

18 December 2012

Mr Michael Cosgrave  
Group General Manager  
Communications Group  
Australian Competition and Consumer Commission  
GPO Box 520  
Melbourne VIC 3001

By email: [michael.cosgrave@accc.gov.au](mailto:michael.cosgrave@accc.gov.au)

Dear Michael,

### **Alignment of NBN Co's Special Access Undertaking (SAU) with Contract Development Process (CDP) outcomes**

On 30 November 2012, NBN Co concluded the Contract Development Process (**CDP**) for its Wholesale Broadband Agreement (**WBA**). This year long process has involved extensive multilateral and bilateral consultation between NBN Co and its customers and has facilitated the substantial development and improvement of the WBA.

Some of the non-price related terms and conditions incorporated into the Special Access Undertaking (**SAU**), as lodged by NBN Co on 28 September 2012, are now out of alignment with the final draft of the WBA (as developed via the CDP) because further engagement between NBN Co and customers between 28 September 2012 and 30 November 2012 resulted in additional customer favourable changes to these terms and conditions. The particular aspects of the SAU affected include the terms and conditions set out in the Dispute Management Rules (Annexure 1 to Schedule 1H), Confidentiality and IPR (Annexure 2 to Schedule 1H), Risk Management (Annexure 3 to Schedule 1H) and Service Level Schedule (Annexure 1 to Schedule 1J).

In order for the amended terms and conditions to be efficiently considered by the ACCC as part of the SAU assessment process, NBN Co will withdraw from the ACCC's consideration the SAU lodged on 28 September 2012 (**Withdrawn SAU**) and reodge an SAU on substantially similar terms incorporating the CDP related changes and a small number of other minor amendments to clarify the operation of the SAU<sup>1</sup> (**Amended SAU**). The refinements in the Amended SAU are outlined in Attachment A to this letter. A mark up of the Amended SAU (new Annexures have been replaced without any mark up shown) has been enclosed to assist stakeholders to identify the changes from the Withdrawn SAU.

NBN Co submits that the changes introduced into the Amended SAU result in improved and clearer terms for customers and end users, and enhance the reasonableness of the SAU as result.

Please accept this letter as notification that NBN Co is formally withdrawing the SAU lodged on 28 September 2012 and lodging the enclosed SAU with the ACCC for the purposes of section 152CBA of

<sup>1</sup> As described in NBN Co's letter to the ACCC on December 4 2012, and other minor changes.

the Competition and Consumer Act 2010 (**CCA**) for consideration in accordance with the framework in Division 5 of Part XIC of the CCA.

On 28 September 2012, NBN Co also lodged a supporting submission and four independent expert reports. NBN Co confirms that the ACCC should also consider these documents (supplemented by the material outlined in Attachment A to this letter and NBN Co's letter of 4 December 2012) as supporting material for the Amended SAU. The Network Design Rules provided to the ACCC on 28 September 2012 continue to apply to the Amended SAU.

NBN Co will also be publishing the Amended SAU on its website following lodgement with the ACCC. This letter is not commercial-in-confidence and its contents may be published on the ACCC's website.

NBN Co may submit additional material in respect of the SAU as the ACCC's assessment of the SAU progresses.

Please do not hesitate to contact me if you have any queries in relation to any of the above.

Yours sincerely,



**Caroline Lovell**

Principal, Regulatory Affairs and Industry Engagement



## Attachment A

### Alignment with CDP

#### *Schedule 1H – Annexure 1 Dispute Management Rules*

A small number of drafting amendments have been made to Annexure 1 of Schedule 1H to clarify the operation of the Dispute Management Rules. The substance of the operation of the Dispute Management Rules remains the same.

#### *Schedule 1H – Annexure 2 Information & Rights Management and PDF Processes (Annexure 1 to Schedule 1I)*

Annexure 2 of Schedule 1H has been renamed from Confidentiality and IPR to Information & Rights Management. Since 28 September 2012, a number of further improvements have been made to the terms and conditions of the confidentiality and intellectual property rights (IPR) regime to be included in the WBA in response to CDP feedback, including:

- General principles for IPR have been added to clarify the scope of the intellectual property provisions and to provide delineation between the “business as usual”, or supply related, IPR provisions to be included in the WBA and product-related IPR provisions in the PDF Processes;
- the requirement to identify up-front IPR in material provided to NBN Co has been removed and replaced by a more practical and customer-favourable regime which provides customers with the opportunity to notify NBN Co of any IPR claims;
- requirement to identify third party IPRs and the consequences of failure to do so have been removed and replaced by a requirement for each party to procure its own licences to third party IPR.
- A number of additional confidentiality protections have been added; and
- NBN Co’s permitted use of confidential information has been further clarified.

Consequential changes have been made to the IPR and confidentiality provisions in the PDF Processes (Annexure 1 to Schedule 1I).

#### *Schedule 1H – Annexure 3 – Risk Management*

Annexure 3 of Schedule 1H has been amended to align with the outcome of the CDP work in respect of the service level schedule (Annexure 1 of Schedule 1J) and a number of other amendments have been made in response to customer feedback in the CDP since 28 September 2012, including extending the scope of indemnities to cover losses suffered by the indemnified party’s Related Body Corporates and personnel.

#### *Schedule 1J – Annexure 1 – Service Levels Schedule*

As discussed in NBN Co’s supporting submission for the Withdrawn SAU, NBN Co had not yet finalised its CDP consultation in respect of service levels as it was still considering feedback received from CDP participants. NBN Co has now been able to further consider customer feedback provided on the Service Levels Schedule included in the Withdrawn SAU.

Key changes include the following:

- In response to customer feedback, the service level schedule has been restructured and redrafted so that the operation of the service level regime is clearer, including clear Service Levels and Performance Objectives commitments (Service Level Targets have been incorporated into these measures) giving rise to clear consequences, such as an obligation on NBN Co take corrective action or provide credit rebates.
- Additional commitments have been made regarding service performance including new Performance Objectives to cover re-occurring faults;



- A number of Operational Targets are now Performance Objective commitments, e.g. timeframes around rescheduled appointments; and
- Removal of pass through requirements for rebates.

## **Clarification of intent**

### *Product withdrawal exemption*

As acknowledged in NBN Co's letter to the ACCC on 4 December 2012, NBN Co only intended to exempt the products on the Initial Product Roadmap from the commitments in Schedule 1I in relation to the introduction of a Product, Product Component or Product Feature, and had not intended to exempt those products from the withdrawal commitments. Accordingly NBN Co has amended clauses 1I.1.3 and 2E.1.3 to reflect NBN Co's original intent.

### *Zero-Priced Other Charge not associated with the supply of a Reference Offer*

As noted in NBN Co's letter to the ACCC on 4 December 2012, NBN Co has clarified the drafting in clause 1D.6 to ensure that a new Price introduced for a Zero-Priced Other Charge not associated with the supply of a Reference Offer will be determined by NBN Co having regard to the Initial Pricing Principles and that NBN Co must also publish a pricing rationale statement. A similar amendment has been made to clause 2C.5 to clarify the operation in Module 2.

### *ACCC role in relation to Zero-Priced Reference Offers and Zero-Priced Other Charges associated with the supply of a Reference Offer*

Clauses 1B.1.2, 1C.4.5(b) and 1D.4.3(b) have been amended to clarify the interaction between the regulatory recourse mechanism in Schedule 1B and the ACCC's role in relation to the introduction of a new Price for a Zero-Priced Reference Offer or Zero-Priced Other Charge associated with the supply of a Reference Offer.

The regulatory recourse mechanism in Schedule 1B is not intended to apply to the ACCC's role in relation to Zero-Priced Reference Offers and Zero-Priced Other Charges associated with the supply of a Reference Offer. Rather, the process set out in Clauses 1C.4.5(b) and 1D.4.3(b) is what gives effect to any Price the ACCC sets with regards to a new Price for a Zero-priced Reference Offer or Zero-Priced Other Charge associated with the supply of a Reference Offer.

There is, however, an interrelationship between the regulatory recourse mechanism in Schedule 1B and clauses 1C.4.5(b) and 1D.4.3(b), in that if NBN Co sets a new Price in relation to a Zero-Priced Reference Offer or a Zero-Priced Other Charge associated with the supply of a Reference Offer, and that new Price relates to a Facilities Access Service (e.g. cross connect), then the ACCC would set any Price via a Facilities Access Decision pursuant to clause 1B.2.3 and this decision will be given effect to using the applicable process in clauses 1C.4.5(b) or 1D.4.3(b).

## **Minor and consequential amendments**

A number of other minor changes have been made to the Amended SAU as a consequence of the CDP alignment changes discussed above. These amendments are to a large extent contained in Attachment C (Dictionary), but also affect other areas of the Amended SAU, including Schedule 1D (Non-Reference Offers and Other Charges) due to updates to the names of a number of Other Charges flowing from the CDP. A small number of typographical errors have also been corrected in the Amended SAU.