



NBN Co Submission on ACCC Draft Report on the review of the declaration for the Domestic Transmission Capacity Service

February 2014

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1 Introduction and overview

NBN Co welcomes the opportunity to comment on the ACCC's Draft Report on the review of the declaration for the Domestic Transmission Capacity Service (DTCS).

NBN Co supports the ACCC's draft decision to extend the DTCS declaration until 31 March 2019. Extending the declaration for a further five years will provide certainty to Access Seekers that they will continue to have access to regulated transmission services, which are essential inputs for many other services. This will be particularly significant in the context of the National Broadband Network (NBN), because only a small number of Access Seekers own fibre backhaul networks from all of NBN Co's Points of interconnect (POIs). All other Access Seekers will need to buy backhaul services directly (as wholesale transmission) or indirectly (as part of a wholesale aggregation services) to carry traffic between the NBN POIs and their own Points of Presence (POPs).

NBN Co supports the ACCC's proposal to adopt the Revised Competition Assessment Methodology, based on its current T+2 approach. As noted in NBN Co's previous submission, the current T+2 approach provides an assessment of the potential for competition to develop, rather than actual competition on particular routes.¹ The Revised Competition Assessment Methodology reflects a number of considerations NBN Co submitted as relevant for a competition assessment and is likely to provide a more comprehensive view of the level of actual competition on a given transmission route.

NBN Co considers that its views in relation to the need for an NBN Co POI backhaul route have been substantially addressed by the move to the Revised Competition Assessment Methodology, which applies to all transmission routes, including those with NBN Co POIs. Over time, the NBN will have a greater impact on the DTCS market with increased concentration of DTCS traffic on the routes from NBN Co POIs. Accordingly NBN Co welcomes the ACCC's view that it will reassess its position on NBN Co POI backhaul routes as the NBN rollout proceeds.

NBN Co supports the ACCC's commitment to ensure the DTCS declaration continues to remain relevant over the declaration period, including where necessary considering varying the scope of regulation through a further declaration inquiry. NBN Co notes that changes in market conditions could also be addressed by the ACCC through the DTCS Access Determination.

Set out below are NBN Co's more detailed comments on the ACCC's Draft Report.

2 Revised Competition Assessment Methodology

The ACCC has acknowledged the concerns raised in submissions that the T+2 approach may not provide an assessment of actual competition on particular DTCS routes, but focuses too greatly on potential competition that may develop given the presence of alternative network infrastructure.²

NBN Co notes that its support for the T+2 approach was premised on the ACCC undertaking a more in-depth analysis of the counted fibre providers, including whether they are independent of each other and are actively involved in delivering wholesale transmission services.³

The ACCC's proposal to adopt the Revised Competition Assessment Methodology will ensure the competition assessment for deregulating a route goes beyond a simple 'count' of fibre providers, by considering various other quantitative and qualitative criteria to ascertain the actual levels of competition in respect of that route. NBN Co supports this approach as it focuses on the existence of actual competition rather than the potential for competition.

¹ NBN Co submission to the ACCC discussion paper on DTCS, p. 10

² ACCC draft report on review of the declaration for the Domestic Transmission Capacity Service, p.33

³ NBN Co submission to ACCC's discussion paper on DTCS, p.11

NBN Co supports the inclusion of a wide range of quantitative and qualitative criteria for assessing competition. A number of these criteria align with the competition criteria proposed by NBN Co in respect of deregulating NBN Co POI backhaul routes, including the ACCC's proposed consideration of ownership structures around fibre providers⁴, the requirement for fibre providers to be at, or within very close proximity to a Telstra exchange⁵, and consideration of whether there are active transmission services available on a particular route.⁶

NBN Co reiterates its previous view that the consideration of the availability of transmission services is an important determinant of actual levels of competition.⁷ Although the existence of fibre providers at or in very close proximity to a Telstra exchange provides an important starting point, the key to a competitive market is the ability of Access Seekers to acquire wholesale transmission services suitable for their use. Unless Access Seekers are able to acquire wholesale transmission services from a fibre provider, the mere existence of that alternative fibre is not relevant when determining the level of competition on a particular route.

The combination of requiring only one non-Telstra supplied transmission service⁸, in conjunction with the requirement to be within very close proximity to a Telstra exchange (as opposed to at the Telstra exchange), could result in a proposal to deregulate a route in circumstances where there are three fibre providers, but only two of those providers are actually providing wholesale transmission services (Telstra plus one other).

In the above scenario, the level of actual competition will depend on the likelihood (or perceived likelihood) of the third fibre provider connecting to the Telstra exchange and providing transmission services. This entails consideration of whether there are significant barriers to entry for supplying transmission services, such as the costs involved with connecting to the Telstra exchange. The precise cost of connecting depends to a large extent on how proximate the provider's infrastructure is to the Telstra exchange. NBN Co notes that there are likely to be significant upfront costs involved with connecting to a Telstra exchange, even where the infrastructure is adjacent to the Telstra exchange.

Therefore where the T+2 count includes fibre providers that are within very close proximity to a Telstra exchange, but not actually connected to that exchange, the Revised Competition Assessment Methodology should include consideration of the costs involved with connecting to the Telstra exchange. The ACCC needs to consider whether the costs involved with connecting to the Telstra exchange may create a significant barrier to entry to supplying transmission service when considered together with the other criteria already assessed as part of the Methodology.

A separate and important issue in regard to the Revised Competition Assessment Methodology, in both principle and practice, is whether the use of leased capacity to supply wholesale transmission services is treated as equivalent to capacity that is owned by the supplier in question.

⁴ NBN Co submission proposed that the ACCC consider the independence of fibre providers. (p.9)

⁵ NBN Co submission proposed that fibre providers should have a presence in NBN Co's POIs. (p.9)

⁶ NBN Co submission proposed that the ACCC consider the availability of transmission services which are suitable for use by Access Seekers. (p.9)

⁷ NBN Co submission to the ACCC discussion paper p. 9

⁸ Appendix 5 of the ACCC draft decision on DTCS declaration notes that the ACCC will consider whether there is evidence of transmission services being supplied by a transmission provider other than Telstra.

NBN Co supports, in principle, leased capacity being considered under the Revised Competition Assessment Methodology; for example, counting leased infrastructure arrangements when considering the availability of transmission on a route or an exchange service area (ESA). However, prior to counting leased fibre, the ACCC should closely examine the details of the leasing arrangements, including whether the lessee transmission provider has a long-term leasing arrangement (e.g. at least for the duration of the proposed declaration) and routinely makes sufficient wholesale transmission services available to access seekers.

NBN Co submits that the ACCC's final decision on the DTCS declaration should clearly describe the ACCC's consideration and treatment of infrastructure leasing arrangements in transmission markets. It is currently unclear to what extent, if any, the ACCC has factored in leasing arrangements in the design and application of its Revised Competition Assessment Methodology. For example does the ACCC's consideration of connectivity to CBD ESAs allow for the fibre path to contain leased infrastructure?

NBN Co notes that the ACCC's Audit of Infrastructure Record Keeping Rule was revised in 2013 to collect information on leasing arrangements.⁹

3 ACCC's assessment of Competition on currently deregulated and regulated DTCS routes

NBN Co notes that the ACCC's proposals for deregulation of additional metropolitan and regional routes and the re-regulation of three regional routes reflect the application of the Revised Competition Assessment Methodology to the information currently available to the ACCC.

In absence of any evidence to the contrary, NBN Co is satisfied at this stage with the ACCC's assessment of competition, focused as it is on the existence of actual rather than potential competition.

4 NBN Co POI backhaul routes

The ACCC states in the Draft Report that it does not consider it necessary to have a separate route category for NBN Co POI backhaul routes as the current declaration already covers these routes.¹⁰

NBN Co considers that its views in relation to the NBN Co POI backhaul routes have been substantially addressed by the adoption of the Revised Competition Assessment Methodology, which will apply to the routes from the NBN Co POIs.

As noted in NBN Co's previous submission¹¹, over time the NBN will have a greater impact on the DTCS market with increased concentration of DTCS traffic on the routes from NBN Co POIs.

In this regard NBN Co's welcomes the ACCC's commitment to reassess its position on NBN Co POI backhaul routes once the NBN is rolled out further.¹²

⁹ Audit of Telecommunications Infrastructure Assets – Record Keeping Rule 2013

¹⁰ ACCC draft report on review of the declaration for the Domestic Transmission Capacity Service, p.44

¹¹ NBN Co submission to the ACCC's discussion paper, p. 7

¹² ACCC draft report on review of the declaration for the Domestic Transmission Capacity Service, p.63

5 Tail-end services

NBN Co supports the ACCC's preliminary view that tail-end transmission services should continue to be declared for the reasons expressed by the ACCC.¹³

6 The DTCS service description

NBN Co supports the ACCC's proposal to align the DTCS service description, where appropriate, with some of the definitions in the 2012 DTCS FAD.¹⁴

NBN Co also welcomes the ACCC's view that it is not necessary to define protection in the DTCS service description, given that the declaration covers both protected and unprotected DTCS services. NBN Co reiterates the view expressed in its previous submission¹⁵ that this approach will provide the ACCC with flexibility over the definition of 'protection' by providing for the detailed definition to be, if needed, managed through the DTCS FAD rather than through the declaration itself.

In regard to tail-end services, NBN Co supports, consistent with its previous submission¹⁶, the ACCC's proposed change to recognise the market practice of bundling a tail-end service with other routes.

However, NBN Co considers that some of the wording in the proposed service description may have the unintended effect of limiting the coverage of the declaration in regard to transmission services that incorporate a tail-end component.

Under the current service description in respect of inter-exchange and CBD routes, the deregulated routes are expressed to be between transmission points located at relevant exchanges within specified ESAs. As such, a route from an exchange in Ashfield NSW to an exchange in Balgowlah NSW (route 1) would be a deregulated inter-exchange (metropolitan) transmission route. However, if the transmission point at Balgowlah is an access seeker network location (i.e. not at an exchange in the Balgowlah ESA), then the route from the exchange in Ashfield to the access seeker network location in Balgowlah (route 2) would be a regulated inter-exchange (metropolitan) transmission route, containing a bundled tail-end element.

Under the proposed service description, in respect of metropolitan routes (and also in respect of regional routes), the deregulated routes are expressed to be between two transmission points located in relevant deregulated ESAs (but not limited to transmission points at relevant exchanges). Accordingly, with the two routes as described above, the regulatory status of route 1 would stay the same (it would continue to be deregulated), but the regulatory status of route 2 would change (it would become deregulated). This change of outcome would be caused by the removal of the requirement that the relevant transmission points be located at an exchange and, as noted above, this appears unintended.

To address this, NBN Co suggests the following amendments to the proposed service description:

- In clauses (d) and (e) of the service description, insert the words 'located at an exchange' after the words "transmission point" and "transmission points" respectively.
- The definition of exchange in the service description should be amended to include a reference to a Telstra exchange. This will make it clear that the exempted routes are based on consideration of competition at Telstra exchanges.

¹³ ACCC draft report on review of the declaration for the Domestic Transmission Capacity Service, p.43

¹⁴ ACCC draft report on review of the declaration for the Domestic Transmission Capacity Service, p.59

¹⁵ NBN Co submission to the ACCC's discussion paper, p. 6

¹⁶ NBN Co submission to the ACCC's discussion paper, p. 7

Separately, for clarity, NBN Co also suggests the drafting of the definition of inter-capital routes be amended as follows:

- “*a transmission point from one capital city boundary..*”, should be revised to, “*a transmission point within one capital city boundary..*”.

The definition should also be aligned with the regional route definition to the extent that each of the transmission points must be in a deregulated ESA. For example the revised definition could read, “*a transmission point in a deregulated ESA within one capital city boundary to a transmission point in a deregulated ESA within another capital city boundary.*”