

26 April 2013

Mr Sean Riordan
General Manager
Industry Structure & Compliance
Communications Group
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

By email: sean.riordan@accc.gov.au

Dear Sean,

Proposed minor variations to clause 17 of the migration plan

NBN Co supports Telstra's proposal to vary clause 17 of the Migration Plan in order to:

- defer the commencement of the cease sale obligation until 1 July 2013 (the Cease Sale Commencement Variation); and
- create a new exception to the cease sale obligation (the Cease Sale Exception Variation).

NBN Co submits that these variations comply with the *Telecommunications (Migration Plan Principles) Determination 2011* (the Migration Plan Principles) and that if accepted by the ACCC, the final Migration Plan as varied will also comply with the Migration Plan Principles.

The remainder of this letter addresses a number of concerns raised by Access Seekers in relation to clause 17 of the Migration Plan. Generally speaking, these concerns relate to:

- a lack of information about when Telstra's cease sale obligation will apply;
- a lack of information about Telstra's operational processes to implement the cease sale obligation; and
- the extent to which clause 17 of the Migration Plan is consistent with the Migration Plan Principles.

These concerns have been brought to the ACCC's attention on several occasions including:

- concerns raised by Access Seekers at the Wholesale Telecommunications Consultative Forum held on 26 March 2013; and
- public submissions to the ACCC in respect of Telstra's proposed variations to clause 17 of the Migration Plan.

Access Seekers have also requested information from NBN Co about Telstra's cease sale processes.

Noting that the implementation of the cease sale obligation is Telstra's responsibility; NBN Co makes a number of comments in relation to each of the concerns raised by Access Seekers.

1. NBN Co's understanding of when clause 17 of the Migration Plan will apply

NBN Co's working understanding of clause 17 of the Migration Plan is that the following three conditions must be met in order for Telstra's Cease Sale obligation to be triggered:

Condition 1: that an order for a new retail or wholesale copper service, or HFC service, must be placed with Telstra after the Cease Sale Commencement Date;

Condition 2: the order must be in respect of a premises that is located in a rollout region that has been declared Ready for Service (RFS); and

Condition 3: at the time that the order is placed with Telstra the premises must be NBN Serviceable. NBN Serviceable is defined in Telstra's Migration Plan as follows:

"NBN Serviceable means a Premises within the Fibre Footprint that NBN Co has determined is serviceable by the NBN Co Fibre Network, under and in accordance with the Definitive Agreements, and as shown in the NBN Co Service Qualification System."

If all three of the above conditions are satisfied, then Telstra must not supply a new wholesale or retail copper service, or HFC service, to that premises. Instead, Telstra may provide a wholesale or retail NBN based fibre service.

If however the first two conditions are satisfied but the premises is not NBN Serviceable then the cease sale obligations will not apply. The following two scenarios illustrate this:

- First, if the premises is not NBN serviceable, but is connected to either the copper or HFC networks then Telstra will be able to provide either a wholesale or retail copper service, or HFC service, to that premises up until the Disconnection Date. Importantly, in this scenario the category A Standard Access Obligations (SAOs) (see clause 152AR of the Competition and Consumer Act 2010 (CCA)) will continue to operate meaning that Telstra will have an obligation to provide any new copper service which is a declared service.
- A second scenario is that the premises is not NBN Serviceable and the premises is not connected to Telstra's copper network. In this scenario clause 17 of the Migration would not apply because Telstra can not cease to supply new copper services to a premises that is not physically connected to the copper network. Telstra's Universal Service Obligation (USO) would however continue to apply, meaning that Telstra would be required to provide a standard telephone service (STS) upon request. Importantly, Telstra's USO is a retail obligation and allows Telstra to provide an STS using its technology of choice.

Based on the above understanding of clause 17 of the Migration Plan, the following information will be used by Telstra to effectively implement its cease sale obligation:

- Information about whether the premises is connected to the copper network. Specifically, Telstra needs to know whether at the time the order was placed with Telstra if the relevant premises is connected to Telstra's copper network. This

information will allow Telstra to determine whether its cease sale obligations apply and how it may fulfil its USO.

- Information about whether the premises is located in a rollout region that has been declared RFS. This information will be used by Telstra and Access Seekers to determine whether the cease sale obligations apply. NBN Co provides the RFS dates for each rollout region to all Access Seekers including Telstra at the same time.
- Information about whether the premises is NBN Serviceable. This information will be used to determine whether either the cease sale obligation or the Category A SAOs will apply. Up to date information about whether a premises is NBN Serviceable is available to all Access Seekers via NBN Co's customer portal.

2. Telstra should provide industry with more information about its Cease Sale obligations

NBN Co notes the concerns of Access Seekers about how Telstra will implement its cease sale obligations. These concerns are likely to be addressed and potentially mitigated by Telstra providing industry (including NBN Co) and the ACCC with further detailed information about its cease sale processes.

Accordingly, NBN Co encourages Telstra to provide further information to industry about its processes. We also note that this information will complement NBN Co's Public Information Migration (PIM) activities, which provide information to the general public about the consequences of the NBN rollout.

3. Clause 17 of the Migration Plan is consistent with the Migration Plan Principles

In its submission to the ACCC dated April 2013, iiNet argues that the proposed Cease Sale Commencement Variation and the Cease Sale Exception Variation should be rejected by the ACCC because clause 17 of the Migration Plan is inconsistent with the Migration Plan Principles. Specifically, iiNet submits that clause 17 of the Migration Plan, as currently drafted (and as amended by the proposed variations), does not comply with section 12 of the Migration Plan Principles because it does not provide for the shortest Cease Sale Applicability Period reasonably required.

We note that iiNet has not previously raised this concern with either the ACCC or with industry. NBN Co further notes that iiNet did not raise this concern:

- in any of its submissions to the ACCC in response to the ACCC's public consultation in respect of its assessment of Telstra's draft Structural Separation Undertaking (SSU) and draft Migration Plan; and
- in relation to Telstra's previous variation to clause 17 of the Migration Plan which was approved by the ACCC on 14 November 2012.

For the following reasons NBN Co does not share iiNet's concern in relation to clause 17 of the Migration Plan:

- clause 17 of the Migration Plan provides for the shortest cease sale period reasonably required to ensure a smooth and efficient migration to the NBN;
- clause 17 facilitates a progressive migration to the NBN as contemplated by the Migration Plan Principles; and
- iiNet's assessment of clause 17 of the Migration Plan is inconsistent with the requirements of the Telecommunications Act.

Clause 17 of the Migration Plan provides for the shortest cease sale period reasonably required

Clause 12 (2) (b) of the Migration Plan Principles require that the:

“restrictions proposed in the migration plan regarding the processing of customer transactions must be imposed for the shortest period reasonably required.”

NBN Co submits that the cease sale period imposed by the current Migration Plan (and as amended by the proposed variations) is the shortest period reasonably required to ensure a smooth and efficient migration of end-users from the Telstra copper network to the NBN. By contrast, a shorter period would increase the number of NBN connections that would need to be managed in the last months before the the Disconnection Date which could potentially increase the cost involved in migrating customers to the NBN and may increase the extent to which there is service disruptions for end-users.

Clause 17 of the Migration Plan facilitates a progressive migration to the NBN as contemplated by the Migration Plan Principles

The stated object of the Migration Plan Principles is to (emphasis added):

“provide for the efficient and timely disconnection of wholesale and retail carriage services from a separating network as the NBN Co fibre network is deployed.”

Hence, the Migration Plan Principles clearly contemplate that migration to the NBN will occur progressively as the NBN fibre network is rolled out. This is in stark contrast to iiNet’s recommendation which would mean that migration to the NBN would be limited to a much shorter period close to the Disconnection Date.

iiNet’s assessment of clause 17 of the Migration Plan is inconsistent with the requirements of the Telecommunications Act

iiNet has undertaken a limited assessment of clause 17 of the Migration Plan against section 12 of the Migration Plan Principles. This limited assessment is inconsistent with section 577BD of the Telecommunications Act which requires the ACCC to assess whether the Migration Plan in its entirety is consistent with the Migration Plan Principles.

Consistent with section 577BD of the Telecommunications Act the ACCC’s assessment of Telstra’s Migration Plan to date has assessed the extent to which clause 17 of the Migration Plan is consistent with not only section 12 of the Migration Plan but also sections 9, 15 and 38.

If you require any further information about any of the issues raised in this letter please contact either myself or James Endres.

Yours sincerely,



Caroline Lovell
Head of Regulatory Affairs and Industry Analysis