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Australian Competition and Consumer Commission

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Attention: Isolde Lueckenhausen  
General Manager (Acting), NBN Engagement and Group Coordination Branch

Dear Ms Lueckenhausen

### Variation of NBN Co Special Access Undertaking

#### Your Reference

Our Reference IP 071303

Macquarie Telecom Pty Limited (“**Macquarie**”) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (“**ACCC**”) in response to the ACCC’s “response to submissions” paper<sup>1</sup> and draft notice to vary<sup>2</sup> concerning the above. After a long period of consultation with industry the ACCC is now poised to issue NBN Co with a formal notice to vary its special access undertaking (“**SAU**”) which would, if agreed to by NBN Co, bring this matter to a close.

The Draft Notice to Vary follows a number of failed attempts by NBN Co over the past three years to submit an access undertaking that was acceptable to the ACCC and now comes after a further round of industry consultation.<sup>3</sup> Macquarie has reviewed the Draft Notice to Vary against the ACCC’s Draft Decision. This essentially reflects Macquarie’s overall support for the Draft Decision. That is, if the Draft Notice to Vary aligns closely with the Draft Decision, Macquarie would *ceteris paribus* be expected to support the Draft Notice to Vary.

In addition, Macquarie has reviewed the Draft Notice to Vary against what it considers to be the more important matters addressed in the SAU and which have been the subject of industry discussion. Moreover, Macquarie has also addressed matters upon which the ACCC has sought specific comments. In this context, and given the short time frame that the ACCC has allowed industry to respond to the Draft Notice to Vary, Macquarie has limited its comments in this submission to a few key matters.

In particular, Macquarie’s comments address the following:

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<sup>1</sup> ACCC, Variation of NBN Co Special Access Undertaking - response to submissions, July 2013 (“**Response to Submissions Paper**”)

<sup>2</sup> ACCC, draft notice to vary as attached to the Response to Submissions Paper (“**Draft Notice to Vary**”)

<sup>3</sup> ACCC, Draft Decision on the Special Access Undertaking lodged by NBN Co on 18 December 2012, April 2013 (“**Draft Decision**”)

- regulatory recourse;
- regulatory oversight of the pricing of new services;
- periodic ACCC review of NBN Co's prices;
- services to which the SAU relates;
- Reference Offers and Non-Reference Offers; and
- CVC pricing.

### Regulatory Recourse

The extent to which commitments are given in the SAU concerning how standard forms of access agreements (“**SFAAs**”) would be updated in response to access determinations (“**ADs**”) and binding rules of conduct (“**BROC**”) as promulgated the ACCC, (collectively “**Regulatory Determinations**”) has been the subject of much debate in the industry. As noted in the Draft Decision, the ACCC is essentially concerned that any such commitments may affect the obligations of NBN Co to comply with the normal operation of Part XIC of the *Competition and Consumer Act 2010*. Macquarie understands that the normal operation of Part XIC is essentially as follows:

- NBN Co must supply services on request to access seekers on the basis of regulated terms as provided in an SAU or in Regulatory Determinations;
- it is not necessary for an access seeker to enter into an access agreement in order to obtain access to services on regulated terms; and
- NBN Co, the ACCC and access seekers can enforce the terms of Regulatory Determinations.

As proposed in the Draft Notice to Vary, the ACCC intends to remove from the SAU those provisions which relate to commitments which link SFAAs with Regulatory Determinations. Essentially this means that Part XIC is allowed to operate normally, i.e., free of any ambiguity or limitation which may arise from such provisions in the SAU.

Macquarie reiterates its view as set out in its submission to the ACCC in response to the Draft Decision.<sup>4</sup> In particular, its view that the removal from the SAU of commitments which link SFAAs with Regulatory Determinations allows the legislative process to operate without any other concurrent process which may create uncertainty. This would expose any practical weakness in the legislation which may provide the basis for future legislative amendment. On the basis of its satisfaction with the Part XIC processes and the removal of ambiguity concerning how these processes operate, Macquarie supports the ACCC's proposal concerning regulatory recourse as provided in the Draft Notice to Vary. In other words, despite the previously acknowledged deficiencies of the broader regulatory framework, the ACCC's proposal appears to be a workable compromise.

### Regulatory Oversight of the Pricing of New Services

Macquarie has expressed concern with provisions in the SAU which effectively lock-out the ACCC from having any role in the setting or approval of prices for new NBN Co services.<sup>5</sup> In its Draft Decision, the ACCC noted that NBN Co may not always have an incentive to set

<sup>4</sup> Macquarie, Submission to ACCC on Variation of NBN Co Special Access Undertaking, 2 May 2013 (Reference: IP 051301)

<sup>5</sup> Macquarie, Submission to ACCC on NBN Co Limited Special Access Undertaking, 20 July 2012 (Reference: IP 071201), page 3



prices for new services efficiently. Accordingly, the ACCC proposed to amend the SAU by establishing provisions by which the ACCC is able to determine prices for new services and previously zero-priced services. This would essentially mean that where NBN Co could not agree new prices with its customers, the ACCC could determine such prices in accordance with Part XIC. Such an approach is in keeping with traditional regulation of monopoly providers of network services in relation to provision of proposed or future products and services.

In the Draft Notice to Vary, the ACCC has set out provisions in Schedule 1D.4.1 to handle regulatory oversight for the pricing of new services and the pricing of services which are currently zero-priced. Macquarie understands that in the case of a new service, NBN Co simply sets the price for that service and that price will apply unless the ACCC within two years sets a maximum price by way of a Regulatory Determination. The ACCC would make such a Regulatory Determination in accordance with Part XIC with the additional requirement that it must consider certain factors including the characteristics of other offers and their costs and revenues.

In the case where NBN Co wishes to set a price for a service which is currently zero-priced, the process is a little different but the outcome is very similar. Here NBN Co provides six months' notice of its proposed price. The ACCC may then disallow the proposed price within the six month period otherwise the proposed price applies. An ACCC determination which disallows a proposed price applies for a maximum period of two years.

In both cases, NBN Co takes the initiative to set prices for new services or to price a previously zero-priced service. Moreover, the ACCC has an opportunity to intervene should circumstances warrant this. As such, the ACCC's proposal provides access seekers with a satisfactory regulatory safeguard to protect against the possibility that NBN Co may inappropriately price its services. On this basis Macquarie supports the ACCC's proposal concerning this matter.

#### Periodic ACCC review of NBN Co's Prices

Macquarie has previously expressed concern about the absence of a mechanism within the SAU for the ACCC to periodically review NBN Co's prices and pricing structures.<sup>6</sup> In its Draft Decision the ACCC considered that circumstances could arise over the term of the SAU which would result in prices for particular services which would not be consistent with promoting competition or the efficient use of network infrastructure. Accordingly, the ACCC proposed that the SAU be varied to provide for NBN Co's prices to be subject to revenue neutral price rebalancing to be conducted by the ACCC. However, the ACCC did not set out the process by which this would be achieved.

The ACCC has now set out its proposal in the Response to Submissions Paper and the Draft Notice to Vary. According to the Response to Submissions Paper, the ACCC's proposed rebalancing review has six features as follows:

- a single review in Module 1, i.e., within the network build phase of the NBN but not before 1 July 2018;
- the outcome of a review must satisfy three criteria, i.e., (i) rebalanced prices are reasonable, (ii) net revenue neutrality is achieved and (iii) the ACCC has considered the effect of the rebalance on other NBN Co offers;

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<sup>6</sup> Macquarie, Submission to ACCC on Variation of NBN Co Special Access Undertaking, 2 May 2013 (Reference: IP 051301), page 9

- net revenue neutrality is assessed over the remaining term of the SAU;
- the review should consider the reasonableness of one or more maximum regulated prices;
- the ACCC decides when a review should occur; and
- a review cannot occur until a previous review has been implemented.

Having considered the ACCC's pricing review proposal, Macquarie is broadly supportive to the extent that there is now a process in place for the ACCC to review NBN Co's prices. However, Macquarie is concerned that the effectiveness of such a review may be constrained given some of the conditions on which such review would be undertaken. Macquarie's particular points of concern are discussed below.

#### *Single Module 1 Review*

Macquarie considers that the condition that there be only one review during Module 1, i.e., during the build phase of the NBN roll-out is unnecessarily restrictive. While the build phase is expected to be a period of up to ten years, its date is inherently uncertain. This uncertainty is exacerbated to the extent that the network roll-out has already experienced considerable delay. Macquarie suggests that this condition be relaxed.

#### *No Review Prior to 1 July 2018*

Macquarie considers that the condition that the date of the first review must not occur prior to 1 July 2018 is also unnecessarily restrictive. While such a date is currently just under five years away, Macquarie considers that this is a particularly long period given the inherently dynamic nature of the communications sector, the significant scale of NBN Co's activities in the context of overall industry activity and the fact that NBN Co is undertaking new and unique activities.

In order to address its concerns with no review prior to 1 July 2018 (and the single Module 1 review) Macquarie suggests that the ACCC have greater flexibility to initiate a review. For example, the ACCC could have the discretion to initiate a review on a date not prior to 1 July 2015 and to then initiate subsequent reviews at least three years following the commencement of an earlier review. This is not the same as a review every three years: rather a review, if warranted, must be at least three years after the previous review.

#### *Requirement for Net Revenue Neutrality*

Macquarie is concerned that a requirement for net revenue neutrality may also be unnecessarily restrictive. The requirement essentially is that there be no material difference between costs and revenue over the remaining period of the SAU with the change as compared to without the change. Given inherent uncertainties of future demand and the initially long timeframe involved, fulfilling this condition would appear to be open to unduly broad interpretation. Accordingly, revenue impacts flowing from possible access price changes ought to be taken as one consideration amongst other LTIE considerations.

#### Services to which the SAU Relates

Macquarie notes that there may be some ambiguity concerning the services to which the SAU relates. This arises in the situation where the ACCC makes a Regulatory Determination about an ACCC declared service which may to some extent be covered by



the SAU. Macquarie is of the view that such a Regulatory Determination is not inconsistent with the SAU as the SAU does not specifically apply to that service.

### Reference Offers and Non-Reference Offers

The ACCC in the Response to Submissions Paper proposes to remove from the SAU provisions which make a distinction between Reference Offers and Non-Reference Offers. The ACCC's proposal arises in the context of the product withdrawal provisions in the SAU. In particular, that the product withdrawal disallowance power that would be given to the ACCC as proposed in the Draft Notice to Vary does not rely upon a distinction between Reference Offers and Non-Reference Offers. *Prima facie*, Macquarie is supportive of the ACCC's proposal especially as it would simplify the SAU and to this extent would enhance its effectiveness.

However, Macquarie cautions that the ACCC's proposal must not affect other provisions in the SAU which rely upon the distinction between Reference Offers and Non-Reference Offers. In particular, the commitment that the prices of Reference Offers will not increase before July 2017 must be preserved.

### CVC Pricing

NBN Co's pricing of its CVC product has been the subject of much industry discussion. Access seekers are essentially concerned that NBN Co's CVC price is too high. This will result in access seekers making a trade-off between high end-user prices and inferior quality of service. NBN Co's commitment to review the CVC price provides little comfort to access seekers especially given that under the ACCC's current price review proposal (as discussed above) a review of NBN Co's prices would not occur prior to 1 July 2018. As such, Macquarie suggests that the SAU should contain more specific commitments to review the CVC price to on or before 1 July 2016, particularly as demand for this service increases.

### Closing

Macquarie welcomes the opportunity to make this submission in response to the ACCC's Response to Submissions and Draft Notice to Vary. Macquarie's comments in this submission are limited to several key matters. In particular, Macquarie's key views are:

- that it supports the ACCC's proposal to remove provisions in the SAU which link SFAAs with Regulatory Determinations and thereby relying on the normal operation of Part XIC;
- that it supports the ACCC's proposal which provides a regulatory safeguard to protect against the possibility that NBN Co may inappropriately set prices for new services or previously zero-prices services;
- that while it broadly supports the ACCC's proposal concerning its review of NBN Co's prices, some aspects of the review appear to be unnecessarily restrictive;
- that a Regulatory Determination made about a service which is partly covered by the SAU is not inconsistent with the SAU as the SAU does not specifically apply to that service;
- that while it broadly supports the ACCC's proposal concerning the removal from the SAU provisions which make a distinction between Reference Offers and Non-

- Reference Offers, the existing commitment that the prices of Reference Offers will not increase before July 2017 must be preserved; and
- the SAU should contain more specific commitments to review the CVC price particularly as demand for this service increases.

Please do not hesitate to contact me should you have any queries in relation to this matter.

Yours sincerely



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