



Access Undertakings in relation to digital radio multiplex transmission services

**Response to Proposed Revisions to Access Undertakings
Submission by the Community Broadcasting Association of Australia
April 2009**

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1. Introduction

- 1.1 The CBAA welcomes the opportunity to make a further submission in response to the revisions proposed by the ACCC to the Access Undertakings for digital radio multiplex transmission services.
- 1.2 The Access Undertaking is the chief mechanism by which the ACCC can ensure that all users of multiplex services, including community broadcasters, are able to gain access on fair and reasonable terms.
- 1.3 Once this Access Undertaking is in place, there will be limited opportunity to address barriers that will hinder access to services, especially for community broadcasters. It is therefore essential the ACCC ensure the Access Undertaking has in place mechanisms to remove those barriers, whether they exist immediately or can be reasonably predicted into the future.
- 1.4 The CBAA is pleased that some the matters it has raised have been addressed by the ACCC in its proposed revisions. However, the CBAA remains concerned that the revisions as currently proposed do not fully take into account or deal adequately with several key issues.
- 1.5 While the CBAA stands by its original submissions, it has focussed in this submission on these key areas of concern.

2. Summary

- 2.1 The CBAA urges the ACCC to amend Attachment A to its proposed undertaking by inserting a new clause 1.1(c) in the following terms:

'(c) The Multiplex Transmission Service is a service supplied using a single transmission site. Services (including the capacity to supply services) that are provided using a backup or redundant site do not form part of the Multiplex Transmission Service.'

- 2.2 The CBAA urges the ACCC to recognise the consumer importance of the EPG and, as a very minimum, that the Undertaking should specify that all Access Seekers are treated equally in respect of operation of and access to any EPG. This can be achieved by amending Attachment A to its proposed undertaking to insert a new clause 1.1(d) in the following terms:

'(d) Any electronic programming guide offered or supplied by the Multiplex Licensee shall be taken to be part of the Multiplex Transmission Service.'

- 2.3 The word 'all' should be removed from clause 3.2(a) in Schedule 2. The same amendment should be made to clause 3.2(b). The CBAA believes that clause 3.2(c) must also be amended as set out below:

*'(c) **expenditure on corporate overheads** properly allocated to the Multiplex Transmission Service incurred by the Multiplex Licensee'.*

- 2.4 The CBAA remains concerned that the pricing principles are based on a pro-rata of **allocated** capacity, rather than pro-rata of **total** capacity. This shifts risk and makes for an uncertain and potentially excessive cost environment to all Access Seekers.

- 2.5 While it recognises that the ACCC is not prescribing the WACC methodology in this undertaking, the CBAA believes there is still considerable benefit to be gained from reducing the scope for uncertainty and dispute by inserting a clause 3.4(d) in Schedule 2 which provides:

'(d) For the purposes of clause 3.4(c)(i), the rate of return must take into account the reduced risk profile of the Multiplex Licensee resulting from the formula for determining fixed recurring charges in clause 5 of this schedule.'

- 2.6 The CBAA submits that the reference to the representative company must be removed entirely from the definition of 'Access Seeker' in the Access Agreement and Access Undertaking.

- 2.7 If there are concerns that this would require the Multiplex Licensee to communicate with multiple digital community broadcasters, this could be easily addressed by inserting a new clause 23.1(e) into the access agreement in the following terms:

'(e) All communications relating to capacity allocations between the Multiplex Licensee and a digital community broadcaster are to be made through the Digital Community Broadcasting Representative Company or its nominee'.

3. Definition of Service to provide Optional Service Levels

- 3.1 The CBAA noted in its previous submissions that the main digital radio transmission site in each city is being built with a high level of redundancy. There are fully replicated main and alternate (backup) multiplex and transmit equipment chains. Whilst that is certainly not the lowest cost method of providing a digital radio transmission facility, the CBAA generally accepts this level of redundancy at the main site as prudent to provide at this point. For some years to come, this level of redundancy will be sufficient for all broadcasters.
- 3.2 At some point in the future it may suit the business model of some broadcasters to invest in the additional comfort of a duplicate and separate transmission site. This is not a trivial or incidental decision. It would, more or less, double the cost of supplying the RF service.
- 3.3 Faced with such a significant cost increase, an Access Seeker may wish to bear the risk of an unavoidable outage should the main RF transmission site fail in its entirety, or to tolerate occasional planned outages and/or short term re-configurations for maintenance purposes.
- 3.4 The Access Undertaking as currently proposed allows a situation where those Access Seekers who do not require the additional comfort of a fully duplicated transmission site have no choice. This will clearly and seriously hinder access.
- 3.5 At pages 42 to 44 of its final decision,¹ the ACCC sets out its reasons for rejecting the CBAA's submission that Access Seekers should not be forced to pay for a completely duplicated transmission site, should it not be required by an individual Access Seeker. The CBAA does not believe the ACCC's reasons support its conclusion on this issue. The ACCC's reasons, and CBAA's response, are as follows:
- 3.6 *'The Radiocommunications Act is quite specific in how capacity is to be allocated between access seekers. It is not clear how this would translate to the allocation of capacity at a backup site if an opt out arrangement were provided.'*

The relevant provisions of the *Radiocommunications Act 1992 (the Act)* are quite clear. While Division 4B of Part 3.3 creates standard access obligations, it provides that a licensee must comply with those obligations *'on such terms and conditions as are ascertained in accordance with an access undertaking in force in relation to the licence'*.² The Access Undertaking will define the manner in which a service will be supplied (or not supplied) to an Access Seeker that has opted to acquire a service without a backup facility.

There is nothing in the Act which prevents the ACCC from:

- (a) defining different service levels or service features in the Access Undertaking; or
- (b) setting out different charging principles for different services. For example, in the ACCC's proposed access agreement, clause 9.3(c) expressly permits an Access Seeker to request a service with a lower bit rate. Clause 4.4 in Schedule 2 deals with charging for services supplied in this manner.

While section 118NP of the Act prohibits discrimination in relation to the quality and timing of fault rectification, it is plainly not discriminatory to provide a lower level of redundancy to an Access Seeker who has elected to receive that lower level of redundancy in exchange for a lower tariff.

¹ Assessment of undertakings in relation to digital radio multiplex transmission services, ACCC, March 2009.

² Section 118NO(2).

- 3.7 *'The ACCC accepts CRA's claims about the costs of introducing an opt out arrangement, as well as the technical and operational challenges that would need to be overcome. Of particular note is that introducing the arrangement would impact on the quality of service afforded to access seekers that had agreed to the investment.'*

It is incorrect to say that there are large costs, or serious technical and operational challenges of an opt out arrangement. The only operational requirement is for multiplex capacity to be re-allocated to reduce the capacity used by the opt out service to 'zero' when the duplicate site is in use. The multiplex operator will be routinely re-allocating capacity to reduce and increase capacity used by particular services on a daily and day-part basis as a matter of operational routine. As noted at page 29 of its draft decision, the ACCC stated:

'...it is the nature of the transmission technology that the multiplex transmitters do not need to make any alterations to their services to process a capacity change, but simply needs to be notified of this change in the signal received.'

It is clear this is a trivial operational matter.

At a technical implementation level, the establishment of the duplicate transmission facility for backup would mean, either:

- (a) a duplication of all transmission equipment at the duplicate site, with a link from the main site multiplexing equipment to feed the duplicate site transmission equipment; or alternatively
- (b) a duplication of the multiplexing as well as the transmission equipment at the duplicate site.

In scenario (a) there is no extra cost and/or technical or operational challenge whatsoever to implement an opt out arrangement. The multiplexing equipment is identical. It only requires a capacity change request, which, as noted, is trivial.

In scenario (b) it may well be convenient for engineering simplicity to replicate the main site multiplex equipment exactly at the duplicate site. It is certainly not necessary to do so. Even if it was decided as necessary it would be a trivial once off capital cost (on an incremental cost causality basis, and compared to the alternative of opting in) for the Access Seeker to provide the sub-multiplexing and/or encoder equipment necessary to provide a 'phantom' of its service.

It is also important to note that a duplicate site would only be built on the agreement of the majority of multiplex licensee shareholders. It is hard to see how a duplicate site would ever be built under any other scenario.

As the shareholders are also Access Seekers it is likely that the majority of Access Seekers would opt in for the duplicate site. Therefore, they would fully accept the increased capital and operational costs that would flow.

It is also likely that those Access Seekers who opt out would be in the small minority. Therefore, the costs for additional multiplexing equipment required (if any) would be trivial and operational complexity would also be trivial.

- 3.8 *'The ACCC considers a decision to construct a backup transmission site as simply a decision about the manner in which the multiplex licensee has chosen to provide the transmission service, rather than as an additional service.'*

This reasoning is circular. The decision to construct a backup site is only a decision about the way the transmission service is supplied because of the way the transmission service is defined in the undertaking. If the definition of the Multiplex Transmission Service is amended as requested by the CBAA, this argument would cease to have any relevance.

- 3.9 *'The ACCC has some concerns about the effect that having an opt out arrangement could have on incentives for the multiplex licensee to maintain the primary transmission site in certain circumstances.'*

The CBAA agrees that a licensee might have an incentive to use the backup site as often as possible (and that would disadvantage of an access seeker that has elected not to acquire that redundant capacity). However, this is a risk that an access seeker must take into account before deciding to opt out of a backup transmission site. It is not a reason to deny access seekers the ability to make this decision for themselves.

- 3.10 *'The ACCC does not believe that a multiplex licensee that fails to provide an opt out arrangement is asking access seekers to commit to a service on which they have very little information.'*

While there a range of future costs which may be incurred by the multiplex licensee, the ACCC's proposition has no bearing on the key issue, namely, whether an access seeker should be forced to pay for a service level that it neither needs nor wants.

- 3.11 The ACCC's pricing principles will provide little, if any, protection to Access Seekers faced with the cost of a back up transmission site they do not require. While the criteria in Schedule 2 of the proposed Access Agreement might permit an Access Seeker to contest the level of cost incurred in establishing the back up site this will have, at most, a marginal impact on the costs imposed on the Access Seeker. It will be difficult, if not impossible, to successfully dispute the decision by the multiplex licensee to construct the duplicate back up site under the ACCC's criteria.

- 3.12 Faced with this, the CBAA urges the ACCC to amend Attachment A to its proposed undertaking by inserting a new clause 1.1(c) in the following terms:

'(c) The Multiplex Transmission Service is a service supplied using a single transmission site. Services (including the capacity to supply services) that are provided using a backup or redundant site do not form part of the Multiplex Transmission Service.'

4. Definition of Service to include EPG, and access to be non-discriminatory

4.1 The CBAA reiterates that it believes the Electronic Program Guide to be a fundamental element of a digital radio service. It is a key consumer interface by which consumers make station and program selections, and can take advantage of many of the features that set digital radio apart from analog radio.

4.2 Moreover, the CBAA believes that:

- (a) the EPG will and/or should be ensemble wide, and be multi-lateral (i.e. all program/service listings on every DAB+ multiplex, Category 1, 2 and/or 3); and that
- (b) the current legislation does not specifically recognise that capacity will be required on the commercial / community multiplex for this purpose and that capacity for an ensemble wide EPG will need to be segmented from 'excess capacity';
- (c) the Access Undertakings are currently silent on the matter of the EPG;
- (d) the provision of the EPG does not represent, as has been suggested, a commercial opportunity for third party providers of EPG systems to buy excess capacity on the digital radio multiplex a commercial basis; rather
- (e) the provision of the EPG will be by way of a service contracted out by the multiplex operator, and so should become an integral part of the digital radio multiplex 'service'.

4.3 Therefore, the CBAA urges the ACCC to recognise the consumer importance of the EPG and, as a very minimum, that the Undertaking should specify that all Access Seekers are treated equally in respect of operation of and access to any EPG. This can be achieved by making it clear (for the avoidance of doubt) that any EPG offered by the Multiplex Licensee is to be treated as part of the Multiplex Transmission Service by amending Attachment A to the ACCC's proposed undertaking to insert a new clause 1.1(d) in the following terms:

'(d) Any electronic programming guide offered or supplied by the Multiplex Licensee shall be taken to be part of the Multiplex Transmission Service.'

5. Clarification of Efficient Costs

5.1 Schedule 2 to the proposed access agreement sets out the ACCC's pricing principles. Clause 3.2 refers to costs categories, providing that:

'The Multiplex Licensee may recover all Efficient Costs it incurs in relation to the supply of the Multiplex Transmission Service. The Efficient Costs that the Multiplex Licensee may incur and recover is presently anticipated to include:

*(a) **capital expenditure**, being the capital outlays incurred by the Multiplex Licensee in order to supply the Multiplex Transmission Service including all expenditure ...'*

5.2 The reference to 'all' underlined in clause 3.2(a) appears to presuppose that all capital expenditure that will be incurred by the licensee will be efficient and may be recovered. This clearly contradicts the ACCC's stated objective in requiring this clause to refer to 'efficient' costs.

- 5.3 The word 'all' should be removed from clause 3.2(a) in Schedule 2. The same amendment should be made to clause 3.2(b).
- 5.4 The CBAA welcomes the ACCC's proposed amendment to clause 3.1(a) to ensure that the licensee can recover 'no more than' the efficient cost of supplying the multiplex transmission service. It is critical that the licensee cannot force access seekers to fund capital or operating expenditure that is not attributable to the supply of the multiplex transmission service. While clauses 3.2(a) and (b) appear to be consistent with this principle (subject to the comments above) the CBAA believes that clause 3.2(c) must also be amended as set out below:

*'(c) **expenditure on corporate overheads** properly allocated to the Multiplex Transmission Service incurred by the Multiplex Licensee'.*

6. Mechanism for WACC to be reduced to reflect lower risk

- 6.1 The CBAA remains concerned that the pricing principles are still based on a pro-rata of **allocated** capacity, rather than pro-rata of **total** capacity. This shifts risk and makes for an uncertain and potentially excessive cost environment to all Access Seekers.
- 6.2 In its reasons, the ACCC has acknowledged these concerns about the pricing principles formula, but has not required a change to the formula. Rather the ACCC has suggested that the commercial rate of return on capital investment by shareholders (the WACC) should be lowered as a result of the lower risk to shareholders.
- 6.3 The rate of return is described in clause 3.4(c)(i) in Schedule 2. At page 68 of its final decision, the ACCC notes the reference to a rate of return that is commensurate with the WACC for a business '*with a similar risk profile*'.
- 6.4 The CBAA is concerned that, left unchanged, this clause leaves much scope for debate surrounding the level of risk faced by the licensee and the extent to which this impacts on the WACC. The only way for an Access Seeker to pursue this issue will be a lengthy and expensive fight about the proper calculation of the WACC before an expert under the dispute process.
- 6.5 While it recognises that the ACCC is not prescribing the WACC methodology in this undertaking, the CBAA believes there is still considerable benefit to be gained from reducing the scope for uncertainty and dispute by inserting a clause 3.4(d) which provides:

'(d) For the purposes of clause 3.4(c)(i), the rate of return must take into account the reduced risk profile of the Multiplex Licensee resulting from the formula for determining fixed recurring charges in clause 5 of this schedule.'

7. DRC as an Access Seeker

- 7.1 While the CBAA welcomes the ACCC's amendments to the Access Undertaking and Access Agreement with respect to the identity of an Access Seeker, the CBAA believes the appropriate amendment is to remove the representative company from the definition of an Access Seeker entirely.
- 7.2 The representative company's prime purpose is to hold shares in one or more companies that hold, have applied for, or propose to apply for, category 1 digital radio multiplex transmitter licences, or category 2 digital radio multiplex transmitter licences, for the designated BSA radio area.³
- 7.3 The fact that community broadcast licensees are shareholders in each representative company does not make the representative company an Access Seeker. Similarly, the fact that a representative company may be a shareholder in multiplex licensee does not make it a access seeker. There is no role for the representative company under the Act which could result in it doing anything that would cause it to be properly described or treated as an Access Seeker.
- 7.4 The representative company's dealings with the multiplex licensee are limited to the giving, amending and revocation of notices relating to the capacity to be allocated to community broadcast licensees.⁴ This does not (and must not) result in the representative company being treated as an Access Seeker.
- 7.5 The CBAA submits that the reference to the representative company must be removed entirely from the definition of 'Access Seeker' in the Access Agreement and Access Undertaking.
- 7.6 If there are concerns that this would require the Multiplex Licensee to communicate with multiple digital community broadcasters, this could be easily addressed by inserting a new clause 23.1(e) into the access agreement in the following terms:

'(e) All communications relating to capacity allocations between the Multiplex Licensee and a digital community broadcaster are to be made through the Digital Community Broadcasting Representative Company or its nominee',

³ section 9C(1)(k)(i)

⁴ section 118NR.