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Submission in response to ACCC Draft Decision 'Variation to NBN Co Special Access Undertaking' dated March 2017

1. Summary of submission

1.1 This submission is provided by the Competitive Carriers' Coalition (**CCC**) in response to the ACCC's draft decision titled 'Variation to NBN Co Special Access Undertaking' released in March 2017 (the **Draft Decision**).

1.2 The CCC supports the ACCC's decision to reject the proposed Special Access Undertaking (**SAU**) variation submitted to the ACCC by NBN Co Limited (**NBN Co**) on 27 May 2016 (the **Variation**) in its current form.

1.3 Further, the CCC supports the ACCC's view that there is an interaction between the existing pricing provisions of the SAU and the Variation, which will incorporate MTM technology within the definition of the services provided under the SAU. The CCC therefore agrees that, in assessing the Variation, the ACCC is required to consider the SAU pricing provisions as they apply to the MTM technology.

1.4 The ACCC has specifically requested comments as to whether the NBN Co's proposal to apply the existing SAU price terms to functionally equivalent MTM services (rather than specify MTM specific prices) is reasonable. The ACCC has indicated its preliminary view that there are a number of strong arguments in favour of NBN Co's proposed approach. The CCC does not agree.

1.5 To extend the existing SAU price terms to MTM services would require the ACCC to reach the conclusion that a CVC price of $20 per Mbps for such services is reasonable. The CCC does not consider that such a conclusion can be reached given that it is widely recognised by the market and even NBN Co itself that such a price is neither reasonable or sustainable.

1.6 The CCC has previously made detailed submissions in response to the ACCC's consultation paper regarding the Variation, dated 20 July 2016. For the reasons detailed in that submission, the CCC does not believe that the Variation meets the reasonableness and LTIE criteria set out in sections 152CBD(2)(ca) and 152CBD(2)(cb) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and submits that the Variation must therefore be rejected by the ACCC in accordance with section 152CBG of the CCA.

1.7 The CCC remains of this view, notwithstanding the arguments raised by the ACCC in Chapter 7 of the Draft Decision in favour of applying the existing SAU price terms to equivalent MTM services. It is open to NBN Co to amend the pricing regime currently set out in the SAU to ensure that reasonable price terms apply to all technologies covered by a varied SAU. Alternatively it could include differential pricing for MTM services which is set at a reasonable level, and then provide all services (including FTTP services) at that reasonable level.

1.8 The CCC has prepared this submission in response to the arguments outlined by the ACCC in Chapter 7 of the Draft Decision in relation to this aspect of its assessment.

2. Criteria for consideration of the Variation

2.1 In considering the Variation, the ACCC must have regard to the criteria outlined in section 152CBD(2) of the CCA. Applying section 152CBD(2), the ACCC must reject the Variation unless it is satisfied (relevantly, and in summary) that:

2.1.1 the terms and conditions specified in the SAU (as varied) which relate to the Category B standard access obligation (**SAOs**) are consistent with the Category B SAOs, and are reasonable (section 152CBD(2)(b));

2.1.2 the terms on which NBN Co will engage in conduct specified in the SAU (as varied) in relation to access to services supplied by NBN Co will promote the LTIE, and those terms are reasonable (section 152CBD(2)(ca)); and

2.1.3 the terms on which NBN Co will engage in conduct specified in the SAU (as varied) in relation to the matters referred to in section 152CBA(3C) will promote the LTIE (section 152CBD(2)(cb)).

2.2 Essentially, the ACCC must be satisfied that the Variation is reasonable and is in the LTIE.

2.3 In determining whether particular terms and conditions are reasonable, the ACCC is required by section 152AH of the CCA to consider:

2.3.1 whether the terms and conditions promote the LTIE;

2.3.2 the legitimate interests of NBN Co;

2.3.3 the interests of RSPs;

2.3.4 the direct costs of providing the service;

2.3.5 the operation and technical requirements of the service; and

2.3.6 the economically efficient operation of a carriage service, a telecommunications network or a facility.

2.4 The way in which the ACCC has approached its assessment in light of these criteria is outlined in Appendix A of the Draft Decision.

2.5 In its original assessment regarding the reasonableness of the SAU pricing provisions, the ACCC adopted a set of three 'pricing principles' to assist it in applying these regulatory criteria (the **Pricing Principles**). The pricing principles applied by the ACCC are that:

2.5.1 NBN Co should have the opportunity to recover its efficient expenditure;

2.5.2 NBN Co should face incentives to only incur efficient expenditure; and

2.5.3 End-users should not be made worse off.

The ACCC has applied these same pricing principles again in its assessment of the Variation to consider the application of the existing SAU pricing terms to the functionally equivalent MTM services.

2.6 The CCC submits that the pricing principles adopted by the ACCC focus too strongly on the benefits and incentives which apply to NBN Co, and do not adequately take account of the remaining 152AH criteria. In particular, the following criteria are not adequately taken into account:

2.6.1 Promoting the LTIE (which the CCC submits must be a broader consideration than simply asking whether end-users are being made 'worse off') (s.152AH(1)(a));

2.6.2 The interests of RSPs (s.152AH(1)(c)); and

2.6.3 The economically efficient operation of the NBN (s.152AH(1)(h)).

2.7 Further the CCC submits that, in its analysis in Chapter 7 of the Draft Decision applying the Pricing Principles, the ACCC has focussed too closely on the principles which relate to NBN Co's opportunities for cost recovery, to the exclusion of other relevant factors.

2.8 Notwithstanding its view that the criteria described in 2.5 above are too narrowly focussed, the CCC also considers that any reasonable application of these criteria would still result in the rejection of the proposed pricing approach.

3. Response to ACCC arguments in support of the approach

The ACCC has set out a number of arguments in support of the application of the existing SAU price terms to the services provided using MTM technologies. The CCC provides its responses below.

3.1 NBN should have the opportunity to recover costs over the long term

3.1.1 This is not disputed, however it is not clear how this relates directly to the consideration of whether the existing price terms and conditions are reasonable or are in the LTIE. While NBN Co should have the opportunity to recover its costs, this factor cannot be prioritised to the exclusion of other relevant considerations, including how the current pricing structure is affecting:

(a) the economically efficient operation of the network;

(b) the ability of RSPs to compete on price or service quality basis;

(c) the quality of service being experienced by end-users.

3.1.2 It is clear that the current CVC pricing is not reflective of cost and does not promote economic efficiency. NBN Co's pricing model creates an artificial scarcity in relation to CVC. Clearly NBN Co's costs of providing CVC capacity to RSP's cannot increase in a linear fashion. It is a well-known characteristic of telecommunications networks that the cost of capacity reduces as volume increases. NBN Co's CVC pricing as set out in the SAU however increases in a linear fashion and does so at a unit price that artificially and unreasonably restricts the busy hour capacity that RSPs can offer to their customers at an affordable price.

3.1.3 Under the SAU pricing model, the price of CVC capacity sold to RSPs increases in a linear fashion as the RSPs consumption increases, even though it is clear that there is little, if any, corresponding increase in the costs incurred by NBN Co in providing the service. The ACCC in its draft decision has failed to demonstrate how this pricing model, which is totally divorced from the underlying cost of providing the relevant service, can possibly have the effect of encouraging efficiency.

3.1.4 NBN Co has recently voluntary reduced its CVC pricing on a number of occasions and has implemented a CVC pricing regime whereby pricing reduces based on the amount of CVC capacity per user acquired by the RSP. This arrangement is not enshrined in the SAU, nor is it proposed to be adopted in the Variation. This demonstrates that:

(a) The existing pricing levels (as set out in the SAU) are higher than necessary for NBN Co to recover its costs.

(b) The pricing levels for CVC under the SAU are not reasonable, and NBN Co has had to respond to market pressure from RSPs and dissatisfied end-users to acknowledge this.

3.1.5 Importantly, in determining whether the CVC pricing model set out in the SAU is reasonable or appropriate to be extended to the provision of CVC capacity in connection with MTM services, it cannot be relevant for the ACCC to take account of discount arrangements currently offered by NBN Co (other than as evidence that the SAU prices are not reasonable). In accepting the SAU, or a proposed variation of the SAU, the ACCC is excluding its own power to intervene in relation to the pricing of NBN services for an extraordinarily long period. Once the SAU is accepted, the ACCC has no, or extremely limited, ability to intervene in relation to pricing of NBN services for so long as prices remain at or below the levels set out in the SAU. Transitory discounts currently offered by NBN Co have no weight in the consideration of the price caps set out in the SAU, as the ACCC has no ability to enforce the continuation of such discounts.

3.1.6 In determining whether it is reasonable to extend the prices set out in the SAU to MTM services the ACCC must have regard to all of the 152AH criteria, only one of which is the legitimate business interests of NBN Co.

3.1.7 In particular, the ACCC is also required to consider the interests of persons who have rights to use the declared services (s. 152AH(1)(c)) and the LTIE (s.152AH(1)(f)). The CCC submits that:

(a) Access seekers are currently restricted in their ability to compete in the supply of services using the NBN, based on the cost or quality of their services relative to one another.

(b) In fact, the consumer market for NBN services is demonstrating concerning signs of a lack of competition, with poor upload and download speeds being experienced by end users and a trend in consumer complaints regarding the speed of service available using the NBN.

(c) If RSPs were in a position to compete in the supply of their NBN services based on cost and quality, the market would already be responding to these pressures with some differentiation in the offering provided by different RSPs.

(d) Instead, it appears NBN based broadband plans are being marketed to consumers purely on a like-for-like basis (same download speeds, same prices) as existing plans. This is because the current CVC pricing model makes it unviable for any RSP to offer its end users sufficient CVC capacity to provide appropriate levels of busy hour speed.

(e) Meanwhile, current CVC pricing (even at discounted rates) makes it difficult for RSPs to even offer the same standard of service for the same price on NBN services as is available from legacy services. This is resulting in rising consumer complaints and requirement for initiatives such as the broadband performance monitoring and reporting program recently announced by the ACCC.

3.2 The SAU provides incentives for NBN Co to price services efficiently in order to increase traffic on the NBN and uptake of higher value services.

3.2.1 The fact that NBN Co may elect to price its services at a different rate (and may face some incentive to do so) is not relevant to considering whether the current pricing terms of the SAU (which NBN Co may revert to at any time) are reasonable.

3.2.2 NBN Co has made no commitment to continue to offer CVC at the currently reduced rates over the long term.

3.2.3 The ACCC needs to be satisfied that the price provisions of the SAU are reasonable and in the LTIE, and will remain so for the term of the SAU. The current approach relies on NBN Co exercising its discretion to monitor and reduce prices in response to competitive pressures. A similar approach has been deemed by the ACCC to be unacceptable in relation to the proposed co-existence and remediation provisions of the Variation.

3.2.4 The CCC submits that similar considerations should apply as are outlined by the ACCC in its consideration of the proposed co-existence and remediation provisions of the Variation (Chapter 4 of the Draft Decision), as highlighted by the discussion in page 3 of the Draft Decision where the ACCC recognises that:

> NBN Co's incentives are likely to change over time and it may not face the same incentives later in the SAU period.

3.2.5 At page 62 of the Draft Decision, the ACCC states that it "*considers that NBN Co's recently announced changes to its DBD pricing scheme (to be implemented on an RSP basis) are likely to facilitate RSP differentiation and in turn promote competition in downstream retail markets."* However, this scheme is not a part of the SAU. The fact that NBN Co has chosen to implement a different pricing scheme than that enshrined in the proposed variation to the SAU clearly cannot be a relevant consideration in assessing the reasonableness of the pricing scheme in the Variation. In fact, this scheme represents a recognition by NBN Co itself that the CVC pricing model in the current SAU is inadequate and inappropriate. While this response by NBN Co is, in the view of the CCC, somewhat belated and inadequate, clearly it can in no way support the view that the SAU pricing model is adequate or reasonable.

3.2.6 While the ACCC has no ability through the current process to revisit the reasonableness of the price terms of the SAU as they apply to the existing technologies, it is prevented by the CCA from approving the application of those prices to the MTM services unless it is satisfied that those prices are reasonable. In the CCC's view it is not possible to form such a view when that pricing model has effectively been abandoned by NBN Co itself.

3.2.7 The ACCC has recently announced a new broadband performance management program. This has been linked to the 48% increase in complaints to the TIO about broadband speeds during 2015-2016. The program also has a particular focus on busy hour speeds. ACCC Chairman Rod Sims has been quoted as saying that the program will "*allow the ACCC to determine if issues are being caused by the performance of the NBN or by ISPs not buying sufficient capacity".* In the CCCs view, it is caused by the latter. That, in turn is caused by the unreasonable price for CVC capacity set by NBN Co.

3.2.8 The rise in consumer complaints clearly demonstrates that there is a high consumer demand for consistent, reliable high speed broadband services. Economic theory predicts that where such a demand exists, in the absence of a constraint, suppliers will endeavour to meet this demand. The fact that these complaints have escalated so rapidly is illustrative of the fact that suppliers are constrained in their ability to do so. The factor that constrains the busy hour speed that RSPs are able to supply is the price of CVC capacity.

3.2.9 At page 62 of the draft decision, the ACCC states that "*many RSPs currently offer NBN services and legacy services at similar price points … This observation does in part support the ACCC's original assessment that the SAU prices would facilitate comparable retail prices for entry level services."* Earlier on the same page, the ACCC criticises assumptions in the costing examples provided by the CCC in its earlier submission, and states that the CCC "*appears to have overestimated the amount of CVC required per end-user"* and notes that in fact the average amount of CVC acquired is only about 1 Mbps per user.

3.2.10 All of these observations in fact perfectly support the CCC's view. The amount of CVC required per user to provide an acceptable level of busy hour service is considerably higher than that currently being provided. In spite of consumer demand and dissatisfaction in relation to busy hour services, RSPs are not able to meet the required level of service. This is because, s in order to provide NBN services at an equivalent price point to that of legacy services, the amount of CVC that can be provided is severely constrained.

3.2.11 If it were possible to provide a higher level of busy hour service at a comparable price point as legacy services, an RSP could gain significant competitive advantage by doing so. The fact that this has not happened is illustrative that the problem arises from the high cost of CVC services and the lack of an available alternative. This is the case even in the environment where NBN Co has substantially discounted CVC pricing below the price which it is seeking to apply to MTM services in the proposed Variation. In the CCC's view it is abundantly clear that the application of the CVC price of $20 per Mbps as set out in the SAU to MTM services could not be reasonable.

3.2.12 At page 63 of the Draft Decision, the ACCC states that it accepts NBN Co's submission that consideration of potential price shock is only relevant to situations involving mandatory migration to the NBN. It goes on to state that "non-NBN services are likely to provide some degree of competitive constraint".

3.2.13 It is unclear to the CCC why it should be the case that a price shock experienced by an end-user who moves (perhaps because his or her lease has expired) from an apartment served by a non-NBN service to a different apartment or dwelling where NBN is the only fixed line service available, should not be considered a relevant factor. This situation would appear to constitute 'an end user being made worse off', for the purposes of the ACCC's criteria.

3.2.14 In addition, in the CCC's submission, the constraints on busy hour speed that are inevitably imposed by NBN Co's CVC pricing model as set out in the SAU mean that many end users who experiencing a forced migration from existing DSL based services to NBN based services are also likely to be made worse off. This is borne out by the rapid increase in complaints being made to the TIO even with NBN currently providing CVC pricing at a level substantially below the price which the Variation is seeking to extend to MTM services.

3.2.15 The statement by the ACCC that non-NBN services are likely to provide some degree of competitive constraint on NBN Co is simply misconceived given extensive legislative and regulatory restrictions that have been put in place to limit the extent of competition faced by NBN Co. In addition, even is some such constraint did exist, it cannot be relevant to the consideration of whether it is reasonable to extend a wholesale CVC price of $20 per Mbps to MTM services.

3.3 The SAU price terms include the ability to rebalance prices in a revenue neutral manner which would be extended to include the MTM services under the proposed SAU variation

3.3.1 The utility of this provision is obviously greatly reduced if the starting point for any such rebalancing is the current level of CVC pricing set out in the SAU which is substantially higher even than the prevailing price offered in the market by NBN Co.

3.3.2 As the ACCC considers extending the existing SAU pricing regime to MTM services, it must take account of the fact that an exercise of this rebalancing power could potentially be undertaken and produce a result of significantly higher AVC prices and a reduced regulated CVC price that is no lower than that currently offered to the market by NBN Co. Clearly such a power is only of benefit if the starting prices for the rebalancing are themselves reasonable.

3.4 The SAU pricing model is technology neutral and is based on the service an end-user receives rather than the specific access technology

3.4.1 The CCC does not dispute this. RSPs and end users should not have to pay a different price for the same service based on the access technology used to deliver that service.

3.4.2 However, again, this is not relevant to consideration of whether the current prices are reasonable. If they are found not to be reasonable, the ACCC cannot accept their application to the MTM Services, regardless of the fact that it has previously approved their application to FTTP services under the existing SAU.

3.4.3 From a practical perspective (as outlined below), there are alternative options available which would ensure that end users could be charged a consistent price rather than a price which is dependent on the access technology used.

3.5 Pricing MTM services outside the SAU through another framework may lead to complexity and uncertainty

3.5.1 The CCC acknowledges that the legislative framework does not allow the existing price terms as they apply to existing technologies to be reassessed in considering the Variation.

3.5.2 However, this is not an argument which supports a conclusion either:

(a) that the existing prices are reasonable as they apply to the existing services; or

(b) that the existing prices will be reasonable as they apply to the new MTM services.

3.5.3 For the reasons outlined in its previous submission, the CCC considers that the existing price provisions of the SAU are not reasonable. This is demonstrated by a number of factors.

3.5.4 The fact that the industry is already, effectively, 'locked in' to the application of unreasonable pricing terms under the SAU does not allow the ACCC to perpetuate that situation by continuing to approve the application of those terms to new services which are incorporated into the SAU.

3.5.5 The implementation of new pricing in relation to the MTM Service also does not necessarily result in complexity and uncertainty, given:

(a) MTM services could be priced under the existing SAU via a further variation, provided that the proposed pricing was reasonable. This would avoid the need for the ACCC to set terms and conditions for the MTM services using another regulatory instrument, (i.e. there need not be an Access Determination or other similar instrument).

(b) Even if services are priced differently under the SAU, NBN Co may choose to charge the same price for functionally equivalent services, regardless of the delivery technology, provided it ensures that the pricing falls within the approved limits for each type of technology.

4. Conclusion

4.1 As detailed in its previous submission, the CCC does not believe that the Variation meets the reasonableness and LTIE criteria set out in sections 152CBD(2)(ca) and 152CBD(2)(cb), and submits that the Variation must therefore be rejected by the ACCC applying section 152CBG of the CCA

4.2 Under section 152CBG(3) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) the ACCC must either accept or reject the Variation. The CCC submits that the ACCC has no option other than to reject the Variation in its current form. This is primarily because acceptance of the Variation would have the effect of applying the existing price terms of the SAU to a range of new services in a manner which is neither reasonable, nor in the long term interests of end users (**LTIE**).

4.3 If a further or amended Variation is submitted by NBN Co, it should also be rejected if it seeks to apply the existing SAU pricing to MTM services.