



5 July 2018

Mr Robert Wright  
General Manager, Insurance, Water and Wireline Markets Infrastructure Regulation  
Australian Competition and Consumer Commission  
Level 17, Casselden Place  
2 Lonsdale Street  
Melbourne VIC 3000  
Email: robert.wright@accc.gov.au

Copy to:

Mr Darren Kearney  
Email: Darren.Kearney@accc.gov.au

Mr Rod Middleton  
Email: rod.middleton@accc.gov.au

Dear Mr Wright

**Notification of Telstra's performance being materially affected by an Excluded Event under Telstra's Migration Plan**

As the ACCC is aware, on 27 November 2017, nbn co announced that it would temporarily pause all new orders over its HFC access network from 11 December 2017 (the **HFC Pause**).

nbn co implemented the HFC Pause (in part) by resetting the service classifications for Premises in impacted Rollout Regions so that Premises that did not have an active NBN Service or in-train order on 11 December 2017 remained in the Fixed Footprint List for the Rollout Region but were reset in nbn's service qualification systems to non-serviceable (SC20) (**HFC Pause Premises**).

Telstra considers that the impact of the HFC Pause, and the retention of the HFC Pause Premises, on the Fixed Footprint List used by Telstra for the purpose of managed disconnection amounts to an Excluded Event under the Migration Plan. Telstra further considers that this Excluded Event is likely to materially affect its performance under the Migration Plan.

In this letter, Telstra therefore wishes to notify the ACCC under clause 4.5 of the Migration Plan of:

- the impact of the HFC Pause on the Fixed Footprint List in impacted Rollout Regions and its consequential impact on Telstra's disconnection and related obligations under the Migration Plan; and
- the steps nbn co and Telstra intend to take to respond to this issue. The purpose of these steps is to ensure that Retail and Wholesale Customers are not disadvantaged by the HFC Pause, and impacted end-users have sufficient time to migrate their services to nbn before their legacy services are disconnected.



## Nature and scale of impact of the HFC Pause

As the ACCC is aware, nbn co announced the HFC Pause on 27 November 2017. Telstra understands that, to date, the HFC Pause has impacted 577 Parent Rollout Regions, covering approximately 1.38 million Premises.

The Disconnection Dates for some of the impacted Rollout Regions are rapidly approaching, with the first Disconnection Date for a Rollout Region including HFC Pause Premises scheduled for 9 November 2018.

A consequence of the HFC Pause is that a very substantial proportion of HFC Pause Premises remain in the Fixed Line Footprint, but customers are unable to place orders for NBN Services because the Premises is classified by nbn co as non-serviceable. As the ACCC will appreciate, Telstra is generally required to disconnect all Premises within the Fixed Line Footprint for a Rollout Region, irrespective of whether or not the Premises is NBN Serviceable.

nbn co has recently commenced 're-releasing' some HFC Pause Premises by changing their status to NBN Serviceable. However, the experience for the vast majority of customers at HFC Pause Premises is that for at least 5 months of their migration window, they have been unable to place an nbn order. Similarly, Retail Service Providers (RSPs) have been unable to undertake any of their usual preparatory activities required to connect the HFC Pause Premises to nbn.

RSPs have raised significant concerns with Telstra regarding the risks to the customer experience and to service continuity of not allowing adequate time for customers at HFC Pause Premises to place orders for NBN Services and for RSPs to perform the required marketing, connection and activation activities to provide consumers with working NBN Services ahead of Telstra's managed disconnection activities commencing under the Migration Plan.

As the ACCC is aware, the Migration Plan requires Telstra to undertake its disconnection obligations in a manner that seeks to minimise disruption to the supply of services and, to the greatest extent practicable, provides Wholesale Customers with autonomy over decisions about the timing of disconnection.

Telstra is concerned that the scale of the HFC Pause and its proximity to Disconnection Dates will not allow Telstra to meet these objectives of the Migration Plan, in respect of the impacted Rollout Regions, if it disconnects HFC Pause Premises in the Fixed Footprint List in accordance with the current Disconnection Dates.

## Notification of an Excluded Event

Under clause 4.5 of the Migration Plan, Telstra will not be liable for any delay or failure to perform obligations to the extent that the delay or failure is caused by an Excluded Event. The full set of Excluded Events is set out in clause 2.2 and 2.3 of the Migration Plan. They cover a number of inter-dependencies between Telstra's activities under the Migration Plan and the actions of third parties, including nbn co.

In this case, Telstra considers that the HFC Pause has caused the Fixed Footprint List in impacted Rollout Regions to reflect inaccurately that the majority of Premises have had a significant opportunity to migrate to nbn (even though HFC Pause Premises have not been NBN Serviceable for a material period) and, when associated with the current Disconnection Dates in impacted Rollout Regions, the Fixed Line Footprint no longer provides an appropriate basis for Telstra to perform disconnection of Premises in impacted Rollout Regions. As outlined in sub-clauses 2.2(b)(v), 2.2(b)(vii), 2.3(a) and (c) of the Migration Plan, Telstra is not responsible for achieving NBN Serviceability at Premises within the Fixed Line Footprint or for the timing of the rollout and is



dependent on an appropriate and reliable Fixed Footprint List in order to be able to publish its Disconnection Schedule and perform its disconnection obligations under the Migration Plan.

because of the HFC Pause, orders for NBN Services are only able to be placed in respect of a small minority of HFC Premises (~1/3) across the impacted Rollout Regions. Notwithstanding the commencement of nbn co's HFC re-release program, if the current Disconnection Dates apply in impacted Rollout Regions, there remains a high risk that customers at a large percentage of HFC Pause Premises will remain unable to place orders for NBN Services, at or only very shortly before, the date on which Telstra is required to commence managed disconnection.

Telstra therefore considers that the serviceability status and timing of HFC Pause Premises are matters which fall outside Telstra's responsibilities under the Migration Plan, and has resulted in a Fixed Footprint List and associated Disconnection Dates for impacted Rollout Regions which will materially and adversely affect its performance of its obligations under the Migration Plan.

To respond to this concern, Telstra and nbn co are working towards an agreement to amend the Disconnection Schedule to extend the Disconnection Dates for impacted Rollout Regions. Telstra will separately provide the ACCC with a high level outline (on a confidential basis) of the core principles of this approach as these are finalised (noting these principles are subject to final commercial agreement and any necessary approvals). In summary, Telstra and nbn co intend to extend the Disconnection Date of impacted Rollout Regions to ensure that customers have at least 6 months after the date nbn co notifies Telstra that the relevant Rollout Region is no longer subject to the HFC Pause to migrate their services, prior to disconnection. Amending Disconnection Dates in this way is intended to:

- result in customers in impacted Rollout Regions having approximately 18 months (for Parent Rollout Regions) and approximately 12 months (for Service Continuity Rollout Regions) during which they can migrate services (i.e. broadly equivalent to the amount of time they would have received if the HFC Pause had not occurred); and
- ensure that, where the HFC Pause has occurred late in the migration window for a Rollout Region, there will still be a minimum period of 6 months for the customer to place a migration order and for RSPs to engage in assisting customers with migration and performing their preparatory activities to enable connection to nbn, following nbn co's 're-release' of the Rollout Region (and the HFC Pause Premises becoming NBN Serviceable)

The proposed Disconnection Dates, as extended, will be updated on the Disconnection Schedule (and the TW Portal) on a region by region basis after nbn co notifies Telstra that the relevant Rollout Region is no longer impacted by the HFC Pause. All Premises in Rollout Regions impacted by the HFC Pause (potentially including non HFC Pause Premises in those impacted Rollout Regions) will receive the same extended Disconnection Date. Telstra considers that this approach provides a sensible and orderly response to the issue, which is consistent with the interests of consumers, RSPs and Wholesale Customers impacted by the HFC Pause.

In taking these steps, Telstra recognises that:

- proceeding with managed disconnection of the impacted Rollout Regions, without amending the Disconnection Schedule to respond to these unique circumstances (in the manner explained above), would be likely to result in managed disconnection that was inconsistent with its obligations under the Migration Plan (especially as it may result in disruption to the supply of services); and
- amending the Disconnection Schedule to extend the Disconnection Dates for impacted Rollout Regions in the manner explained above may be viewed as inconsistent with the



Migration Plan (given the maximum periods specified for Disconnection Dates in clause 7.2).

However, Telstra considers that to the extent that any such inconsistency arises, it will be the consequence of an Excluded Event and Telstra should not be taken to have contravened the Migration Plan. Moreover, in extending the Disconnection Dates in consultation with nbn co, we are taking all reasonable steps to address the issue and to be in a position to promptly perform our obligations under the Migration Plan as appropriate once the revised Disconnections Dates have passed.

### **Telstra's proposed communications strategy with industry**

Telstra considers that the plan for communicating these new arrangements to industry will be extremely important. Telstra is still in the process of finalising the communication strategy to inform Wholesale Customers in a timely and effective manner about these changes to the Disconnection Schedule. We understand that nbn co is also still in the process of finalising its communications strategy to advise RSPs about these changes. Telstra's communication strategy with its Wholesale Customers will include:

- promptly sending individual customer communications to inform Wholesale Customers of the changes to the Disconnection Dates for impacted Rollout Regions;
- updating the Disconnection Schedule to reflect these modifications to the Disconnection Dates for impacted Rollout Regions in accordance with clauses 7.1 and 7.3 of the Migration Plan (on a progressive basis); and
- including updates in the regular communications distributed generally to Wholesale Customers.

Once the communication strategy is finalised, Telstra will communicate the new arrangements to Retail Customers in an equivalent manner to Wholesale Customers.

Telstra would be pleased to provide any additional information the ACCC requires in relation to this response to the HFC Pause.

Please contact Kim Hilton-Cowie on (02) 9866 2001 or me if you have any questions in relation to this matter.

Yours sincerely

Jane van Beelen  
Executive Director – Regulatory Affairs  
Corporate Affairs  
jane.vanbeelen@team.telstra.com