessary planning (including with respect to facilities access) in order to make arrangements with respect to the permanent POI. Nextgen submits that such a notification will assist to promote competition and the efficient use of and investment in infrastructure in downstream markets as services are delivered over the NBN.