

22 April 2015

Mr Michael Cosgrave
Group General Manager
Communications Group
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

By email: michael.cosgrave@accc.gov.au

Dear Mr Cosgrave,

Special Access Undertaking – Draft LTRCM Determination for 2013-14, comments on Optus submission

NBN Co has reviewed the submission lodged by Optus in response to the ACCC's Draft LTRCM Determination for 2013-14 and would like to make the following comments. Please note that this is not an exhaustive submission and NBN Co does not necessarily agree with those aspects of Optus' submission that are not addressed here.

- Access to confidential information – with regard to Optus' comment in paragraph 1.8, NBN Co would like to clarify that Optus did have the opportunity to gain access to NBN Co's confidential information but chose not to avail itself of this opportunity.
- The alternatives open to NBN Co to satisfy the Prudent Design Condition – with regard to Optus' comments in paragraphs 2.2 to 2.4, NBN Co considers that the criticism of the drafting of clause 1D.6 is without foundation. The SAU clearly specifies three alternatives for satisfying the Prudent Design Condition. As Optus itself notes, paragraphs (a), (b) and (c) are clearly alternatives given the reference to "or" at the end of paragraph (b), as is the normal drafting convention. As summarised by the ACCC in October 2013 in its Notice to Vary:

The prudent design condition is specified in clause 1D.6. In particular, in order for capital expenditure to meet the prudent design condition it must be "materially consistent" with the network design rules or a permitted variation, endorsed network change or ACCC approved network change to the network design rules.¹ [Emphasis added]

- Updating the NDRs to account for the transition to MTM – with regard to Optus' comments in paragraphs 2.5 to 2.19, it appears that Optus has misunderstood the relevant SAU provisions in relation to updating the NDRs, which has led to a number of incorrect conclusions about the operation of the SAU in the transition to MTM. NBN Co would highlight the following points in regard to how the SAU operates.

¹ ACCC, Final decision: NBN Co Special Access Undertaking — December 2013, p.35.

- NBN Co indicated in its 1 July 2014 update to the NDRs (as noted by Optus) that it intends to account for the transition to MTM once the relevant design aspects are settled. In the meantime, as noted above, there are alternatives for satisfying the Prudent Design Condition in respect of capital expenditure incurred in connection with the transition to MTM, such as, for example, utilising the Permitted Variation provisions related to variations required in order to comply with the Statement of Expectations (clause 1D.7.2(a)(vi)).
- The SAU (clause 1D.7.4) includes provisions that require NBN Co to update the NDRs in certain circumstances, including where variations to the network design are made in connection with a change to the Statement of Expectations. In this context and noting that NBN Co has already stated an intention to make the necessary updates when possible, NBN Co would highlight that the relevant SAU provisions allow for the scope of the NDRs to evolve over time. In particular, the scope of the NDRs as described in clause 1D.7.1 is explicitly subject to clause 1D.7.4, so changes to the NDRs required in order to comply with the Statement of Expectations (such as occurred on 8 April 2014) are expressly contemplated.
- The relationship between the Prudent Cost Condition and the Procurement Rules – with regard to Optus’ comments in paragraphs 2.20 to 2.22 and 3.2 to 3.5, it would appear that Optus has misunderstood the relevant SAU provisions. The Prudent Cost Condition and the equivalent provisions in respect of operating expenditure are specified in clauses 1D.4.1 and 1E.8.3 of the SAU, where there is no dependence on the Procurement Rules. The Procurement Rules are referred to in a non-exhaustive way in clause 1D.4.2 as one of the factors that the ACCC may consider. As explained by the ACCC in October 2013 in regard to its Notice to Vary:

In relation to Optus’ concern about the reliance on compliance with Procurement Rules to assess prudence, the ACCC notes that the Procurement Rules are only a factor that the ACCC must have regard to when assessing whether capital expenditure was incurred subject to a competitive tendering and procurement process. The ACCC can also have regard to any other factors it considers relevant. This means that the ACCC does not necessarily have to be satisfied that the capital expenditure is prudent simply because it was incurred in accordance with NBN Co’s Procurement Rules.²

Accordingly, it is not necessary for the Procurement Rules to be disclosed to Optus to enable the ACCC to determine whether the Prudent Cost Condition is satisfied. In any case, as the ACCC is aware, NBN Co’s Procurement Rules are highly sensitive and commercial-in-confidence. Disclosing these Procurement Rules would be counterproductive because it would significantly damage NBN Co’s ability to procure goods and services in a way that represents value for money.

- Wording of the Expenditure and Price Compliance Reports – with regard to Optus’ comments in paragraphs 3.6 to 3.11, it appears that Optus has misunderstood the process of investigation and testing by which the Expenditure and Price Compliance Reports are compiled and therefore why the wording of those reports is appropriate. As described in NBN Co’s 31 October 2014 submission in relation to the Expenditure Compliance Report (and equivalently in regard to the Price Compliance Report):

Any such investigation and testing is necessarily subject to inherent limitations; there is an unavoidable risk that some deficiencies may not be detected, regardless of how carefully and thoroughly the work is planned and performed.

² ACCC, Variation of NBN Co SAU – explanatory statement — October 2013, p.76.

Consistent with this, the NBN Co CFO's certification in the Expenditure Compliance Report is subject to appropriate qualifying language to make clear the basis on which the certification is provided and expresses negative assurance conclusions.³

In developing the qualifying language in the certifications for both the Expenditure and Price Compliance Reports, as noted in NBN Co's 31 October 2014 submission⁴, NBN Co has had regard to the Australian Standard on Assurance Engagements ASAE 3000 "Assurance Engagements Other Than Audits or Reviews of Historical Financial Information".

NBN Co would highlight that its CFO has also provided a separate declaration in regard to the financial statements lodged as part of the Regulatory Information⁵ that is modelled on Schedule 9 to the RAF RKR. The difference in wording between the financial statements declaration and the Expenditure and Price Compliance Reports is appropriate in each context.

Please let me know if you would like to discuss any aspect of this letter.

Yours sincerely



Caroline Lovell
Chief Regulatory Officer

³ NBN Co submission to the ACCC – 2013-14 Regulatory Information and LTRCM Determination, p.11.

⁴ NBN Co submission to the ACCC – 2013-14 Regulatory Information and LTRCM Determination, p.11 and p.13.

⁵ NBN Co Limited, Special Access Undertaking – Regulatory Information for the period ended 30 June 2014, p.18.