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Michael Cosgrave
Executive General Manager
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000

By email: digitalradio@accc.gov.au

Dear Mr Cosgrave

Response to CBAA submissions on the proposed access undertakings for Canberra, Darwin and Hobart

We act for the Foundation Category 1 Digital Radio Multiplex Transmitter Licensees in Canberra, Darwin and Hobart (each a **JVC** and together the **JVCs**).

We welcome the opportunity to respond to the CBAA's submission to the Australian Competition and Consumer Commission (**ACCC**) on the proposed digital radio access undertakings for Canberra, Darwin and Hobart (**First CBAA submission**) dated 20 December 2018, along with its follow up submission dated 15 February 2019 (**Second CBAA Submission**, together, the **CBAA Submissions**).

This letter responds to the main issues raised in both submissions.

Key messages

- The proposed digital radio access undertakings are consistent with the requirements of the Radiocommunications Act and the ACCC's decision making criteria. The proposed undertakings are capable of acceptance without further amendment.
- The CBAA raises several broader issues about the operation of the applicable policy and regulatory framework for digital radio transmission services, such as the maximum power level for digital radio transmissions, interoperability and the process for allocating excess multiplex capacity.
- We do not consider that these issues are relevant to the current statutory process. Such issues are either beyond the scope of the current statutory process or are addressed (or capable of being addressed) outside of the access undertaking process.
- The other non-substantive issues identified by the CBAA do not require any amendments to the proposed access undertakings. We encourage the ACCC to move straight to acceptance of the proposed undertakings.

1. JVCs have strong regulatory obligations and incentives to operate a high-quality transmission service

The Radiocommunications Act and the applicable regulatory framework establish the overarching parameters for the delivery of digital radio transmission services from an operational and technical perspective.

The CBAA submits that the access undertaking does not sufficiently safeguard the standard of the multiplex transmission service.[1] It argues that nothing prevents the JVCs from underinvesting in the multiplex transmission service, leading to sub-optimal coverage and quality of service.[2] This, it claims, will disadvantage access seekers (particularly digital community broadcasters) and that it is necessary to amend the definition of the RF Service to address this concern.[3]

Such arguments do not have sufficient regard to the constraints that exist within the applicable regulatory environment and run counter to the incentives of the JVCs to prudently and efficiently invest in transmission infrastructure.

The digital radio channel plan (**DRCP**) for each digital radio broadcasting area prescribes the location for the main transmission infrastructure and the technical specifications to be used in each market,[4] including the maximum effective radiated power (**ERP**).

The maximum ERP in the Canberra market was recently increased four times from 5 kW to 20 kW.[5] In response, the Canberra JVC has ordered more transmission equipment to ensure that it can deliver the multiplex transmission service at the increased full power.

Consequently, the maximum ERP for each market will now be as follows:

Digital radio market	Maximum ERP
Canberra	20 kW (formerly 5 kW)[6]
Darwin	20 kW[7]
Hobart	20 kW[8]

In addition to the maximum ERP level for each market, the JVCs are also required, as a licence condition, to ensure transmission power does not fall below 5 dB of the maximum ERP.[9]

The combined effect of these regulatory requirements is to ensure a high level of coverage within the designated licence area and to ensure that services run at full power (subject to any practical engineering limitations).

These regulatory requirements are also complemented by the incentives of JVC owners.

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[1] First CBAA Submission, paragraph 6.1.
[2] First CBAA Submission, paragraph 6.4.
[3] First CBAA Submission, paragraphs 6.7 to 6.9.
[4] As prepared by ACMA pursuant to s 44A of the Radiocommunications Act.
[5] *Radiocommunications (Digital Radio Channels — NSW/ACT) Plan Variation 2019 (No. 1)* (Cth).
[6] *Radiocommunications (Digital Radio Channels — NSW/ACT) Plan 2007* (Cth), Schedule 2.
[7] *Radiocommunications (Digital Radio Channels – Northern Territory) Plan 2017* (Cth), Schedule 1.
[8] *Radiocommunications (Digital Radio Channels — Tasmania) Plan 2007* (Cth), Schedule 1.
[9] *Broadcasting Services (Technical Planning) Guidelines 2017* (Cth), guideline 11. This is a licence condition for the JVCs by virtue of s 109B(1)(n) of the Radiocommunications Act.

As the owners of the JVCs will also be the primary users of the multiplex transmission service, the JVCs have strong incentives to invest prudently and to operate their digital radio transmission facilities at:

- maximum power (or as close as possible to the maximum ERP); and
- the highest practicable quality and standard.

In particular, JVC owners would want to maximise the quality and coverage area of any digital radio broadcasts to maximise their selling opportunities in downstream advertising markets, while also avoiding any economically inefficient 'gold-plating' of such investments.

In light of these considerations, the CBAA's submission on this issue[10] significantly overstates the risks associated with how the JVCs will operate their digital radio transmission infrastructure.

2. The JVCs are already required to consult and ensure transparency on operational and technical matters

Delivery of transmission infrastructure for digital radio is an operationally and technically complex endeavour. There has been significant technical planning over many years to develop the digital radio transmission service. To date, this has occurred in a highly collaborative manner between ACMA and industry participants (including commercial, community and national broadcasters) without the need for regulation.

Trials of DAB+ services in Canberra and Darwin have been in place for an extended period and the JVCs are currently in the process of upgrading infrastructure to support the industry moving into long-term supply arrangements (and in the case of Canberra, to a new higher power arrangement).

The CBAA has raised concerns about ensuring that the multiplex transmission service is supplied in an efficient, open, and non-discriminatory manner. It has also raised concerns about interoperability.[11]

To address its perceived concerns, it has proposed that each JVC must meet with the access seekers at least twice a year to discuss operational, performance and development issues. Additionally, the CBAA requires that each JVC must consult with the access seekers if any significant upgrades or updates to the infrastructure are contemplated.[12]

While the JVCs are broadly supportive of consultation, the JVCs do not consider that these additional commitments need to be included within the access undertaking. The existing mechanisms within the access undertaking, along with the broader arrangements that apply at the industry level in respect of operational and technical matters, already facilitate significant levels of consultation between industry stakeholders on these issues.

In particular:

- the JVCs have a broad obligation in the access undertaking not to discriminate between access seekers in technical and operational matters, nor to hinder access to the multiplex transmission service[13]

[10] First CBAA Submission, paragraph 6.5.
[11] First CBAA Submission, paragraphs 7.1 – 7.2.
[12] First CBAA Submission, paragraph 7.8.
[13] Access agreement, clauses 7.2 and 7.3 of the main body.

- there already exists a multi-party industry forum convened by Commercial Radio Australia, the Digital Technical Advisory Committee (**DTAC**), that meets six times a year to discuss operational, technical and development matters. DTAC includes representatives of the various stakeholders (including the CBAA) and technical subject matter experts. The operational and technical aspects of the multiplex transmission service are already within the scope of DTAC's functions. The JVCs consider that DTAC is the appropriate forum to address any potential issues and there is likely to be little, if anything, to be gained from implementing additional bilateral consultation obligations in the access undertaking

- the JVCs have designed the multiplex transmission service in a way that aligns to global standards for DAB+ transmission,[14] and do not anticipate that there will be any interoperability issues associated with its design

- the JVCs are using leading vendors for the DAB+ transmission equipment and its vendor and equipment selection decisions have been shared with the CBAA. Such decisions have had regard to the need to ensure compatibility to the extent possible with existing systems

- the access undertaking includes an option to develop an operations manual, and this can serve as the basis for clarifying and providing further details on operational and technical matters for the benefit of access seekers, if required.

We also note that, as the digital radio access agreement operates bilaterally between each JVC and each digital community broadcaster, it is not necessarily the correct vehicle for discussions with the community sector (which will be represented by the CBAA).

As the ACCC is aware, each JVC and the CBAA will shortly enter into a separate implementation agreement to govern how the community sector will interface with each JVC from a commercial, operational and technical perspective. To the extent that additional consultation is needed between the CBAA and each JVC, then the implementation agreement provides an option for further discussion between the CBAA and the commercial sector.

3. The process for allocating excess multiplex capacity is clear and prescribed in legislation

The Radiocommunications Act provides a detailed framework for allocating excess multiplex capacity in each market. The proposed access undertaking aligns with these legislative requirements by broadly providing that any excess multiplex capacity is to be treated in accordance with section 118NT of the Radiocommunications Act.

The CBAA argues that section 118NT can operate to lessen competition and hinder access if excess multiplex capacity arises after the initial 12-month period.[15] It claims that there is an overall lack of transparency and certainty in the allocation process.

Even though section 118NT makes it clear that it is **optional** for the JVC to ascertain the level of demand for excess capacity after 12-months after the digital radio start up day, the CBAA

[14] E.g. *ETSI TS 102 693: Digital Audio Broadcasting (DAB); Encapsulation of DAB Interfaces (EDI)*; *EBU TR025: Report on Frequency and Network Planning Parameters Related to DAB+*.
[15] First CBAA Submission, paragraph 8.10.

has requested changes that would force the JVC to undertake such an assessment in any event under the access undertaking.

The JVCs strongly disagree with including provisions within the access undertaking that are inconsistent with the overarching legislative framework. Section 118NT governs the applicable process for allocating excess capacity. It provides as follows:

1 it provides a mandatory process for initially ascertaining demand for any excess capacity within 90 days of the digital radio start up day

2 it provides an optional process for ascertaining demand for any excess capacity if any exists at any time after the 12-month period starting on the digital radio start up day (**residual excess capacity**)

3 in both the above cases:

(a) if demand falls short of the available excess multiplex capacity, then each access seeker is entitled to the fraction sought

(b) if demand exceeds available excess multiplex capacity, then the excess multiplex capacity is allocated according to a statutorily-prescribed auction process.

Contrary to the CBAA's claims,[16] it is not open to the JVC to arbitrarily allocate residual excess capacity to an access seeker without following the process stipulated in the Radiocommunications Act. Section 118NT(3) makes it clear that if the JVC exercises the option to subsequently ascertain demand for any residual excess capacity, then it must give notice to all and comply with the applicable allocation process in the remainder of section 118NT. Any such allocations would also remain subject to the capacity cap restrictions under section 118NV which prohibit each incumbent commercial broadcaster from holding more than 2/9 of the total amount of capacity per multiplex. Accordingly, the JVC cannot arbitrarily allocate such residual excess capacity.

Similarly, the JVC strongly disagrees with the CBAA's assertion that the option for the JVC under section 118NT(3) as to whether it wishes to ascertain whether there is demand for any residual excess capacity allows the JVC to "*potentially…deny access to Excess Capacity even if there was demand…*".[17]

The JVCs will have strong incentives to maximise the allocation and usage of any residual excess capacity.

The table below illustrates initial indicative fractions of multiplex capacity the broadcasters in each market are expected to take up as standard access entitlements and expected levels of excess capacity:

Canberra	
Commercial Broadcasters	4/9
Community Broadcasters (reserved)	2/9
Unallocated (initial excess capacity)	3/9
Darwin	
Commercial Broadcasters	2/9
Community Broadcasters (reserved)	2/9

[16] Second CBAA Submission, paragraph 3.5(b).
[17] Second CBAA Submission, paragraph 3.5(a).

Unallocated (initial excess capacity)	5/9
Hobart	
Commercial Broadcasters	3/9
Community Broadcasters (reserved)	2/9
Unallocated (initial excess capacity)	4/9

To the extent that residual excess capacity exists because it is not allocated as part of the initial process under section 118NT(2), then the JVC will always have an incentive to subsequently allocate that residual excess capacity if there is interest. This is because a failure to allocate that capacity would result in each access seeker (including each JVC owner) facing a higher access charge relative to a situation where that residual excess capacity is acquired by an interested party. Allocation of that residual excess capacity would spread the JVC's costs across a larger number of access seekers for recovery, resulting in a per unit, fee reduction for each 1/9th of multiplex capacity. Consequently, the pricing principles, when combined with the protections offered by the capacity cap to prevent capacity misuse and hoarding, create the correct incentives and would avoid the scenarios suggested by the CBAA.

4. Role of the digital community radio broadcasting representative company

The CBAA submits that changes are required to clarify the role of the digital community radio broadcasting representative company. In particular, the CBAA proposes that the digital community radio broadcasting representative company should have the right to outsource transmission and spectrum management.

These changes are not required, for the reasons summarised in the following table:

Clause Reference	CBAA Comment	JVC Response
4.4(e)	The right of the Representative Company to grant a third party the right to provide outsourced transmission and manage the digital spectrum on behalf of a community broadcaster has been removed. The original wording of clause 4.4(e) in the metropolitan market digital radio access undertaking should be retained.	The CBAA's proposed amendments are not required. It is correct that the original wording in the metropolitan undertakings conferred the right to outsource spectrum management to the digital community radio broadcasting representative company. This wording in the metropolitan access undertakings is an overhang from an initial proposal during the metropolitan undertaking process that the representative company could also be an access seeker. This outcome was rejected in the ACCC's previous decision on the basis that the Radiocommunications Act provides for standard access entitlements and excess capacity access entitlements to be made available to digital community broadcasters only. The role of the representative company under the Radiocommunications Act is to nominate the amount of standard access entitlements that will be allocated to each digital community broadcaster. The relevant access seekers will be digital community broadcasters, not the representative company as per the ACCC's previous decision for the metropolitan markets.
7.4(b)	The reference to 'Representative Company' should be changed to 'Digital Community Radio	No change is required. 'Representative Company' is already defined in the access agreement to mean 'Digital Community Radio Broadcasting Representative Company'.

	Broadcasting Representative Company'.	

5. The weighted average cost of capital review mechanism is appropriate

The JVCs have proposed an annual review of the weighted average cost of capital (**WACC**) using the latest ACCC decision from comparable regulated sectors to ensure that the return on capital component of the access charges reflects the latest ACCC-endorsed approaches.

In the First CBAA Submission, the CBAA supports this proposed approach but suggests that further text is required to ensure that any adopted WACC figure is at the low end of any referenced determination.

This additional wording is not required. The WACC determined in respect of another regulated sector will not typically be expressed as a range but as a definitive figure, based on specific WACC parameters included by the ACCC in its final decision.

We thank the ACCC for the opportunity to provide this supplementary submission and would be pleased to discuss any aspect of it.

Yours sincerely
Webb Henderson

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Partner