Assessment of Access Undertakings in relation to digital radio multiplex transmission services

Response to ACCC's Draft Decision

Submission by the Community Broadcasting Association of Australia
January 2009

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1. Introduction

1.1 The CBAA welcomes the opportunity to make a further submission in response to the ACCC's draft decision in relation to the access undertakings for digital radio multiplex transmission services.

1.2 The CBAA is disappointed that few of its concerns have been addressed by the ACCC in its draft decision. The access undertaking is the chief mechanism by which the ACCC can ensure that all users of multiplex services, including community broadcasters, are able to gain access on fair and reasonable terms. Once this access undertaking is in place, there will be limited opportunity to address barriers that will hinder access to services, especially for community broadcasters. It is therefore essential that the ACCC take a strong position in deciding whether to accept the access undertakings that have been proposed.

1.3 In the view of the CBAA the ACCC draft decision fails to fully take into account that community radio services are required to operate in accordance with the *Broadcasting Services Act 1992*. Section 15 (b) that stipulates community broadcasting services 'are not operated for profit or as part of a profit-making enterprise'. This is a critical distinction in the consideration of the impact of the access undertaking provisions on the capacity of community radio services to participate in the digital radio framework as legislated.

1.4 While the CBAA stands by its original submission, it has focussed in this submission on the key areas of concern. These areas of concern are addressed in the order in which they appear in the draft decision.

Assessment of whether the terms and conditions of access are reasonable

2. Service description – RF service

2.1 In section 2.4 of its submission (at page 5) the CBAA argued that the RF service should be a service for one main multiplex transmission site only, and that access seekers should be able to opt in or out for additional service levels.

2.2 At page 27 of its draft decision, the ACCC stated that:

> *"The ACCC also takes the view that access seekers should not be granted the discretion to opt in or opt out of additional service levels and charges in relation to additional transmission sites for the RF service built to back-up or in-fill the existing transmission service footprint."*

2.3 The ACCC provided no reasons for this conclusion. The CBAA submits that the ACCC has failed to give proper consideration to the CBAA's arguments in relation to this issue. In order that the ACCC may do so, the CBAA explains this issue in greater detail below.

2.4 Under the access agreement as currently drafted, an access seeker will enjoy a right of access to a RF service provided over a single multiplex transmission site. There will be a high level of redundancy built into the transmission site.

2.5 The 'back-up' issue is one of risk versus cost. How much redundancy should an access seeker be forced to pay for? The current design of the RF facility at the main site in each city is highly redundant. It has main and alternate transmitters, multiplexers and so on. For some years to come, this level of redundancy will be sufficient for all broadcasters.

2.6 However, at some point it may suit the business model of some broadcasters to invest in the additional comfort of a completely alternate main transmission site. This is not a trivial or incidental decision. It would, more or less, double the cost of supplying the RF service.

2.7 Faced with such a significant cost increase, an access seeker may instead elect to bear the very small risk of an unavoidable outage should the main RF transmission site fail in its entirety, or to tolerate occasional planned outages and/or short term re-configurations for maintenance purposes.

2.8 While this issue is likely to be particularly acute for a not for profit community broadcaster, there is no reason why a commercial broadcaster might not wish to exercise the same judgment.

2.9 As it stands, the access agreement forces all access seekers to pay for redundancy that they may not require and cannot afford. The CBAA's proposal to provide for an opt in/out arrangement is a reasonable one, in that it allows those access seekers that wish to enjoy complete site redundancy to do so, while recognising the rights of those access seekers that are willing to operate with an increased (but acceptable) risk of an outage.

2.10 The undertaking in its current form has the strong potential to hinder access as it allows those access seekers who wish full site redundancy to hinder and/or completely exclude access for those who, quite reasonably, do not.

3. Electronic Program Guide (EPG)

3.1 In section 2.5 of its submission, the CBAA argued that:

> *"the ACCC should consider a requirement that:*
>
> - *all digital radio multiplex licensees use an ensemble wide EPG; and*
> - *all digital radio multiplex licensees operating in the same licence area share EPG data on a multi-lateral basis.*
>
> *In the interests of equity to all Access Seekers, the ACCC should require that all Access Seekers be treated equally in relation to their inclusion in the framework for the EPG."*

3.2 At page 28 of its draft decision, the ACCC stated that:

> *"The ACCC does not believe the non-inclusion of a commitment to an ensemble wide EPG and the sharing of EPG data is unreasonable. The ACCC views the inclusion of this service as part of the multiplex transmitters' standard services and the sharing of data as matters to be agreed on by the multiplex licensees and access seekers.*
>
> *The ACCC understands that to require multiplex licensees to provide an ensemble wide EPG and oblige each access seeker to provide their EPG data for this service would close a potential niche market to third party enterprises who could offer EPG services and force access seekers to provide this data for combined distribution, who might otherwise choose not to do so. The ACCC also notes that the requirement, referred to by the CBAA in its submission, that an ensemble wide EPG would need to be run over excess capacity by agreement between the multiplex licensees and their access seekers, further suggests that this matter should be one for negotiation between these parties, rather than one for prescription under the access undertaking."*

3.3 Two issues remain unresolved in light of the ACCC's draft decision:

(a) Setting aside whether or not a third party enterprise decided to enter the market to develop an EPG, how would the capacity be found to supply such a service?

(b) If (as is more likely) a multiplex licensee decided to tender out the provision of a common EPG platform, what measures are in place to ensure all access seekers are afforded non-discriminatory treatment in relation to the content of an EPG?

3.4 In relation to (a), the CBAA submits that greater weight can and should be given to the interests of consumers, who will be the ultimate beneficiaries of an EPG that covers all access seekers using a multiplex. Leaving the development of an EPG to the market, in the absence of a clear mechanism to identify the capacity over which an EPG can be transmitted, leaves open the possibility that consumer demands in this area will not be met.

3.5 In relation to (b), even if the ACCC does not adopt the CBAA's submission with respect to the development of an ensemble wide EPG, it should give serious and further consideration to the CBAA's recommendation relating to equal treatment of all access seekers in order to ensure that an EPG operated by a multiplex licensee cannot be used to lessen competition by discriminating against particular access seekers or classes of access seekers.

3.6 The EPG is a critical part of the digital radio service as it provides by means by which consumers navigate services on their radio. Each multiplex operating in each city ought to carry the EPG data for all multiplexes operating in that city. In addition, for preference, EPGs on all multiplexes in Australia should operate in the same manner. Otherwise radio receivers may not work compatibly across the whole country.

3.7 The CBAA believes that ensemble wide EPG data will necessarily be carried as part of excess capacity on each multiplex. The multiplex licensee would either provide the EPG platform itself or tender out the task to a third party. It is therefore appropriate and likely that the multiplex licensee will set aside capacity within excess capacity for EPG data. However, if a common EPG cannot be required as part of the Service, then, as an absolute minimum, the undertaking should be amended to say that if a common EPG platform is established that it should become part of the Service, and that all access seekers must be treated equally.

4. Timely response to requests for capacity changes

4.1 In section 2.6(c) of its submission, the CBAA noted that:

> *"There is no requirement in the undertaking or Access Agreement for the Multiplex licensee to respond to capacity change requests in a timely manner."*

4.2 At page 29 of its draft decision, the ACCC stated:

> *"The ACCC understands that it is the nature of the transmission technology that the multiplex transmitters do not need to make any alterations to their services to process a capacity change, but simply needs to be notified of this change in the signal received."*

4.3 While it is true that certain day to day operational changes to arrangements do not require changes to the service supplied by the multiplex licensee, the multiplex licensee would be required to modify a service if, for example:

- a new access seeker is to commence provision of a service;
- an existing access seeker wished to transfer capacity to another user; or
- increase or decrease its capacity or to split existing capacity into two or more services from different originating locations.

4.4 These points are critical to consider in the context of access to digital capacity by community radio services on a shared basis under the representative company as prescribed by legislation. This is unlike commercial services with individual service allocations. The timeliness of such changes is critical for successful shared access to limited capacity.

4.5 Capacity changes as a result of providing new services clearly needs to be handled in a timely manner. This situation is highly likely to occur for the community stations as they may not all be in a position to commence at the general digital radio start up day due to funding not being available until sometime after 1 July 2009. Of course the multiplex licensee is required by legislation to commence before that date.

4.6 The process of bringing on new services after the general commencement of the digital radio services on a multiplex may result in the need to configure connections details of each and all services that contribute to that multiplex, as well as a need for the multiplex itself to be re-configured. These re-configurations have the potential to cause a temporary disruption to all services and clearly require a high degree of co-ordination. This underlines the need for some timeliness requirement to be included in the Undertaking.

4.7 The CBAA remains of the view that it is fair and reasonable for the access agreement to provide for the multiplex licensee to respond to requests for such modifications in a timely manner.

Assessment of whether the access prices or pricing methodologies are fair and reasonable

5. Specifying charges on a per access seeker basis

5.1 At pages 36 to 37 of its draft decision, the ACCC noted that a per access seeker approach to pricing:

(a) passes risk from the multiplex licensee to access seekers (but not all risk, since the loss of each access seeker may increase incentives for remaining users to abandon the service);

(b) limits incentives for the multiplex licensee to maximise usage of the multiplex.

5.2 Despite this, the ACCC concluded that this approach to pricing "is not unreasonable".

5.3 The relevant criterion prescribed by the ACCC in the *Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria) Determination 2008* (**the Determination**) is clause 5(1)(d) which requires the ACCC to have regard to:

> *"whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable."*

5.4 It is not clear from the ACCC's draft decision why it considers that the pricing methodology in the access agreement satisfies this criterion. While the ACCC's draft decision canvasses a series of flaws in the pricing methodology, it does not identify the factors that support the view that the pricing methodology is fair and reasonable. The statement by the ACCC that the pricing methodology "is not unreasonable" suggests that the ACCC has approached this criterion on the basis that the pricing methodology should be approved unless grounds are established to support the view that it is 'unreasonable'.

5.5 Such an approach is a misapplication by the ACCC of its own decision making criteria. The ACCC's discussion of this issue at pages 36 to 37 of its draft decision point strongly towards the conclusion that a per access seeker pricing methodology is not fair and reasonable. Unless the ACCC can satisfy itself that there are countervailing grounds to support the opposite view, the ACCC should, in its final decision, determine that this aspect of the access undertaking is not fair and reasonable and must be rejected.

5.6 At page 34 of its draft decision, the ACCC stated:

> *"The ACCC notes the CBAA's argument that investment that occurs on a shared basis between the users of those facilities could be provided at prices that simply reflect the underlying cost. However, not all broadcasters using the multiplex licensee's infrastructure will also be a shareholder. The absence of a normal commercial rate of return within the access charges would mean all access seekers benefit from the facilities, yet only some have to bear the risks associated with the investment."*

5.7 The ACCC has recognised the need for a commercial rate of return on the basis that the shareholders are bearing the risk of the investment. Despite this, the ACCC has allowed per-access seeker pricing under which most of this risk is transferred to all users, whether they are shareholders or not. While the ACCC notes, in passing, that this should result in a lower WACC, this does not feature in the ACCC's decision. The proposed methodology for calculating a commercial rate of return was approved by the ACCC in its draft decision.

5.8 If, in reality, the risk of investment is to be shared between shareholders and users who are not shareholders, the non-shareholders deserve to be compensated for this risk. In the absence of such a mechanism, the allocation of risk needs to be reflected more accurately in the pricing methodology. If shareholders will receive a commercial rate of return on their investment, they should bear a greater proportion of the risk relating to utilisation. Even if the ACCC insists on rejecting the CBAA's initial proposal, a more equitable method of allocating this risk is required. For example, the ACCC could require that the proportion of the cost of unallocated capacity to be met by a non-shareholder is to be 50% of the proportion to be borne by a shareholder access seeker, with the residual costs to be met by shareholder users.

6. Treating the Representative Company as an Access Seeker

6.1 In section 3.4 of its submission, the CBAA argued that the definition of "Access Seeker" should be amended to remove the reference to the Representative Company. Division 4B of Part 3.3 of the *Radiocommunications Act 1992* confers access entitlements on both commercial and community broadcasters. However, no access entitlement is conferred on the Representative Company. The CBAA further added that unless this amendment was made a single community broadcaster, nominated by the Representative Company, could find itself liable for the entire capacity allocated to the community broadcasting sector.

6.2 At page 36 of its draft decision, the ACCC addressed this argument in the following terms:

> *"Elsewhere in its submission, the CBAA repeats its opposition to a per-access seeker basis for determining service charges, in this case referring to the example of a single community broadcaster being liable for the total charges due from a representative company, even if the broadcaster is only using a small proportion of the total two channels allocated to the community sector. Again the CBAA does not set out why a per-access seeker basis for determining service charges is unreasonable on anticompetitive grounds, but rather it only seeks to establish that the pricing methodology disadvantages its members due to certain characteristics that some or all of them share."*

6.3 It is clear from this passage that the ACCC has failed to understand the argument that was being put by the CBAA. The ACCC has assumed that section 3.4 of the CBAA's submission repeats the argument made in section 3.3. In fact, section 3.4 is not concerned with pricing on a per-access seeker basis. It deals with a separate issue, namely, the treatment of the Representative Company as an access seeker under the access undertaking and access agreement. In order to enable the ACCC to give proper, genuine and realistic consideration to this matter, the CBAA has explained this issue in greater detail below.

6.4 At the heart of this issue is the fact that the access undertaking and access agreement treat the Representative Company as an access seeker. "Access Seeker" is defined in clause 1 of Schedule 1 to the access agreement in the following terms:

> *"**Access Seeker** means an access seeker under this Agreement and may include:*
>
> *(a) an Incumbent Commercial Broadcaster;*
>
> *(b) the Representative Company (acting on behalf of Digital Community Broadcasters); and*
>
> *(c) a Restricted Datacaster."*

6.5 A similar definition is given in clause 1.1 of the access undertaking.

6.6 There is no logical or legitimate reason why they should do so. For example, under clause 1(b)(i)(B) of the Attachment A to the access agreement, it is a condition precedent of obtaining access that the access seeker is a Representative Company. This is a condition that cannot, by definition, be satisfied. Division 4B of Part 3.3 of the *Radiocommunications Act 1992* confers access entitlements on both commercial and community broadcasters. No access entitlement is conferred on the Representative Company. The role of the Representative Company is limited to allocating capacity to community broadcasters and notifying those allocations to the multiplex licensee.

6.7 The potential effect of clause 4.1 of Schedule 2, when combined with the definitions of Access Seeker, is that charges could be levied based on the capacity reserved for the Representative Company (ie. 2/9ths of the multiplex), not the capacity allocated to a community broadcaster. This can be illustrated using this following example.

6.8 Clauses 4.1 and 4.2 in Schedule 2 to the access agreement state:

> ***"4.1 Fixed recurring charge***
>
> *Fixed recurring charges will be levied based on the Multiplex Capacity allocated to an Access Seeker, irrespective of whether that capacity is used or not and irrespective of the type of use.*
>
> ***4.2 Converting costs into charges***
>
> *The annualised costs derived under section 3 of these pricing principles will be converted into an annual fixed recurring charge according to the following formula:*
>
> $$AFRC = AC \times \frac{BMC}{TMC}$$
>
> *where,*
>
> ***AFRC** is the annual fixed recurring charge.*
>
> ***AC** is the annualised costs derived under section 3.*
>
> ***BMC** is the amount of Multiplex Capacity allocated to the relevant Access Seeker by the Multiplex Licensee allocated for access by the Access Seeker.*
>
> ***TMC** is the total amount of Multiplex Capacity allocated to all Access Seekers by the Multiplex Licensee and which shall be no greater (but may be less) than 9/9."*

6.9 Assume that:

(a) there are 4 commercial broadcasters and 1 community broadcaster using a multiplex;

(b) each broadcaster uses 1/9th of the multiplex's capacity; and

(c) the Annualised Cost of the multiplex is $100,000.

6.10 If each broadcaster is treated as an access seeker, the formula set out in clause 4.2 should apply as follows:

$$\text{AFRC} = 100{,}000 \times \frac{1/9}{5/9}$$

Therefore, the AFRC for each access seeker is $20,000. Put simply, each of the 5 access seekers bear 1/5th of the Annualised Charge.

6.11 However, using the assumptions set out in clause 6.9 above, if the Representative Company is treated as an access seeker, the outcome could be very different. 2/9ths of the capacity of the multiplex are reserved for community broadcasters represented by the Representative Company. If the Representative Company is treated as an access seeker, on the basis that 2/9ths of the capacity of the multiplex is allocated to it, the AFRC for each *commercial broadcaster* would be calculated as follows:

$$\text{AFRC} = 100{,}000 \times \frac{1/9}{6/9}$$

Therefore, the AFRC for each commercial broadcaster would be $16,666.

6.12 However, the AFRC for the *Representative Company* would be calculated as follows:

$$\text{AFRC} = 100{,}000 \times \frac{2/9}{6/9}$$

Therefore, the AFRC for the Representative Company would be $33,333.

6.13 The Representative Company does not actually use the multiplex. Its role is limited to allocating capacity to community broadcasters and notifying those allocations to the multiplex licensee. In this example, there is only one community broadcaster, using 1/9th of the capacity of the multiplex. However, since the Representative Company does not use the multiplex and has no means of its own to bear this cost, the entire amount allocated to the Representative Company will need to be passed on to the single community broadcaster using the multiplex. In this example, the community broadcaster will be forced to pay twice as much as a commercial broadcaster for exactly the same capacity.

6.14 In its draft decision, the ACCC stated that:

> *"the CBAA does not set out why a per-access seeker basis for determining service charges is unreasonable on anticompetitive grounds, but rather it only seeks to establish that the pricing methodology disadvantages its members due to certain characteristics that some or all of them share."*

6.15 The relevant criterion in the Determination is not expressed in such terms. Clause 5(1)(d) states that the ACCC to have regard to:

> *"whether the terms and conditions of access specified in the access undertaking include access prices or pricing methodologies which are fair and reasonable."*

6.16 Whether prices are "fair and reasonable" is a question that is concerned with more than whether the charges are "unreasonable on anti-competitive grounds". According to the ACCC's own explanatory notes to the Determination, this issue is also concerned with whether charges are 'excessive'.[1]

6.17 It is abundantly clear that a pricing methodology which has the potential to result in a community broadcaster paying twice as much as a commercial broadcaster, for the same capacity, would result in charges that are excessive. In so far as the ACCC is concerned with competition grounds, it must recognise that such an outcome would discriminate against a community broadcaster and severely hinder its ability to compete with commercial broadcasters in downstream markets. In relation to criterion (b) (whether the access undertaking unduly restricts competition in related markets) the ACCC's explanatory notes state:

> *"Under this criterion, a licensee would, for example, be prevented from including provisions in its access undertaking that artificially inflated some access seekers' costs or enabled a licensee to provide inferior services to some access seekers compared to those it offers to other access seekers, where this is not reasonable."*[2]

6.18 Proper consideration of this matter requires that the following amendment is made to paragraph (b) of the definition of access seeker in clause 1.1 of the access undertaking and clause 1 of Schedule 1 to the access agreement:

> "(b) ~~the Representative Company (acting on behalf of~~a Digital Community Broadcaster~~s)~~;"

Assessment of whether there is an obligation on the licensee not to hinder access

7. Creditworthiness and Financial Security

7.1 In section 2.2 of its submission, the CBAA argued that community broadcasters should not be subject to creditworthiness reviews or financial security requirements.

7.2 At page 42 of its draft decision, the ACCC stated:

> *"The ACCC considers it reasonable to have appropriate financial security provisions applying indiscriminately to all access seekers. It also does not believe the financial security provisions in the undertaking provide the multiplex licensees with an opportunity to hinder access inappropriately."*

[1] page 6.

[2] page 5.

7.3 The ACCC has failed to give adequate weight to the fact that community broadcasters are not for profit enterprises. It is not simply a question of "compensating particular access seekers for their relative financial disadvantage".[3] Remarks such as these suggest that the ACCC has failed to appreciate that community broadcasters are, by their very nature, different to commercial broadcasters in relation to the way in which they operate. This distinction is recognised in the fact that the legislation reserves certain capacity for the community broadcasting sector and is relevant to the ACCC's consideration of the access undertakings.

7.4 In the absence of government support, most community broadcasters will find it difficult (if not impossible) to satisfy a requirement to provide financial security imposed by a multiplex licensee. Whether such support might be provided is not relevant to the ACCC's consideration of the access undertaking. The only issue for the ACCC is whether clause 15 of the access agreement and clause 3 of Attachment A satisfy the criteria prescribed by the ACCC in the Determination. The ability of a multiplex licensee to require financial security "indiscriminately" (ie. from a not for profit broadcaster on the same terms and a commercial broadcaster) plainly gives the multiplex licensee the ability to unfairly hinder access to services by community broadcasters.

7.5 The need to amend this aspect of the access agreement is even more pressing if the ACCC does not accept the need to amend the definition of "Access Seeker" to exclude the Representative Company.

7.6 The fact that the access agreement defines "Access Seeker" to include the Representative Company means that the *Representative Company* might be subject to a creditworthiness review and Financial Security requirement under clause 3 of Attachment A.

7.7 Whatever view the ACCC might take of the financial capacity of a community broadcaster, it cannot seriously suggest that a Representative Company, whose role is limited to allocating capacity to community broadcasters and notifying those allocations to the multiplex licensee, would or should have the capacity to undergo a creditworthiness review or provide financial security to the multiplex licensee.

[3] draft decision, page 37.