



29 November 2022

Ms Sarah Proudfoot
Executive General Manager, Infrastructure Division
Australian Competition and Consumer Commission
By email: sarah.proudfoot@acc.gov.au

CC:

Ms Gina Cass-Gottlieb – Chair
Ms Anna Brakey – Commissioner
Ms Liza Carver – Commissioner
Mr Peter Crone – Commissioner
Ms Delia Rickard – Commissioner

Dear Ms Proudfoot

Lodgement of variation to nbn’s Special Access Undertaking (SAU)

We enclose a variation to **nbn**’s Special Access Undertaking (the **Variation**), which is provided to the ACCC pursuant to s152CBG of the *Competition and Consumer Act 2010* (Cth) (**CCA**), together with related documents described further below.

Lodgement consistent with Government expectations

nbn lodges this Variation following recent changes in the policy landscape and operating environment. These were summarised in a letter issued by the Communications and Finance Ministers to **nbn** in July 2022¹ (Ministers’ letter). In particular, the Government has stated that it will retain **nbn** in public ownership for the foreseeable future, expand full-fibre access to more homes and businesses, and ensure the NBN delivers for consumers and facilitates productivity. **nbn** understands the Government also maintains an expectation that **nbn** will operate as a commercially sustainable company that can efficiently invest in Australia’s future connectivity needs².

The Variation represents numerous significant changes to the way in which **nbn**’s products, pricing and revenues are regulated under the existing SAU. This includes material changes to the variation proposal lodged by **nbn** on 29 March 2022 which was subsequently withdrawn on 27 July (the **March Variation**). It also expands the scope of the product and pricing commitments in the SAU to services supplied by **nbn** over its FTTB, FTTC, FTTN and HFC networks (the Multi-Technology Mix or **MTM** networks), with a view to providing a consistent regulatory framework for **nbn** services.

¹ See: <https://www.infrastructure.gov.au/sites/default/files/documents/nbn-co-sau-letter-to-nbn-co.pdf>.

² Minister Michelle Rowland, “Government outlines expectations for NBN Co Special Access Undertaking Variation” Media Release, 27 July 2022 (<https://www.michellerowland.com.au/news/media-releases-communications/government-outlines-expectations-for-nbn-co-special-access-undertaking-variation-27-may-2022/>)



In doing so, the Variation fulfils the Ministers' letter, which asked **nbn** to work constructively with the ACCC to ensure the Variation addresses issues that were raised in relation to **nbn**'s March Variation, and to develop a forward-looking regulatory model for the business which reflects the changes in policy landscape and operating environment since March. The Ministers also expressed the view that that the objective for the SAU variation process should be to aim to secure an outcome by early 2023 and allow **nbn** to develop new systems and prepare to implement a varied SAU on 1 July 2023. **nbn** is committed to this outcome and to continuing to work with the ACCC and industry throughout the ACCC's assessment and consultation process.

Lodgement following significant industry consultation

The lodgement of the Variation follows a significant engagement process with retail service providers, consumer and industry stakeholders, and the ACCC, including:

- Consideration of stakeholders' written submissions in response to the ACCC Consultation Paper in respect of **nbn**'s March SAU Variation which was published 23 May 2022;
- **nbn**'s release of a Discussion Paper on proposed changes to its SAU variation in early August 2022;³
- the ACCC's industry forum held on 18-19 August 2022;
- consideration of stakeholder submissions in response to the August Discussion Paper (we received 12 written submissions in early September); and
- engagement with the ACCC, retail service providers and industry and consumer groups on **nbn**'s March Variation proposal, which included the release by **nbn** of an SAU Variation Discussion Paper in June 2021, **nbn**'s consultation with industry on proposed SAU drafting to incorporate **nbn**'s MTM networks into the SAU (and make other minor changes), held over August to October 2021, and the ACCC's industry roundtable held in June 2021 and industry Working Groups held from August to December 2021.

The Variation reflects a package of commitments and should be accepted

nbn considers that the Variation is a comprehensive response to the concerns of RSPs and addresses each of the key outcomes of the industry Working Groups, and addresses feedback provided in relation to the March Variation, while ensuring that **nbn** retains the regulatory opportunity to be a sustainable commercial wholesale-only enterprise and to implement government policy. The Variation represents a strong regulatory framework which would supplement:

- the other obligations and scrutiny faced by **nbn** as a wholesale-only provider and a Government Business Enterprise; and
- the commercial and market-based incentives that **nbn** already faces on account of being a wholesale-only provider which is subject to significant competition and revenue sufficiency risk.

In that context, the Variation is an integrated package of proposals which, taken together, comprise an appropriate variation to the SAU that meets the relevant statutory assessment criteria, including (as relevant) that the terms of the Variation are reasonable and promote the long-term interests of end-users.

nbn therefore submits that the Variation should be accepted.

³ See: <https://www.nbnco.com.au/content/dam/nbn/documents/media-centre/media-statements/2022/sau-variation-discussion-paper-august-2022.pdf>.



If accepted, the Variation will vary **nbn**'s current SAU which was:

- accepted by the ACCC under s152CBC(2) of the CCA on 13 December 2013; and
- varied by way of a variation accepted by the ACCC under s152CBG(3) of the CCA on 1 April 2021.

Documents enclosed

The Variation comprises:

- a Variation Execution Document; and
- an Annexure 1 to the Variation Execution Document, being a mark-up to the current SAU as varied on 1 April 2021.

The Variation does not contain any information over which **nbn** claims confidentiality.

We also enclose Part A: *Executive Summary and Key Narrative* of **nbn**'s submission in support of the Variation. **nbn**'s supporting submission has been developed in a modular structure and it is **nbn**'s intention to provide the remaining parts of the submission to the ACCC in the coming days along with other relevant supporting materials.

Part A of **nbn**'s supporting submission does not contain any information over which **nbn** claims confidentiality.

Next steps

nbn considers that the commitments in the Variation address the needs and concerns of stakeholders and now welcomes the ACCC's public consultation process. **nbn** remains ready and willing to continue its constructive engagement with the ACCC and other stakeholders during and following the ACCC's consultation process. Ultimately, the SAU variation submitted by **nbn** must balance the needs and concerns of all parties, and enable **nbn** to remain a sustainable Commercial enterprise which can continue to implement government policy.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jane van Beelen', written in a cursive style.

Jane van Beelen

Chief Legal & Regulatory Officer, **nbn**