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Ms Jane van Beelen
Chief legal and regulatory officer
NBN Co Limited
Level 13, 100 Mount Street
NORTH SYDNEY NSW 2060

By email: janevanbeelen@nbnco.com.au

Dear Ms van Beelen

Re: NBN Co Special Access Undertaking variation – confidentiality claims in Supporting Submissions

I refer to NBN Co's proposed special access undertaking variation lodged with the ACCC on 29 March 2022 (**variation**) and to supporting material provided to the ACCC on 5 and 6 April 2022 (**Supporting Submissions**). I also refer to correspondence from NBN Co on 5 April 2022, 6 April 2022, 10 April 2022 and 13 April 2022, and correspondence from the ACCC on 8 April 2022 and 12 April 2022, regarding confidentiality claims made by NBN Co.

As notified to NBN Co in our letter dated 12 April 2022, the ACCC proposes to publish the variation in full on 23 May 2022, and consequently publication of the variation is not discussed further in this letter.

The purpose of this letter is to provide additional information on the ACCC's proposed next steps to resolve confidentiality claims made by NBN Co over information contained in the Supporting Submissions. The ACCC expects to publish NBN Co's Supporting Submissions at the same time as the variation, which will require resolution of the confidentiality claims made by NBN Co.

2014 Confidentiality Guidelines

In meetings with ACCC staff, NBN Co has referred to the ACCC's 2014 Confidentiality Guideline¹, and has proposed bilateral confidentiality terms with third parties as a basis for managing confidentiality claims over information in the Supporting Submissions.

As noted in the paragraph 1.2 of the Confidentiality Guideline: "The ACCC will confirm at the commencement of an inquiry whether it expects parties to follow this Guideline in preparing their submissions."

¹ <https://www.accc.gov.au/publications/communications-inquiries-submitting-confidential-material>

The ACCC has formed the view that it is not appropriate to apply the Confidentiality Guideline in this matter. Given the importance of public consultation for all stakeholders in this matter, the ACCC does not consider it appropriate to manage confidentiality claims in the Supporting Submissions by making that information available to third parties only through limited individual non-disclosure agreements.

Accordingly, in the ACCC's consideration of the variation, NBN Co and third parties will not be expected to follow the ACCC's 2014 Confidentiality Guideline for submitting confidential material to ACCC communications inquiries.

We will continue to engage with NBN Co regarding our confidentiality process ahead of the proposed publication date, including inviting and considering further substantiation of confidentiality claims, our assessment of those claims, and the implications for release of information in the Supporting Submissions.

The ACCC will notify third parties of the relevant confidentiality process for the consultation period when it publishes the variation and Supporting Submissions on 23 May 2022.

Redaction of information in the Supporting Submissions

The ACCC considers that a transparent and effective public consultation process is necessary to allow the ACCC to assess the variation in accordance with the relevant statutory criteria. This accords with the Minister of Communications statement of expectations for the ACCC's telecommunication-related functions.

Public consultation is particularly important in this matter, given the significance of the issues contained in the NBN Co variation, the duration and extent of the proposed changes and the range of stakeholders potentially impacted, including Australian consumers.

The information provided by NBN Co in respect of the extensive redactions to the Supporting Submissions does not provide a sufficient basis to determine that the information is competitively sensitive or otherwise confidential, or that disclosure of the information would be likely to cause any harm to NBN Co. NBN Co has made conclusionary statements with regard to confidentiality without supporting detail or facts. Several redactions appear to relate to information that has been released publicly in a similar form or information that is already aggregated. Further, several redactions relate to information that we will release as part of the proposed public release of the variation.

The ACCC's preliminary view is that the redacted information is likely to be essential to understanding the variation, as well as the Supporting Submissions put forward by NBN Co.

If that is the case, the ACCC does not consider that the redaction of such information from the Supporting Submissions is consistent with an effective and transparent consultation process, because it would not permit an effective public consultation to be undertaken in relation to the substance of the variation.

While there may be circumstances in which it is appropriate for the ACCC to accept confidentiality claims over specific information in the Supporting Submissions or third party submissions in this matter, this will be assessed on a case by case basis. The ACCC will consider whether to publish information having regard to its statutory and common law duties and functions in each instance.²

² The ACCC notes in this regard paragraph 3.1 of the ACCC/AER Information Policy, <https://www.accc.gov.au/system/files/ACCC-AER%20Information%20Policy.pdf>

Substantiation of confidentiality claims

The ACCC therefore requires NBN Co to specifically substantiate its confidentiality claims in respect of each relevant item in the Supporting Submissions. The ACCC asks NBN Co to provide any material and/or submissions it wishes to make in relation to substantiation of these claims urgently, and by no later than **2pm Friday 6 May 2022**.

The ACCC will consider any additional information and submissions provided by NBN Co in further substantiation of its claim and will then, ahead of the proposed 23 May 2022 publication date:

- notify NBN Co of any claims the ACCC does not propose to accept in respect of information proposed to be redacted in the Supporting Submissions;
- provide a final opportunity for NBN Co to withdraw or amend any information over which NBN Co maintains a confidentiality claim in the Supporting Submissions ahead of the ACCC proceeding to publication of the Supporting Submissions.

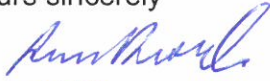
Next steps

Staff would be pleased to meet with NBN Co to discuss any questions about the matters raised in this letter.

Please note that this letter will be published on the ACCC website.

If you wish to discuss the matter further, please contact Scott Harding on (03) 9658 6434.

Yours sincerely


S.P.

Sarah Proudfoot
Executive General Manager
Infrastructure Division