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COMMUNITY  
BROADCASTING  
ASSOCIATION OF  
AUSTRALIA

**February 2019**

## **Assessment of Access Undertaking for Digital Radio Multiplex Transmission Services in Canberra, Darwin and Hobart**

### **Follow up comments by the Community Broadcasting Association of Australia to the Australian Competition and Consumer Commission**

#### **1. Introduction**

- 1.1 In December 2018 the Community Broadcasting Association of Australia (**CBAA**) submitted comments in relation to the ACCC's consultation and position paper regarding three new access undertakings received in relation to the commencement of digital radio services in Canberra, Darwin and Hobart.
- 1.2 The three undertakings were lodged by the Digital Radio Multiplex Transmitter (**DRMT**) licensees for the Canberra, Darwin and Hobart licence areas and are identical.
- 1.3 The ACCC sought further comments from the CBAA on its submission regarding the points set out below, in particular.
- 1.4 The comments by the CBAA in this document are made in response to the ACCC's request and they supplement and are in addition to the comments previously provided by the CBAA.

#### **2. Background**

- 2.1 In February 2019 the ACCC sought additional clarification regarding concerns submitted by the CBAA.
- 2.2 The ACCC sought further comments on the following points in particular:
  - (a) Excess capacity - reasons for and methods to address concerns regarding allotment of excess capacity after the initial period of 12 months from digital radio start-up day, including whether an auction is preferred as the method for allocation of excess capacity.
  - (b) Representative company - the definition of the representative company in relation to changes in clauses 4.4 (e) and in general throughout the proposed Access Agreement.
  - (c) Consultation - proposed bi-annual meetings, mostly to address equipment and interoperability matters, The ACCC understands the Digital Radio Technical Advisory Committee (**DTAC**) operates regularly and whether these matters in relation to the regional locations might be addressed similarly or by using the same forum.
- 2.3 Having advised that it understood from CRA that the digital radio rollout timeline for all three regions has been delayed and with digital radio start-up later than planned, the ACCC sought the CBAA's comments on the impact of delay. The initial planning was targeting digital radio start up in 2018. The delays to date have caused significant re-planning and re-scheduling, particularly in regard to equipment and linking provision. A slight further delay beyond March 2019 is not significant.
- 2.4 In providing follow up comments on the specific matters in paragraph 2.2 above, the CBAA reiterates comments made in its previous submission, and notes, in addition, that other comments, including the suggested amendment to the definition of the RF Service, remain relevant and appropriate.

### 3. Excess Capacity

- 3.1 The CBAA's December 2018 submission points out that in the large majority of regional areas there will be Excess Capacity above the combined total of commercial standard access entitlements and the capacity reserved for community broadcasters. The ACCC has requested that the CBAA provide reasons for and methods to address concerns regarding allotment of excess capacity after the initial period of 12 months from digital radio start-up day, including whether an auction is preferred as the method for allocation of excess capacity.
- 3.2 The CBAA believes it has largely addressed this in its previous submission, but is pleased to clarify its position in the following paragraphs.
- 3.3 The scheme set out in the Radiocommunications Act 1992 (Cth) (Act) for the period at any time after the 12 month period beginning on the digital start up day for the area, provides in Section 118NT(3)(a) that "the digital radio multiplex transmitter licensee may ascertain the level of demand for access to that excess multiplex capacity" and in Section 118NT(3)(b) provides "if the licensee proposes to ascertain the level of demand as mentioned in paragraph (a)" the licensee must publish a notice and invite expressions of interest from content service providers. If, as a consequence of inviting expressions of interest from content service providers:
- (a) the demand from interested content service providers for access to that excess multiplex capacity falls short of that excess multiplex capacity, then Section 118NT(4) provides that each interested content service provider is entitled to access to the fraction of multiplex capacity sought by it; or
  - (b) the demand from interested content service providers for access to that excess multiplex capacity exceeds that excess multiplex capacity, then Section 118NT(6) provides that the digital radio multiplex transmitter licensee use an open and transparent auction process to determine which content service providers are to have access to which fractions of multiplex capacity.
- 3.4 The CBAA's concern is that under Section 118NT(3) of the Act in relation to the period after the initial 12 months, the DRMT licensee is not specifically required to ascertain the level of demand for Excess Capacity as it is during the initial 12 month period in Section 118NT(2). That is, the word "must" (in Section 118NT(2)) is replaced with the word "may".
- 3.5 As there is then no mandatory requirement on the DRMT Licensee to ascertain the level of demand, any time after the initial 12 months, the DRMT licensee could potentially:
- (a) deny access to Excess Capacity even if there was demand, either as a result of increased interest from existing content service providers, and/or if there were new eligible content service providers as a result of further new commercial or community broadcast service licenses being issued by the Australian Communications and Media Authority (**ACMA**); or
  - (b) grant access to Excess Capacity to one or more content service providers without ascertaining whether other content service providers would wish to gain access to some of that Excess Capacity.
- 3.6 In the CBAA's view, neither circumstance is desirable without a structured, open and transparent process.
- 3.7 This situation has significant potential to lessen competition and hinder access to digital radio multiplex capacity.
- 3.8 As noted in the CBAA's December 2018 submission, this could be remedied by an update to the Access Undertaking that makes clear the circumstance under which the DRMT licensee would ascertain the level of demand for unused Excess Capacity. Specifically, it is suggested that in terms of the Access Agreement, clause 5.3(a) of the Access agreement be revised to read:
- "(a) *The Multiplex Licensee will allocate Excess-Capacity Entitlements to each Digital broadcaster in accordance with section 118NT of the Radiocommunications Act and where the circumstances in section 118NT(1)(b) of the Radiocommunications Act apply the Multiplex Licensee must ascertain the level of demand for excess multiplex capacity in accordance with section 118NT(3) of the Radiocommunications Act if:*
    - (i) *there is unallocated Excess Capacity on the digital radio multiplex; and*
    - (ii) *an eligible content service provider applies to the Multiplex Licensee for access to, or otherwise expresses interest in, the use of Excess Capacity.*"

- 3.9 A provision of this kind in the Undertaking and in the Access Agreement would in CBAA's view address the shortcomings noted above as it would provide a process by which an access seeker could seek access to excess-capacity and then trigger the process to ascertain demand for that capacity and, if there is sufficient demand, to trigger an auction process in accordance with the provisions of the Act referred to above.

#### 4. Representative company

- 4.1 The proposed undertakings and agreements are largely identical to those developed or accepted previously by the ACCC for digital radio implementation in Sydney, Melbourne, Brisbane, Adelaide and Perth.
- 4.2 Many of the changes proposed are in the nature of tidy ups and simplifications, and the CBAA in its December 2018 submission has indicated agreement with the majority of those changes.
- 4.3 However, the change to delete the words "Representative Company or a" from clause 4.4 (e) of the Agreement is not supported by the CBAA.
- 4.4 There is no apparent reason to change the wording currently operating well under the metropolitan agreements which is "Nothing prevents a Representative Company or a Digital Community Broadcasters from granting a third party the right to:...".
- 4.5 The existing wording makes clear there is nothing to prevent the flexibility for the Representative Company to do more in respect of arrangements in addition to the statutory requirement that it nominate capacities for the Standard Access Entitlement.
- 4.6 This is particularly relevant for Digital Community Broadcasters under the legislative framework of shared access to digital capacity for all eligible community licensees.
- 4.7 If there is to be a change to section 4.4 (e), which the CBAA does not see as necessary, then perhaps additional clarity would be to change the words to read "Representative Company of one or more Digital Community Broadcasters or a".
- 4.8 As a general point regarding usage of the terms "Representative Company" and "Digital Community Radio Broadcasting Representative Company" the CBAA has reviewed the Agreement document again, and suggest the following amendments be made:
- (a) Background, paragraph B, second bullet point – replace 'Digital Community Broadcasting Representative Company' with "Representative Company".
  - (b) Delete definition of 'Digital Community Radio Broadcasting Representative Company'; and
  - (c) Amend definition of 'Representative Company' to read - "**Representative Company** means a digital community radio broadcasting representative company as defined in section 9C of the Radiocommunications Act."

#### 5. Consultation

- 5.1 In its December 2018 submission, the CBAA noted that the metropolitan digital radio implementation and operation benefits greatly from a collegiate broadcast industry approach that is under-pinned by regular meetings and reporting of operational matters.
- 5.2 The CBAA proposed that the Undertaking provide high level guidance and an open and transparent consultation process around operational and infrastructure development matters for shared multiplex facilities, along the lines of:

*The DRMT licensee to conduct meetings with Access Seekers at least twice per year to discuss and report on operational, performance and development issues, and, irrespective of such meetings, there be an obligation to consult with existing Access Seekers in a timely and transparent manner if upgrades, updates or any material change to the architecture or infrastructure used to provide the Service are under consideration.*

together with a suitably detailed provision to this effect in the Access Agreement.

- 5.3 In February 2019 the ACCC noted that the CBAA had proposed bi-annual meeting, mostly to address equipment an interoperability matters. The ACCC also noted that it understood the Digital Radio Technical Advisory Committee (**DTAC**) operates regularly and asked whether these matters in relation to the regional locations might be addressed similarly or by using the same forum.
- 5.4 The CBAA agrees that the DTAC or a similar forum could address these matters and would align with the spirit of the consultation process outlined above. The CBAA reiterates that the Undertaking should in itself provide high level guidance as outlined in paragraph 5.3 above.

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