

SAU Drafting Refinements

NBN Co has identified some areas of SAU drafting that require refinement to ensure that the clauses operate as intended, and as effectively as possible. The refinements are shown in mark-up in the attached version of the SAU, and a brief rationale for each of the more material items is detailed below (note – clause references below relate to the version of the SAU provided to the ACCC by NBN Co on 26 July 2013). Other changes of a more minor nature are also shown in the attached version of the SAU, with comments noted in the marked-up version to explain the rationale for each change.

1. “WACC” in clause 4.6(b) – given the ACCC’s stated views on the use of “WACC”, it appears that the retention of WACC in this clause may have been inadvertent, and that it should instead read “rate of return”. “WACC” is also used at Recital M of the SAU where it is not required.
2. Inclusion of Facilities Access Services and Ancillary Services in the list of Initial Products - these have now been brought into the scope of the PDF, and should be included within the scope of what is covered by Initial Products. This has been done by showing them as separate items within Attachment D to the SAU. Some other minor refinements have been made to the existing drafting (clause 1(b) of Attachment D) to ensure that the NBN Co Networks are referred to in a manner consistent with the remainder of the SAU.
3. Clause 1B.3(b) – given the possibility that SFAAs (e.g. for interim satellite) may expire less than 12 months after the SAU is accepted, there is a need to have some transitional provisions in regard to the commitment under this clause to convene a Multilateral SFAA Forum no later than 12 months prior to the expiry of the term of each SFAA published under section 152AL(8D) of the CCA and in accordance with clause 6 of the SAU.
4. Clause 1C.2.12, Multicast Media Stream Offers – the operation of this clause should be restricted to be “in respect of the NBN Co Fibre Network”, for certainty and consistency with the other multicast offers.
5. Clarification on the pricing of what was the Standard Business Offer (SBO) - in the December 2012 SAU, the SBO was priced at \$53. When the prices of the products that comprise the SBO are added together, the apparent price is \$63, because the \$10 rebate for the included 0.15 Mbps TC-1 is not explicitly described in the SAU. While existing clause 1C.2.2(d)(i) makes it clear that the Asymmetric AVC Offers on the NBN Co Fibre Network come with 0.15 Mbps of CIR (TC-1) symmetrical Data Transfer Rate included, it is not clearly specified that the 0.15 Mbps allowance is used as a credit against any purchase of additional CIR (TC-1). This has been addressed in clauses 1C.3(b) and 1C.4.1(e), which also make it clear that the level of the rebate is linked to the actual price of the 0.15 Mbps TC-1 AVC, rather than its Maximum Regulated Price, and that the rebate will be at least \$10 per month per SIO until 30 June 2017, to preserve the maximum price of the bundle that previously comprised the SBO at no more than \$53 per month.
6. Clauses 1C.5.1 and 2B.2.2 (and consequential changes to clause 1C.4.1), Maximum Regulated Prices for NBN Offers and Other Charges – NBN Co had flagged in its July 2013 submission that it would like to work with the ACCC to streamline these clauses. NBN Co has proposed a limited set of refinements that are intended to make the operation of the clause clearer, in particular to identify at the start of the clause what is and is not subject to the operation of the clause.

7. Clarification regarding Third Party Funded Network Changes – in the December 2012 SAU, capex and opex in relation to Third Party Funded Network Changes is deemed prudent in Module 1, and any payments from the Third Parties would be included as Revenue in the LTRCM (given how Revenue is defined in the SAU). To ensure that these arrangements work only as intended, NBN Co proposes that the definition of Third Party Funded Network Changes include an additional requirement: at the time the relevant contract, arrangement or undertaking was entered into, NBN Co must have been satisfied that there was a zero or positive expected net present value of incremental Operating Expenditure, Capital Expenditure, tax and Revenue over the term of the relevant contract, arrangement or understanding.
8. Clarification regarding capital contributions – in the December 2012 SAU, clause 1E.2.1(b) explicitly provides that the Capital Expenditure to be included in the RAB “excludes any capital contributions of network assets.” This same statement is included in the Draft Notice to Vary and in NBN Co’s response to that Draft Notice (but in clause 1D.2.1(b)). The term “capital contribution” is not defined, but relates in this context to assets received for nil consideration (such as pit and pipe assets gifted to NBN Co by land developers); it does not relate to any monetary payments. NBN Co considers that the current statement in regard to excluding capital contributions from the capex to be included in the RAB is potentially confusing. Rather than amending it, NBN Co proposes the statement be removed from the SAU and the definition of Capital Expenditure be slightly adjusted so that a positive value for assets received for nil consideration cannot be included in the RAB. This involves making it clear in the Capital Expenditure definition that the capex must be incurred by NBN Co or a related Body Corporate of NBN Co (as in the Operating Expenditure definition). This would exclude the value of capex incurred by a third party such as a land developer as part of constructing pit and pipe assets that are subsequently gifted to NBN Co.
9. Additions have also been made to Attachment C (Dictionary) to include definitions that are required to support drafting in other parts of the SAU. These are described in the New Definitions Table below.

New Definitions Table

Term	Definition	Rationale
New Offer	New Offer means any NBN Offer other than the NBN Offers described in clause 1C.2.	<p>The definition of New Offer is intended to capture NBN Offers (products, product components, product features, ancillary services or types of Facility Access Service) that NBN Co may decide to offer in the future but the initial prices for which are not set out in the SAU. Accordingly, the definition comprises any NBN Offer other than the offers listed in clause 1C.2.</p> <p>The term New Offer is used in clauses 1C.6 and 2B.4, which deal with initial pricing principles for New Offers, in the Initial Regulatory Period and Subsequent Regulatory Period, respectively.</p>
New Other Charge	New Other Charge means any Other Charge other than the Other Charges described in clause 1C.4.2.	<p>The definition of New Other Charge is intended to capture ancillary charges (associated with products and services) that NBN Co may decide to introduce in the future. Accordingly, the definition comprises Other Charges other than those listed in clause 1C.4.2.</p> <p>The term New Other Charge is used in clauses 1C.6 and 2B.4, which deal with initial pricing principles for New Other Charges in the Initial Regulatory Period and Subsequent Regulatory Period, respectively.</p>
Price Review Criteria	<p>Price Review Criteria has the meaning given to the term:</p> <ul style="list-style-type: none"> (a) in relation to the Initial Regulatory Period, in clause 1G.3.8(a); and (b) in relation to the Subsequent Regulatory Period, in clause 2E.2.8(a). 	<p>The term Price Review Criteria is used several times in clauses 1G.3 and 2E.2. The criteria are used to assess the validity of Price Review Proposals and ACCC Determined Price Review Arrangements within the Initial Regulatory Period and the Subsequent Regulatory Period.</p> <p>The Price Review Criteria are set out in clauses 1G.3.8(a) and 2E.2.8(a). The criteria contained in these two clauses are identical.</p>
Prudent Cost Condition	Prudent Cost Condition has the meaning given to that term in clause 1D.4.1.	The term Prudent Cost Condition is used in clauses 1D.3.1, 1D.4 and 1F.2.1. Clause 1D.4.1 sets out the criteria taken into account in determining whether the Prudent Cost Condition has been satisfied.
Prudent Design Condition	Prudent Design Condition has the meaning given to that term in clause 1D.6.	The term Prudent Design Condition is used in clauses 1D.3.1, 1D.6, 1D.11.2 and 1F.2.1. Clause 1D.6 sets out the criteria taken into account in determining whether the Prudent Design Condition has been satisfied.