

2 May 2013

Australian Competition and Consumer Commission  
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Attention Richard Home  
General Manager, NBN Engagement and Group Coordination Branch

Dear Mr Home

### **Variation of NBN Co Special Access Undertaking**

#### **Your Reference**

**Our Reference** IP 051301

Macquarie Telecom Pty Limited (“**Macquarie**”) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (“**ACCC**”) in response to the ACCC’s consultation paper concerning the above.<sup>1</sup> The Consultation Paper coincides with the release of the ACCC’s draft decision on NBN Co’s special access undertaking (“**SAU**”).<sup>2</sup>

Macquarie welcomes the position reached by the ACCC as set out in the Draft Decision. In particular, the ACCC’s draft view is that the SAU does not meet the relevant criteria for acceptance. Macquarie also agrees with the ACCC’s draft view that the SAU has many features which have merit. The SAU reflects considerable improvements which NBN Co has made arising from the ACCC’s inquiry process. As such, Macquarie supports the ACCC’s intention to issue to NBN Co a notice suggesting variations to the SAU.

In this submission, Macquarie has responded to each of the ACCC’s proposed variations to the SAU as set out in the Consultation Paper. Essentially in all cases, Macquarie supports the ACCC’s proposed variation. Where appropriate, Macquarie has also made further suggestions that refine the ACCC’s proposals.

### **Proposed Variations**

In this section, Macquarie makes comments against each of the ACCC’s proposed variations to the SAU. For ease of reference, the numbering and section headings used herein follow

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<sup>1</sup> ACCC, Consultation Paper – variation of NBN Co Special Access Undertaking, April 2013 (“**Consultation Paper**”)

<sup>2</sup> ACCC, Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, April 2013 (“**Draft Decision**”)

that of the Consultation Paper.

## 2.1. Interaction between the SAU and the telecommunications access regime

### 2.1.1. Conduct concerning elements of the telecommunications access regime

#### 2.1.1.1. Conduct about including terms and conditions in SFAAs

The ACCC is concerned that in various instances the SAU makes commitments about terms and conditions that will be included in Standard Forms of Access Agreements (“**SFAAs**”). This may mean that an access seeker would need to enter into an SFAA in order to obtain access to NBN Co services on such terms and conditions. In turn, it may force access seekers to accept other terms which may be unsatisfactory in order to obtain those terms that will be included in SFAAs.

Macquarie understands that the ACCC proposes amendments to the SAU which *inter alia* would remove from the SAU commitments to include terms and conditions in SFAAs. The proposed variation would clarify that the SFAA terms and conditions are specified in the SAU in relation to the standard access obligations (“**SAOs**”). As such, NBN Co would be required to supply on the SFAA terms and conditions to access seekers who choose not to enter into an access agreement. Macquarie supports the ACCC’s proposed amendment as it provides clarity on the basis on which the SFAA terms and conditions are specified in the SAU thereby removing a potential obstacle to market participation by access seekers.

#### 2.1.1.2. Conduct about updating SFAAs in response to Access Determinations and Binding Rules of Conduct

The ACCC is concerned about the commitments that the SAU makes regarding the flow through of ACCC access determinations (“**ADs**”) and binding rules of conduct (“**BROC**”) to SFAAs. In particular, such ACCC regulatory determinations would not have any impact on the terms and conditions of an SFAA until the SFAA expires and is replaced with a new SFAA which would incorporate the effect of any ACCC regulatory determinations. In addition, the ACCC is also concerned that there is uncertainty about whether the effect of ACCC regulatory determinations is limited to NBN Co updating new SFAAs or whether NBN Co is required to directly comply with such determinations. Further, if the latter situation is the case, the ACCC is concerned that this may be inconsistent with the SAU given the “legislative hierarchy”. Macquarie shares the ACCC’s concern in relation to this matter having raised this in its submission to the ACCC’s inquiry.<sup>3</sup>

The ACCC is considering two options to address its concern regarding this matter. The first option would essentially require NBN Co to commit to ensuring that SFAAs are consistent with ACCC ADs and BROC. The second option would remove any linkages between SFAAs and the SAU on the one hand and SFAAs and ACCC ADs and BROC on the other which would require NBN Co to comply with Part XIC of the *Competition and Consumer Act 2010* (“**CCA**”) under its normal operation.

Macquarie understands that there is little practical difference in the outcomes that either option provides. The basic difference between the options is that under the first option, NBN Co would commit to ensuring that there is consistency between SFAAs and ACCC

<sup>3</sup> Macquarie, Submission to ACCC (reference IP 011301) 18 January 2013 pp 2-4

regulatory determinations. Under the second option, which essentially defaults to the Part XIC process, NBN Co would make no specific commitment. I

On the basis that there is apparently no material difference between the outcomes of the ACCC's two options, Macquarie favours the second option. This view recognises that any form of words which would be included in the SAU under the first option will inevitably be controversial and would be unlikely to be resolved on a timely basis. As such, the second option expedites this matter. Moreover, the second option allows the legislative processes to operate without any other concurrent processes. As such, this should expose any practical weakness which may provide a basis for possible legislative amendment. Given the complex nature of the ACCC's proposal, Macquarie wishes to reserve its right to comment further on this matter.

#### *2.1.1.3. Conduct about updating SFAAs in response to Facilities Access Decisions*

The ACCC is concerned about the "facilities access decisions" mechanism as specified in the SAU. Specifically, the ACCC is concerned that such mechanism may not result in NBN Co supplying the facilities access service in all circumstances and that NBN Co may not effectively implement a relevant ACCC decision under this mechanism. Macquarie notes that it raised concerns with the ACCC about the limitations of the proposed facilities access decisions mechanism in its submission to the ACCC.<sup>4</sup>

The ACCC proposes to amend the SAU to remove in its entirety the clause which provides for the facilities access decisions mechanism. This would enable the ACCC to make regulatory decisions concerning the facilities access service under Part XIC of the CCA if this was necessary. Macquarie strongly supports the ACCC's proposed amendment to the SAU in relation to this matter because it would remove concern about the limitations of the facilities access decisions mechanism and concern regarding NBN Co's actions following a relevant ACCC decision under this mechanism.

#### *2.1.1.4. Conduct about production and maintenance of SFAAs*

The ACCC is concerned that the SAU commitment that NBN Co *may* include terms and conditions about the facilities access service in SFAAs would not be in the LTIE because the scope of such terms and conditions may be unclear. The ACCC proposes to amend the SAU by removing this commitment. As discussed in response to the previous matter, the ACCC would be able to make regulatory decisions concerning the facilities access service which would then be available to access seekers.

Macquarie supports the ACCC's proposed amendment as it removes the uncertainty that NBN Co may (or may not) include terms and conditions about the facilities access service in SFAAs. In addition, the ACCC's proposed amendment ensures that any relevant ACCC decisions through ADs and BROCs concerning the facilities access service would be available to access seekers.

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<sup>4</sup> *ibid.*, p. 4

#### *2.1.1.5. Conduct about development of SFAAs*

The ACCC has concerns with the multilateral SFFA forum which would be established under a commitment in the SAU. In particular, the ACCC is concerned by NBN Co's ability to exercise control over the procedures of the forum and how outcomes are implemented.

The ACCC proposes to amend the SAU by removing commitments concerning procedural requirements for conducting the forum and for the implementation of forum outcomes. Macquarie supports the ACCC's proposed amendments as they would promote greater balance in the operation of the forum and the implementation of outcomes. This would be achieved by enabling in the first instance commercial negotiations to address concerns arising with the SFAA and if this fails allowing the parties to have recourse to the ACCC.

#### 2.1.2. Conduct concerning changes to the SAU over time

##### *2.1.2.1. Conduct about submitting variations to the SAU*

The ACCC has concerns with the commitments in the SAU regarding the submission, assessment and acceptance of variations to the SAU following the expiry of Module 1. In particular, the ACCC is concerned that the provisions that would deem that a replacement module is accepted may result in unreasonable terms and conditions being adopted.

Macquarie notes that it raised concern with the ACCC about the deemed replacement provisions as set out in the SAU.<sup>5</sup> In addition, the ACCC is concerned by the scope of ACCC regulatory determinations and whether they would apply instead of a proposed replacement module.

The ACCC proposes to amend the SAU by removing commitments about the submission and assessment of replacement module applications. Macquarie strongly supports the ACCC's proposed amendment because it would better balance the interests of NBN Co and access seekers. This would be achieved by enabling in the first instance commercial negotiations to address concerns arising with the replacement modules and if this fails allowing the parties to have recourse to the ACCC.

##### *2.1.2.2. Conduct about the midpoint review of Module 1*

The ACCC has concerns with the commitments in the SAU regarding the procedures for the mid-point review of Module 1. In particular, the ACCC is concerned that the role that the SAU confers on the ACCC may not enable the ACCC to make appropriate decisions. In addition, NBN Co may not appropriately implement ACCC decisions which may arise from the midpoint review.

Macquarie notes that it raised concerns with the ACCC with regard to the midpoint review of Module 1.<sup>6</sup> Specifically, Macquarie expressed concerns with:

- the limited scope of the midpoint review;
- NBN Co undertaking the midpoint review itself;

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<sup>5</sup> *ibid.*, p. 7, p. 22

<sup>6</sup> *ibid.*, p. 5, p. 21

- limited obligations on NBN Co arising from the outcomes of the midpoint review; and
- the limited role of the ACCC in the midpoint review process.

The ACCC proposes to amend the SAU by removing Schedule 1K from the SAU in its entirety which would mean that there would be no provision for a midpoint review *per se*. The proposal would involve NBN locking-in those matters which otherwise be subject to the midpoint review for a five year period. NBN Co could then use the SAU variation process under the CCA to propose amendments which might arise if it were to undertake a review.

While the ACCC's proposed amendment may *prima facie* appear radical, it would effectively ameliorate the concerns raised by Macquarie. Macquarie notes that the ACCC proposes to periodically review NBN Co's prices (refer to discussion in section 2.4.1.2. below). As such, the ACCC's proposed amendments make provision for an independent and comprehensive review of NBN Co's prices which Macquarie considers to be of crucial importance. Accordingly, Macquarie strongly supports the ACCC's proposal.

### 2.1.3. SAU Extension Mechanisms

#### *2.1.3.1. Extension of the Initial Regulatory Period (Module 1)*

The ACCC has concerns with the commitments in the SAU regarding the extension of the initial regulatory period. In particular, the ACCC is concerned by the provisions which would enable the automatic extension of Module 1. Macquarie notes that it raised concerns with the ACCC with regard to the automatic extension of Module 1.<sup>7</sup>

The ACCC proposes to amend the SAU by removing the relevant provisions which provide for the automatic extension of Module 1. Macquarie strongly supports the ACCC's proposed amendment as it would ensure that a specific ACCC decision would need to be made in order for Module 1 to be extended.

#### *2.1.3.2. Extension of the SAU term*

The ACCC has a concern with the commitment in the SAU regarding the extension of the SAU term. In particular, that in considering a request from NBN Co to extend the term of the SAU, the ACCC is not required to consider whether the terms and conditions of the SAU are consistent with the SAOs of section 152AR of the CCA.

The ACCC proposes to amend the SAU by including a requirement that the criteria to be applied by the ACCC in deciding whether to approve an extension to the SAU term is the same as that for assessing an undertaking or a variation to an undertaking. Macquarie supports the ACCC's proposed amendment as it removes an apparent inconsistency in the procedures that apply to decisions that the ACCC would make concerning the SAU.

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<sup>7</sup> *ibid.*, p. 7

## 2.2. Services to which the SAU relates

### 2.2.1. Uncertainty in relation to the ACCC's ability to set terms and conditions

The ACCC has concerns with the interaction between the processes set out under the SAU and the statutory powers of the ACCC to declare services and to set terms and conditions for their supply. In particular, there is some uncertainty about the ability of ACCC to declare services and to set terms for such services. Macquarie notes that it raised concerns with the ACCC with regard to the broad definitions of services in the SAU and the uncertainty of whether a change in a “component” is a change in a “service”.<sup>8</sup>

The ACCC proposes several amendments to the SAU including incorporating explicit statements in the SAU which acknowledge the ACCC’s authority to declare services and that ancillary services and product components may include services declared by ACCC or specified in ADs or BROCs. Macquarie strongly supports the ACCC’s proposed amendments because they remove the uncertainty concerning the role of the ACCC to intervene in matters concerning the description of services supplied by NBN Co.

### 2.2.2. Compliance and consistency with the SAOs

The ACCC has a number of concerns in relation to the commitments under the SAU regarding consistency and compliance with the SAOs of section 152AR of the CCA. These concerns include:

- that an “offer to supply” would not fulfil a commitment to “supply” services in accordance with the Category B SAOs;
- that a commitment to supply a product component is dependent on an access seeker entering into an access agreement; and
- use of the term “Customers” may preclude persons from obtaining supply of services on regulated terms unless they have entered into an access agreement.

In addition, the ACCC is concerned by a provision in the SAU which enables NBN Co to bundle products beyond the extent authorised by section 151DA of the CCA.

The ACCC proposes to amend the SAU by:

- removing the provision which has the effect of requiring an access seeker to enter into an access agreement in order to obtain supply of services on regulated terms;
- substituting references to “Customer” with references to “Access Seeker” in various instances; and
- removing the provision which enables NBN Co to bundle products beyond the extent authorised by section 151DA of the CCA.

Macquarie supports the ACCC’s proposed amendments. These will make clear that it is not necessary for a person to have entered into an access agreement in order to obtain supply of services on regulated terms which is conducive to promoting competition. In addition, the ACCC’s amendments will remove any ambiguity concerning the use of the terms “Customer” and “Access Seeker”. Further, Macquarie in principle supports the unbundling of services

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<sup>8</sup> *ibid.*, p. 9



and believes that NBN Co should only be permitted to do so to the extent allowed by the CCA.

### 2.2.3. Layer 3 awareness

The ACCC is concerned that the SAU may permit NBN Co to incorporate more Layer 3 awareness in its AVC and CVC services than is necessary to support certain services. The ACCC proposes to amend the SAU by rewording the relevant provision such that NBN Co may only incorporate Layer 3 awareness in its AVC and CVC services to the extent necessary to support such certain services. Macquarie supports the ACCC's proposed amendment as it ensures that NBN Co remains focussed on the provision of Layer 2 services thereby not encroaching on the operational territory of retail service providers.

## **2.3. Product development and withdrawal**

### 2.3.1. Product development and variation

#### *2.3.1.1. Term of operation of the PDF Processes*

The ACCC has concerns with the operation of the PDF following its review as contemplated by the SAU as part of the midpoint review. In particular, the ACCC is concerned that the processes and criteria of this review may not enable appropriate ACCC decisions to be made. In addition, NBN Co may not appropriately implement ACCC decisions which may arise from the midpoint review.

In line with its proposed amendment to remove the provision for the midpoint review from the SAU, (as discussed above in section 2.1.2.2) the ACCC proposes to confine the SAU's commitment to the PDF to a five year period only. Following this period, the future of the PDF processes would be subject to commercial negotiation and should that fail it would be subject to ACCC determination.

Macquarie supports the ACCC's proposed amendment to the SAU concerning this matter. While the proposed amendment may *prima facie* seem radical, it provides the opportunity for NBN Co and access seekers to reach commercial agreement on future PDF processes and should that fail, the opportunity for recourse to the ACCC. Moreover, such commercial agreement (or ACCC regulatory determination) would be made with the benefit of the operational experience of the PDF over several years. As such, the interests of NBN Co and access seekers would appear to be balanced.

#### *2.3.1.2. Commitments by NBN Co to share information and consult*

The ACCC has concerns with the commitments in the SAU with regard to the operation of the PDF. In particular, the ACCC is concerned about how NBN Co will share information and consult with consumer advocacy groups. Macquarie notes that it raised concerns with the ACCC about the apparent exclusion of end-users and consumer advocacy groups from the PDF.<sup>9</sup>

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<sup>9</sup> *ibid.*, p. 10

The ACCC proposes to amend the SAU by making provision such that the membership and participation in the PDF is extended to include consumer advocacy groups. Macquarie strongly supports the ACCC's proposed amendment as it is consistent with promoting the interests of end-users.

*2.3.1.3. Provisions which establish rights for and obligations on NBN Co and its customers about how consultation will occur*

The ACCC has concerns with the provisions in the SAU with regard to the processes which establish rights and obligations on NBN Co and its customers about the treatment of confidential information and intellectual property associated with new product ideas. In particular, the ACCC is concerned that such processes may constrain the effectiveness of the PDF and in turn the promotion of competition and the efficient use of investment and infrastructure.

The ACCC proposes to amend the SAU by removing the provisions which address the handling of confidential information and intellectual property rights. This would mean that such matters would be addressed in the first instance through commercial negotiation and should that fail recourse to the ACCC.

Macquarie queries whether the ACCC's proposed amendment to the SAU may impose a greater burden on access seekers than it purports to resolve. That is, *prima facie*, access seekers would need to negotiate with NBN Co terms and conditions regarding the handling of confidential information and intellectual property rights before participating in the PDF. This could be a stumbling block for all but a few of the largest access seekers.

*2.3.1.4. Provisions which allow for consultation to not be undertaken in particular circumstances*

The ACCC has concerns with the provisions in the SAU that establish that NBN Co does not have to consult with its customers on the development or variation of services in certain circumstances. Macquarie notes that it raised concerns with the ACCC about the exclusion of products on the Initial Roadmap from the PDF.<sup>10</sup>

To address its concerns, the ACCC proposes to amend the SAU by *inter alia* removing the provisions that exclude products on the Initial Roadmap from the PDF. Macquarie strongly supports the ACCC's proposed amendments as they enable the PDF to be more an effective forum by allowing it to address a wider range of products particularly those which while they may be listed in the Initial Roadmap they have not yet been defined. As such, this would be consistent with promoting competition and promoting the LTIE.

*2.3.1.5. Provisions which set out NBN Co's ability to make a decision about whether or not to develop, introduce or vary a product*

Refer to the discussion under section 2.2.1 concerning this matter.

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<sup>10</sup> *ibid.*, p. 11



### 2.3.2. Product withdrawal

The ACCC has concerns with the provisions in the SAU regarding product withdrawal. In particular, the ACCC is not satisfied that NBN Co's ability to withdraw non-reference offers will in all circumstances encourage economically efficient use of and investment in the NBN.

The ACCC proposes to amend the SAU by conferring a power on the ACCC to disallow a proposed withdrawal of a currently supplied product component, product feature, ancillary service or facilities access service. In addition, the ACCC proposes an amendment to the SAU by which the ACCC would be afforded the same notice period for product withdrawals as NBN Co's customers.

Macquarie supports the ACCC's proposed amendments. With regard to the ACCC's proposal to confer on the ACCC a power to disallow a proposed product withdrawal, Macquarie believes that such power should be subject to an assessment of the LTIE.

## **2.4. Price-related terms and conditions**

### 2.4.1. Pricing of individual products

#### *2.4.1.1. Incentives to set new prices at levels that promote efficiency and competition*

The ACCC has concerns with the provisions in the SAU that enable NBN Co alone to set new prices, i.e., without any ACCC oversight. While NBN Co should have an incentive to set new prices efficiently this may not always be the case. Macquarie notes that it raised concerns with the ACCC about the absence of regulatory oversight on NBN Co's pricing of new services and pricing in other related situations.<sup>11</sup>

The ACCC proposes to amend the SAU by establishing provisions by which the ACCC is able to determine prices for new services and previously zero-priced products. Macquarie is strongly supportive of the ACCC's proposed amendments as they overcome a major concern of Macquarie and other access seekers by providing for effective regulatory oversight of the pricing of new services.

Macquarie suggests that the ACCC's proposed amendments should be couched in terms by which the ACCC would only exercise its authority to determine prices if necessary. For example, if access seekers and or the ACCC were satisfied with NBN Co's proposed price for a new service, there would appear to be little need for the ACCC to formally determine such a price. In other words, Macquarie suggests that the ACCC's intervention should only occur where it is necessary, i.e., where market forces cannot be relied upon to provide a satisfactory outcome.

#### *2.4.1.2. Ability for relative price levels to change in response to unforeseen circumstances*

The ACCC has concerns with the absence of provisions in the SAU that enable NBN Co's prices to be reviewed and if necessary rebalanced as circumstances change over time. Macquarie notes that it raised concerns with the ACCC about the absence of a mechanism within the SAU for the ACCC to periodically review NBN Co's prices and pricing structures.<sup>12</sup>

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<sup>11</sup> *ibid.*, p. 11

<sup>12</sup> *ibid.*, p. 12

The ACCC proposes to amend the SAU by making provision for the ACCC to periodically review NBN Co's prices and rebalance prices on a revenue-neutral basis. However, the details of this proposal have not yet been developed. Macquarie strongly supports the ACCC's proposed amendment as this overcomes a key deficiency of the SAU and a point of major concern to Macquarie and other access seekers. Moreover, this provides an independent review of NBN Co's prices which would be in the mutual interests of NBN Co, access seekers and end-users.

Macquarie suggests that the details of the ACCC's proposed amendment could include:

- a pricing review to be conducted every five years;
- rebalancing to be based on forecasts of NBN Co's revenues and expenses over the remaining period of the SAU at the time of each review; and
- relevant criteria on which price rebalancing would be based would include the LTIE.

#### 2.4.2. Long-term revenue constraint

##### *2.4.2.1. Long-term revenue constraint in Module 1*

###### *Adoption of ex-post compliance approach in Module 1*

The ACCC has concerns with the *ex-post* compliance approach by which NBN Co itself would assess its compliance with the prudency requirements regarding its capital and operating expenditure. Macquarie notes that it raised concerns with the ACCC about the absence of a role for the ACCC to review or approve NBN Co's annual revenue requirements.<sup>13</sup>

The ACCC proposes to amend the SAU by making provisions for the ACCC to be given a role to calculate the values of the building block components that are inputs to the annual revenue requirements as well as the roll-forward of the RAB and initial cost recovery account. Macquarie strongly supports the ACCC's proposed amendments on the basis that an independent oversight of this process would give access seekers greater confidence that NBN Co's annual revenue requirements are appropriate. However, Macquarie queries whether the ACCC should necessarily have a role to "calculate" NBN Co's annual revenue requirements. Instead, Macquarie suggests that the ACCC's role should be more in the way of reviewing and if appropriate approving NBN Co's calculations.

###### *Terms and conditions relating to capital expenditure in Module 1*

The ACCC is concerned that the SAU allows NBN Co to vary the network design rules such that inefficient investment may be accommodated. In turn, this could result in inefficient capital expenditure being incurred by NBN Co and ultimately passed on to access seekers and end-users.

The ACCC proposes *inter alia* to address its concern by amending the SAU to remove a category of permitted variations to the network design rules which enables NBN Co to make variations which fall below a \$100 million expenditure limit. Macquarie supports the ACCC's proposed variation as it will close off a potential means by which NBN Co could inflate its

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<sup>13</sup> *ibid.*, p. 16

capital expenditure to the detriment of access seekers and ultimately end-users.

*Terms and conditions relating to the annual construction-in-progress allowance in Module 1*

The ACCC is concerned that the SAU may allow NBN Co to include in its cost-base a return on construction-in-progress costs without such costs passing a prudency test. In turn, this could result in NBN Co being compensated for more than its efficient cost.

The ACCC proposes to address its concern by amending the SAU to clarify the process by which expenditure is classified as prudently incurred. In addition, the SAU would be amended to allow the ACCC to calculate the value of the annual construction-in-progress allowance which would be included in NBN Co's annual revenue requirements.

Macquarie supports the first of the ACCC's proposals as it would remove a potential opportunity for NBN Co to be inappropriately compensated for inefficient expenditure. With regard to the second of the ACCC's proposals, Macquarie suggests that the ACCC's role is more in the way of reviewing and if appropriate approving NBN Co's calculations.

*Terms and conditions relating to the tax allowance in Module 1*

The ACCC is concerned that the method set out in the SAU for calculating NBN Co's tax allowance is not consistent with the legitimate business interests of NBN Co and the recovery of its direct costs. In particular, that the value of "gamma" is set at 0.25 and would apply for the duration of Module 1.

To address its concern, the ACCC proposes that the value of gamma should instead be set each year. Macquarie supports the ACCC's proposal noting in particular that this approach is consistent with that that the ACCC and the AER applies across other regulated sectors.

*2.4.2.2. Long-term revenue constraint in Module 2*

*Terms and conditions relating to the criteria and methodologies for determining forecasts in Module*

The ACCC is concerned that the process set out in the SAU concerning the LTRCM in Module 2 may result in NBN Co overstating its revenue requirement in Module 2. This would in turn reduce the incentive for NBN Co to invest and operate efficiently.

The ACCC proposes to amend the SAU by effectively removing the LTRCM from the SAU. This would have the effect of deferring the design of the LTRCM for Module 2 nearer to the time of the expiry of Module 1. The Module 2 arrangements could be proposed by NBN Co in the form of a variation to the SAU proposed by NBN Co or by an ACCC AD. While the ACCC's proposal may *prima facie* seem radical it opens up the opportunity for Module 2 arrangements to be designed with the benefit of several years of NBN Co operational activity. On this basis, Macquarie supports the ACCC's proposal.

*Terms and conditions relating to the length of regulatory cycle in Module 1*

The ACCC is concerned that the length of the regulatory cycle is determined by NBN Co and is not subject to ACCC approval. This would not necessarily encourage efficient investment and operating expenditure.

The ACCC proposes that NBN Co's discretion to decide the length of the regulatory period be removed from the SAU. As such, the length of the regulatory period would be assessed as a variation to the SAU or determined by the ACCC in an AD. Macquarie supports the ACCC's proposal as it removes the possibility that NBN Co could seek to decide the length of the regulatory period to its own advantage.

*Terms and conditions relating to rolling forward the RAB in Module 2*

The ACCC is concerned that the process in the SAU for rolling forward the RAB for the duration of Module 2 would not encourage efficient investment and expenditure. In particular, that the RAB would be updated each year on the basis of actual levels of expenditure rather than on the basis of prudently incurred expenditure.

The ACCC proposes to vary the SAU such that the RAB would be rolled-forward within Module 2 on the basis of prudent capital expenditure, depreciation and asset disposals. Macquarie supports the ACCC's proposal as it would remove a potential opportunity for NBN Co to be compensated for inefficient expenditure.

## **2.5. Non-price terms and conditions**

### 2.5.1. Service levels

The ACCC is concerned that the service level commitments included in the SAU will not encourage efficient use of and investment in the NBN or balance the legitimate business interests of NBN Co with the interests of access seekers. Specifically, the ACCC is concerned about:

- NBN Co's incentives to meet the service levels;
- the absence of a review of the services levels; and
- the absence of an assurance that service levels will be maintained overtime.

Macquarie notes that it raised concerns with the ACCC about the service level regime as set out in the SAU.<sup>14</sup> In particular, that the details of such a regime are specified in the SAU given that they are dynamic and need not be locked-down in a long-term SAU.

The ACCC proposes to address its concerns with the SAU's service level regime by its removal. Macquarie strongly supports the ACCC's proposal as it addresses the concerns previously raised by Macquarie.

While Macquarie supports the removal of the service level regime from the SAU this should not be interpreted as Macquarie considering that such a regime is unimportant. For the avoidance of doubt, Macquarie considers that a service level regime is fundamentally

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<sup>14</sup> *ibid.*, p. 20

important for NBN Co, access seekers and end-users. Macquarie's support for removing the service level regime from the SAU is intended to ensure that the pathway is clear for NBN Co and access seekers to enter into effective commercial negotiations on a service level regime. Macquarie would expect such negotiations to be complex and to that extent the ACCC's assistance in guiding negotiations should be anticipated.

### 2.5.2. Other SFAA non-price terms

The ACCC is concerned that non-price terms included in the SAU regarding dispute management, intellectual property rights and risk management are not reasonable. On this basis, the ACCC proposes that such provisions be removed from the SAU. This would mean that terms regarding these matters would need to be negotiated between NBN Co and access seekers. Should no agreement be reached, such terms might be determined by the ACCC through an AD or BROCC. In forming its proposal, the ACCC notes the complexity of the matters and the difficulty that this imposes for reaching a timely outcome in the form of revised terms.

Macquarie supports the ACCC's proposal to remove detailed terms regarding dispute management, intellectual property rights and risk management from the SAU. Macquarie notes in particular, the ACCC's view that such terms as set out in the SAU are not reasonable.

Macquarie queries whether the removal of such terms from the SAU may mean that an access seeker would be forced to negotiate terms with NBN Co in order to obtain access to services supplied by NBN Co. For many access seekers this may mean that they are forced to accept NBN Co's proposed terms which are *prima facie* unreasonable. Given that dispute management, intellectual property rights and risk management are relatively stable matters Macquarie suggests that the SAU could set out some general principles on which detailed terms relating to each would be based. This would provide appropriate guidance to both NBN Co and access seekers conducive to reaching a timely and effective agreement on relevant terms.

### 2.5.3. POI related matters

The ACCC has several concerns with NBN Co's commitments in the SAU regarding POI matters. In particular, the ACCC is concerned by:

- the possibility that NBN Co might not necessarily provide interconnection at a POI closest to the end-user;
- the possibility that the ACCC would have insufficient time to properly consider a request from NBN Co to open, close or relocate a POI; and
- the shorter notice period that NBN Co will provide to access seekers in the case of a notice to open or make changes to established POIs (six months) compared to temporary POIs (12 months).

To address these concerns, the ACCC proposes to make provisions in the SAU to ensure that:

- NBN Co commits to providing interconnection in such a way that it promotes the

- long-term interests of end-users;
- the ACCC is not constrained by the time frame to properly consider the opening, closing or relocation of a POI; and
- the notice period that NBN Co provides to access seekers concerning established and temporary POIs are the same.

Macquarie supports the ACCC's proposals as they improve the efficient and effective operation of the processes concerning the opening, closing or relocation of POIs as set out in the SAU.

### Closing

Macquarie welcomes the opportunity to make this submission in response to the Consultation Paper. Macquarie supports the ACCC's draft view that the SAU does not currently meet the acceptance criteria and that the ACCC intends to issue a notice to NBN Co suggesting variations to the SAU.

Macquarie essentially supports the ACCC's proposed variations to the SAU. Where appropriate, Macquarie has also made further suggestions that refine the ACCC's proposals.

Please do not hesitate to contact me should you have any queries in relation to this matter.

Yours sincerely



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