

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission to ACCC
in response to

**Revised First Variation to
NBN Co Special Access
Undertaking**

Public Version

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Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the opportunity to provide comments on the Revised Variation to the NBN Co Special Access Undertaking (SAU).
- 1.2 Since the ACCC's Draft Decision, NBN Co has made the following changes to its proposed SAU Variation:
 - (a) Removal of the mechanism for incorporating new access technology variants within the definition of the NBN Co Network;
 - (b) Reinstated the definition of the network boundary point; and
 - (c) Removal of co-existence and remediation provisions from Module 2
- 1.3 Optus welcomes these changes. Optus also welcomes the assessment of extending the existing SAU pricing provisions to the MTM technologies.
- 1.4 Optus submits the LTIE would be best served by not accepting the proposed variation to the SAU. Under this scenario:
 - (a) The price terms in the SAU would only apply to the minority of NBN services covered under the original NBN rollout technologies. For all remaining services (that is, MTM and any future NBN technologies), the ACCC would be able to retain regulatory oversight and industry would be able to engage in a more transparent and consultative process, to ensure pricing promotes the LTIE.
 - (b) ACCC could require NBN Co to provide back-to-back assurances and commitments for MTM access lines, which would enable RSPs to fully inform their customers about the performance aspects of the NBN broadband service they acquire.

Review of NBN pricing

- 1.5 Optus welcomes the Draft Decision recognition that *"there is a clear interaction between the pricing provisions and the proposed changes to introduce the new MTM services."*¹
- 1.6 The SAU was originally approved assuming that the AVC-CVC price construct would promote the interests of end-users, including efficient use of NBN services. Optus does not believe that this outcome has necessarily been achieved. There is an acceptance by industry that the current prices need to change.
- 1.7 Optus believes that the key question before the ACCC is essentially a procedural one. Namely, whether the SAU price review process or the existing FAD process is the better process to enable changes to the current price structure and levels.
- 1.8 It is not necessary to approve the SAU Variation to conduct a price review. Services that are not included in the SAU are declared services under the Act, and the ACCC is able to conduct an FAD inquiry to set the terms and conditions of access.

¹ ACCC, 2017, Variation to NBN Co Special Access Undertaking, Draft Decision, March, p.58

- 1.9 The assessment of the existing price structure needs to be broadened to focus on the impact on competition; efficient use of the NBN; and the interests of end-users. Reliance on the existing FAD process is the best process to ensure that this occurs.

SAU should ensure RSPs are able to provide transparent and accurate information to consumers

- 1.10 Optus reiterates its previous comments regarding the need for improved transparency, accuracy and timeliness of information to be provided by NBN Co to RSPs.
- 1.11 As rollout continues, there is greater need for NBN Co to provide RSPs with the necessary information to adequately serve end-users. Delays or changes in network design details can substantially impact the service provisioning activities, and ultimately the end-user experience with NBN activation. For example, NBN access network node splitting reporting currently does not exist, and NBN Co retains the discretion to update the capacity of NBN access technologies without notifying RSPs of changes as they occur.
- 1.12 In particular, Optus considers that where service performance is degraded due to factors outside an RSP or end-user's control, NBN Co should be required to notify RSPs. The lack sufficient information commitments on NBN line speeds subject to remediation is resulting in an information asymmetry that affects all levels of the supply chain, particularly where it applies to the MTM technologies.
- 1.13 RSPs are held accountable for services they provide to end-users; however, this same accountability does not necessarily apply to services provided by NBN Co to RSPs. Where RSPs rely upon NBN Co to deliver services with stated performance aspects, NBN Co should be required to actually achieve these aspects. Where NBN Co cannot, the SAU should require NBN Co to inform RSPs and to offer redress.
- 1.14 NBN Co is currently offering services to RSPs that is not capable of delivering the 'advertised' service attributes. To address this, NBN Co has introduced co-existence and remediation provides to address situations where the 'advertised' attributes may not be delivered. The duration of this exemption remains uncertain. Moreover, the SAU still enables NBN Co to sell services to RSPs with attributes that cannot be achieved. This should be addressed.
- 1.15 All affected services should also be identified to show whether the line is (or could be) subject to co-existence, remediation or interference mitigation actions – but more importantly, it should provide an estimate of the date by which the co-existence period is expected to end. It is not appropriate that NBN Co does not provide this information, nor is it appropriate for RSPs to continue to be held accountable for delivering lines speeds for a service to end-users that NBN Co knows the line is unable to meet.

Section 2. NBN PRICING REVIEW

- 2.1 The SAU was originally approved assuming that the AVC-CVC price construct would promote the interests of end-users, including efficient use of NBN services. Optus does not believe that this outcome has been achieved. Optus refers the ACCC to our previous submissions on this issue.
- 2.2 Optus welcomes the observation in the Draft Decision that the proposed amendments to the SAU will have the impact of applying the existing price structure and levels to the MTM access technologies. Optus has submitted extensively on this issue in our previous submissions. The ACCC should have regard to these earlier comments.
- 2.3 The Draft Decision seeks further information on whether the SAU price review process should be applied to the MTM access technologies. This section focuses on the procedural question of whether conducting a SAU Price Review or NBN-specific Access Determination to review prices would best promote the LTIE.

NBN Co is yet to address RSP concerns

- 2.4 The current SAU provide NBN Co scope to reset the current price structure and levels, within a limited number of conditions (including maximum values). Within the SAU framework, NBN Co retains the discretion to:
- (a) Adjust existing prices, subject to the maximum regulated rate;
 - (b) Initiate a pricing consultation for all new and existing prices through the PDF Processes; and
 - (c) Initiate a Price Review process.
- 2.5 NBN Co has taken the following measures since the original CVC price of \$20 per Mbps was first introduced; that is, a reduction of the CVC price to \$17.50 per Mbps; and the introduction of a CVC Dimensioned Based Discount approach (which is now based on a RSP-specific DBD discount, previously based on industry average).
- 2.6 These changes to CVC pricing have had a positive impact. However, it is important to note that the SAU does not entrench the reduced CVC price point, and the DBD approach is effectively only applied as a rebate measure and can be removed at any time, with '3 months notice'.² This consequently does not promote access seeker certainty over the long-term.
- 2.7 Finally, NBN Co has embarked on a second tranche of pricing consultations looking at a more fundamental price review. Importantly, NBN Co has stated that this review process is outside the scope of the SAU and not subject to any of the relevant terms in the SAU. The ability of NBN Co to pick and choose when it will be subject to the terms of the SAU further diminishes the ability of the SAU to regulate the behaviour of NBN Co.
- 2.8 Optus submits that these factors, when combined, demonstrate that the SAU may not be the most appropriate way through which to ensure NBN Co prices promote the LTIE.

² NBN Co, Discount Notice: CVC Dimension Based Discount, dated 27 February 2017, cl 3.2

A proposed way forward

- 2.9 Optus considers that there is nothing within the current regulatory framework that prevents NBN Co from undertaking its own price rebalancing of AVC and CVC components. It has chosen not to do so. The question, therefore, is what process best enables the ACCC to initiate a price review if it believes the price structure should be reviewed.
- 2.10 There are two mechanisms to conduct such a review:
- (a) Include the MTM services within the SAU (i.e., accept the proposed variation) and initiate a price review under the SAU terms; or
 - (b) Do not accept the variations and conduct an Access Determination Inquiry under Part XIC.
- 2.11 The key point is that there is an opportunity for NBN pricing to be reviewed. This review should be open for input by all parties through a transparent and multilateral process. The procedural question remains; which approach would best promote the LTIE.
- 2.12 We discuss the differences between the two arrangements below.

Price Review Arrangements

- 2.13 Schedule 1G in the SAU framework “*confers functions and powers on the ACCC pursuant to section 152CBA(10A) of the CCA*” to undertake the relevant price reviews for services covered by the SAU.
- 2.14 The Price Review Arrangements sets out the processes and assessment criteria that govern how the Price Review may be conducted via the SAU. The key features of a Price Review conducted under the SAU framework include:
- (a) **Initiating a Price Review** – A Price Review may be initiated by either NBN Co or the ACCC issuing a Price Review Notice to the other party. The Price Review Notice must specify one or more Maximum Regulated Prices to be reviewed; and include reasons why the notifying party considers the Maximum Regulated Prices should be reviewed.
 - (b) **Developing a Price Review Proposal** – Following receipt of the Price Review Notice, NBN Co will provide the ACCC with a Price Review Proposal within 120 calendar days. The Price Review Proposal must include information on a proposed Price Review Arrangement developed in accordance with the Price Review Criteria; an explanation of the basis on which the proposed Price Review Arrangement satisfies the Price Review Criteria; and the forecasts and estimates used by NBN Co to apply the Price Review Criteria to the proposed Price Review Arrangement. There is no requirement for NBN Co to consult on its Proposal.
 - (c) **ACCC response to Price Review Proposal** – The ACCC response may be to either: accept the Price Review Proposal; reject the Price Review Proposal; or where the ACCC has issued the relevant Price Review Notice it may choose to discontinue the Price Review without making a decision in which case the Price Review will terminate. Where the ACCC decides to reject the Price Review Proposal, it may also choose to either issue its own ACCC Determined Price Review Arrangement; or discontinue the Price Review process without establishing a Price Review Arrangement in which case the Price Review will terminate. The ACCC is also required to publish the reasons for its decision and any resulting Price Review Arrangement.

- (d) **Acceptance of Price Review Proposal** – If a Price Review Proposal is accepted, then the proposed Price Review Arrangement in the Price Review Proposal becomes the accepted Price Review Arrangement. Alternatively, the ACCC may issue its own ACCC Determined Price Review Arrangement.
- (e) **Operation of a Price Review Arrangement** – The contents of a Price Review Arrangement must specify the start and end date; and the Maximum Regulated Price for a Reviewed Offer to which the Price Review Arrangement will apply.
- (f) **Price Review Requirements** – This sets out the assessment framework when the ACCC makes a decision to accept or reject or issues an ACCC Determined Price Review Arrangement.

First, the Price Review Criteria requires that the ACCC must be satisfied that:

- (i) the Maximum Regulated Price for each Reviewed Offer is reasonable, having regard to matters specified in section 152AH of the CCA; the matters referred to in clause 1G.3.8(d) and any other matters the ACCC considers relevant; and
- (ii) there is no material difference between both the factual and counterfactual scenarios (ie. an overall revenue neutral constraint) between the commencement of the Price Review Arrangement and the SAU expiry date.

Second, the Price Review Requirements also reference section 152CBD(5A) and 152BCB(3C) of the CCA applies to the ACCC decision whether to accept or reject a Price Review Proposal or the decision to issue an ACCC Determined Price Review Arrangement.

2.15 It is important to note that this process has yet to be tested, therefore there is no precedent on the operation of this approach.

NBN-specific Access Determination

- 2.16 As noted above, it is not necessary to approve the SAU Variation to conduct a Price Review for the MTM technologies. The ACCC already has at its discretion the scope to undertake an inquiry into and issue an NBN-specific access determination.³ A NBN-Specific access determination would be subject to the framework and assessment criteria in Part XIC of the CCA. Importantly, it also places emphasis on the LTIE criteria as it applies to competition and efficient use of and investment in infrastructure.
- 2.17 Section 152BC in the CCA provides the framework for the ACCC to make access determinations. Section 152BCA sets out the matters the ACCC must take into account in making an access determination, while Section 152BCB sets out the restrictions on making an access determination.
- 2.18 All NBN services are effectively deemed declared services for the purposes of meeting category B standard access obligations: it includes any services supplied by an NBN corporation under a standard form of access agreement (SFAA) and/or services covered by special access undertakings for services supplied by an NBN corporation.⁴ The SAU similarly acknowledges that a NBN service may be declared by the ACCC – that is, an ACCC-Declared Service *“even if the service falls, to any extent, within the scope of the*

³ CCA s 152BC (4A) to (4C)

⁴ CCA s 152AL (8A) to (8E)

services that are declared under section 152AL(8E) of the CCA as a consequence of the operation of this Special Access Undertaking.⁵

2.19 An Access Determination conducted under Part XIC of the CCA is a process well known to industry, with established rules and procedures that are subject to judicial review.

Comparing of the two processes

2.20 The procedural question of which approach best promotes the LTIE should include a comparison of the key features between the two pricing arrangement approaches. This is summarised in the table below.

Figure 1 Comparing SAU and FAD process

	SAU Price Review Arrangement	NBN-specific access determination
Duration of price terms	Must be set relative to a Financial Year period, applicable for up to 5 Financial Year periods.	Length not specified, but is limited by the duration where the declared service is covered by declaration under section 152AL of the CCA.
	Commencement date must be the start date of a Financial Year period, subject to: <ul style="list-style-type: none"> No overlap, ie. not be a Financial Year of which a previous Price Review Arrangement applies; Be no later than 12 months after the date on which the Price Review Arrangement is accepted or issued by the ACCC 	Decision comes into force on the day specified in the determination as the day on which the determination comes into force. s.152BCF(2) allows for retrospective commencement. The specified day may be earlier than the day on which the determination is made
	End date must be the end of a Financial Year period between 1 and 5 Financial Years after commencement of the Price Review Arrangement	Access determination unless sooner revoked, ceases to be in force on the expiry date of the determination
Specification of price terms	cl.1G.3.7 sets out the specification of the price term, such that: <i>The Maximum Regulated Price for a Reviewed Offer may:</i> (i) <i>Be specified in the form of an amount or as a formula for ascertaining the amount; and</i> (ii) <i>May be different for each Financial Year for which the Price Review Arrangement specifies a Maximum Regulated Price for the Reviewed Offer</i>	s.152BC(8) requires that certain terms and conditions must relate to price, such that: <i>“Terms and conditions in specified in an access determination ... must include terms and conditions relating to price or a method of ascertaining price.”</i>
Consultation process	Bilateral process. cl.1G.3.3(e) does not require a formal public inquiry to make a Price Review Arrangement	Open process. s.152BCH(1) requires a formal public inquiry to make an access determination

⁵ NBN SAU, cl 1A.8(a)

	SAU Price Review Arrangement	NBN-specific access determination
	<i>“The ACCC may consult with NBN Co and such other persons as the ACCC considers appropriate on NBN Co’s Price Review Proposal”</i>	<i>“The Commission must not make an access determination unless (a) The Commission has held a public inquiry ... about a proposal to make the determination.”</i>
Assessment Criteria	<p>cl.1G.3.8(d) sets out matters that the ACCC must have regard to, including:</p> <ul style="list-style-type: none"> • The legitimate business interests of NBN Co; • The characteristics and costs associated with Other Offers; • The impact of the ACCC’s decision on the Revenue and demand associated with Other Offers; and • Any other factor the ACCC considers relevant 	<p>s.152BCA(1) sets out matters that the Commission must take into account. These include:</p> <ul style="list-style-type: none"> • Whether the determination will promote the LTIE; • The legitimate business interests of the access provider; • The interests of all persons who have rights to use the declared service; • The direct costs of providing access to the declared service; <p>s.152BCA(2) sets out matters that the Commission may take into account. These include:</p> <ul style="list-style-type: none"> • The characteristics and costs associated with those other eligible services; and • The revenues and demand associated with those other eligible services <p>s.152BCA(3) covers any other matters the Commission considers relevant</p>
Limitations of price review process	Price Review process can only apply to services covered by the SAU, i.e. the NBN Offers; and Other Charges	<p>Access determination can only apply to declared services under s.152AL</p> <p>Where the access determination applies to a declared service supplied by an NBN corporation, it does not apply unless it is expressed to be a NBN-specific access determination</p>
	<p>cl.1G.3.1(c) constrains the ability for Price Review Notice to be issued if there are already two Price Review Arrangements that apply during the operation of Module 1.</p> <p>cl.2E.2.1(c) constrains the ability for Price Review Notice to be issued if it is more than 2 years prior to commencement of the Subsequent Regulatory Period.</p>	

Source: NBN Co SAU; Pt XIC of the CCA.

2.21 Optus considers that a Part XIC process may represent a more robust pricing review process. This is preferred over a NBN Co-Initiated Price Review under the SAU for numerous reasons:

- (a) The Price Review Arrangements⁶ limits the total number of Price Review Arrangements that apply, it can only apply relative to Financial Year period, and the ACCC's ability to intervene only occurs in the event that the ACCC rejects the Price Review Proposal and issues its own Price Review Arrangement. There also appears to be no consultation avenue to which access seekers are able to participate in the initial Price Review process.
- (b) The Price Review Requirements⁷ similarly constrain the ability for a successful Price Review Proposal to be accepted or an ACCC Determined Price Review Arrangement to be issued.
- (c) For Module 2, the price review process does not allow a review within the first 3 years of a Subsequent Regulatory Period.
- (d) Finally, it is not clear that NBN Co would conduct a price review under the SAU processes. As noted above, NBN Co is currently conducting a price review outside the SAU process. The ability of NBN Co to choose when it conducts processes within the SAU could result in the SAU price process being bypassed. NBN Co cannot bypass a FAD inquiry.

⁶ NBN SAU, cl 1G.3

⁷ NBN SAU, cl.1G.3.8

Section 3. SERVICE PERFORMANCE OBLIGATIONS

- 3.1 There has been recent focus on issues around NBN access line quality and the ability to deliver stated performance over FTTN and FTTB lines. Much of the commentary has focused on the information available to RSPs, including whether RSPs are able to rely upon information made available by NBN Co.
- 3.2 These issues have led the ACCC to provide guidance to RSPs over the selling of NBN services over FTTN and FTTB lines.
- 3.3 Optus is concerned that similar issues could arise in relation to co-existence and remediation of NBN copper lines. That is, RSPs could be placed in a position where they may not be able to inform their customers over issues pertinent to the performance of the supplied broadband service. Optus submits that the SAU should not be accepted until there are back-to-back commitments in relation to the provision of services over the MTM technologies. Where a service cannot be delivered, the SAU should require NBN Co to clearly state the limitations and measures taken to alleviate these.
- 3.4 Under the SAU, NBN Co continues to retain broad discretion over the circumstances in which a FTTN/B Node is placed into the co-existence period or when a line is placed into remediation and the period for which these provisions would apply. Optus considers the other proposed changes to the SAU does not address the concerns outlined in the Draft Decision. For example, it does not address the lack of information commitments to access seekers and end-users about the services being provided.
- 3.5 To address these concerns, the SAU should be amended to require NBN Co to do the following:
- (a) Provide specific information on the start and expected end date of the remediation or co-existence period;
 - (b) Provide up to date performance information on the lines subject to remediation or co-existence; and
 - (c) Provide rebates to RSPs that have acquired AVC with PIR or CIR objectives that are not able to be achieved over lines subject to remediation or co-existence.
- 3.6 Optus is concerned that absent these provisions, RSPs may be placed in a position where they would be unable to comply with their obligations under Australian Consumer Law; and consumers could be misled over the performance aspects of their broadband service.
- 3.7 This section discusses:
- (a) The need to include information requirements in the SAU;
 - (b) Provision of rebates for AVC objectives that cannot be achieved; and
 - (c) Inclusion of commitment to ensure HFC access lines have adequate capacity to achieve AVC services sold.

The need to include information commitments in the SAU

- 3.8 The importance of having strong information commitments in the SAU has been highlighted given the recent focus on issues around NBN access line quality and the ability to deliver stated performance over FTTN and FTTB lines.

- 3.9 RSPs are held accountable for services they provide to end-users; however, the same accountability does not appear to apply to services provided by NBN Co to RSPs. This needs to be improved. Optus considers that the SAU should include commitments for NBN Co to provide RSPs with accurate information on line quality both prior to, and after, activation of the relevant NBN access line to end-users. There is a strong need for a commitment for this information to be provided, particularly in the context of NBN lines which may be subject to technical limitations or barriers affecting its ability to deliver to its 'advertised' service attributes. Specifically, Optus discusses this issue as it relates to the co-existence and remediation provisions.

The revised co-existence and remediation provisions

- 3.10 NBN Co has introduced some refinements as part of the updated co-existence and remediation provisions to the proposed drafting:⁸
- (a) Narrowed scope of services to be covered by the co-existence provisions;
 - (b) Refinement of the remediation provisions to address interference management;
 - (c) Introduced new definitions of Interference Event and Interference Mitigation;
 - (d) Amended remediation provisions to clarify that the effect of remediation or interference management is that speeds may be less than both the PIR Objective (relevant to TC-4 AVCs) and CIR Objective (relevant to TC-2 AVCs);
 - (e) Relocated of substantive definitions of terms from Dictionary directly to the relevant clause.
- 3.11 In general, these proposed changes are intended to *"reflect the underlying principles that have been agreed to with the industry in relation to co-existence, remediation and interference mitigation in the time since the Original SAU Variation was lodged in May 2016."*⁹ However, it is concerning that during the remediation period, NBN Co has also proposed an amendment that is intended *"to clarify that speeds may be less than both the PIR Objective and the CIR Objective where remediation or interference mitigation is necessary."*¹⁰ This would effectively make the co-existence provisions redundant, with further uncertainty provided to both the RSP and ultimately the end-user.
- 3.12 Optus accepts that it would be appropriate that co-existence and remediation provisions be included in Module 1 should the MTM technologies (FTTN, FTTB and HFC) be incorporated into the SAU. However the issues set out in the Draft Decision do not seem to be adequately addressed.

Co-existence provisions

- 3.13 Co-existence refers to a situation where there may be the simultaneous supply of NBN and legacy services between the NBN RFS and the final disconnection date of the

⁸ NBN Co, 2017, nbn supporting submission – Revised variation to the NBN Co Special Access Undertaking, 22 June, p.6

⁹ NBN Co, 2017, nbn supporting submission – Revised variation to the NBN Co Special Access Undertaking, 22 June, p.7

¹⁰ NBN Co, 2017, nbn supporting submission – Revised variation to the NBN Co Special Access Undertaking, 22 June, p.7

legacy services. During this period, the provisions are intended “to allow NBN Co to supply its services at lower speed during the co-existence and remediation periods.”¹¹

- 3.14 NBN Co has claimed that “nbn already faces significant incentives to minimise co-existence time and to undertake remediation.”¹² The revised variations, however, still do not address the lack of information commitments for services subject to co-existence.
- 3.15 First, the duration of the co-existence period is not defined. The SAU variation only states that the Co-existence Period “will cease on the date notified by NBN Co to Access Seekers,”¹³ while the WBA states that the Co-existence Period supplied by means of that NBN Co Node will cease at such time “when NBN Co is satisfied that the Downstream Power back-off is no longer required in respect of the NBN Co FTTB Network or NBN Co FTTN Network (as the case may be).”¹⁴ Such an open-ended timeframe makes it difficult for RSPs to inform end-users about the co-existence period. It also makes it difficult for RSPs to adequately plan during the co-existence period.
- 3.16 Second, there is a growing take-up in the number of co-existence affected services. For example, the most recent NBN Wholesale SIOs RKR report shows that approximately 17.3% of FTTB and 13.2% of FTTN services are subject to co-existence period.¹⁵
- 3.17 Third, NBN Co has introduced new clause 1A.4.4(b)(ii) to specify the Co-existing Services that would affect the lines subject to Co-existence. The existence of these legacy services, as well as remaining Designated Special Services will mean that a substantial proportion of node service areas will be affected, and as a result further prolong the duration of the co-existence period.
- 3.18 The combination of these concerns will have implications for RSPs given that during this period, NBN Co will only be obliged to meet its PIR Objective, while charging RSPs at the price point equivalent to the upper end of the relevant AVC price range. Further, it is not clear that RSPs will have adequate information to inform their customers. Moreover, even if NBN Co does supply sufficient information, there are no consequences in the SAU should NBN Co not meet its objectives.

Remediation provisions

- 3.19 Remediation refers to work NBN Co does to address speed issues. NBN Co is obligated to provide 25/5 Mbps under FTTB and 12/1 Mbps under FTTN and to do this they may Remediate the service. However, this typically involves long lead times; and may take up to two years, which is clearly not acceptable since RSPs will continue to be obliged to pay for the ordered speed rate even if the line is not capable of receiving that speed.
- 3.20 While the remediation provisions provide the basis for NBN Co to address problems with copper lines (ie. the legacy services during the transition period), the revised SAU variation also now introduces interference mitigation provisions to provide a basis for responding to third party interference to NBN services in a way that appropriately manages the interests of all affected users.
- 3.21 These interference mitigation provisions only apply as it relates to addressing any interference events related to FTTN and FTTB. It does not include any recourse for HFC

¹¹ ACCC, 2017, Variation to NBN Co Special Access Undertaking, Draft Decision, March, p.30

¹² NBN Co, 2017, nbn supporting submission – Revised variation to the NBN Co Special Access Undertaking, 22 June, p.5

¹³ Revised NBN SAU variation, cl 1A.4.4(b)(i)

¹⁴ NBN Co, SFAA - NBN Co Ethernet Bitstream Service, Product Description, version 2.13, cl 12.5

¹⁵ This is based on the number of AVC services subject to a PIR range as a proportion of total FTTB and FTTN services for the period ended 30 June 2017.

interference events. Additionally, there is no commitment or further action required where the interference mitigation action is unsuccessful.

- 3.22 Of particular concern is the proposed amendment during the remediation period which clarifies that speeds may be less than the both PIR Objective and CIR Objective during the co-existence period. This places further uncertainty risks on RSPs that acquire certain AVC speed tiers but during remediation period may be subject to lower speed. This issue is further compounded due to the lack of information surrounding the line speeds that can be achieved, and the timing at which customers (or even RSPs) are even informed of this information.

Information commitments relating to NBN line speeds

- 3.23 The Draft Decision highlighted that the SAU should include commitments to provide information regarding co-existence and remediation to access seekers or end-users. In particular, the ACCC has recognised that:

“the proposed remediation clauses do not contain adequate information commitments from NBN Co to inform RSPs as to when a service will be placed into remediation and what the impact on their services will be. As a result, RSPs may not be aware if their speed has been reduced due to remediation. This makes it difficult for RSPs to make accurate representations to their customers in relation to the speed they can expect from their service.”¹⁶

- 3.24 The lack of information commitment on NBN line speeds is resulting in an information asymmetry that affects all levels of the supply chain. Optus considers that where service performance is degraded due to factors outside an RSP or end-user’s control, NBN Co should be required to notify access seekers. Where the affected services remain degraded for a prolonged period, then RSPs should also be entitled to a rebate.
- 3.25 All affected services should also be identified to show whether the line is (or could be) subject to co-existence, remediation or interference mitigation actions – but more importantly, it should provide an estimate of the date by which the co-existence period is expected to end. It is not appropriate that NBN Co should not supply this information, nor is it appropriate for RSPs to continue to be held accountable for delivering lines speeds for a service to end-users that NBN Co knows the line is unable to meet.
- 3.26 While the proposed co-existence and remediation provisions only apply to FTTN and FTTB services, similar co-existence and interference issues may also be experienced on HFC services. For example, the SFAA-WBA defines ‘HFC Interference Event’ in a manner similar to Interference Event experienced for FTTN and FTTB; however there is a clear mismatch in the recourse measure following acknowledgement of the third party interference. As set out in the NEBS Product Catalogue, for third party interference on FTTN or FTTB, there is a clear commitment where *“NBN Co will undertake Interference Mitigation as soon as reasonably practicable in the circumstances”¹⁷* while this is clearly omitted in the case of third party interference on HFC.¹⁸ Absent the mitigation of the effects of the interference, the outcome is both the same – that is, the affected Ordered Product may not operate in accordance with the Product Description or the Product Technical Specification for the relevant service.

¹⁶ ACCC, 2017, Variation to NBN Co Special Access Undertaking, Draft Decision, March, pp.32-33

¹⁷ NBN Co, SFAA - NBN Co Ethernet Bitstream Service, Product Description, version 2.13, cl 3.6(b)

¹⁸ NBN Co, SFAA - NBN Co Ethernet Bitstream Service, Product Description, version 2.13, cl 3.8

Provision of rebates for AVC objectives that cannot be achieved

- 3.27 Optus considers that where NBN Co is unable to meet its NBN Performance Objectives, that is, the ability to deliver the speed attributes as 'advertised', rebates should be provided to RSPs – to reflect the obligations placed on RSPs to refund end-users. It is not in the LTIE for NBN Co to continue to be exempt from providing a service at below the 'advertised' service attribute for a prolonged period.
- 3.28 Under the Australian Consumer Law, RSPs have an obligation to ensure that consumers are being provided a service that meets the service attributes of the supplied service. This may include RSPs providing information on the performance aspects of their broadband service; but more importantly it requires that the service provided can deliver on all the 'advertised' service attributes.
- 3.29 However this same obligation has not been placed on NBN Co in respect of the services it provides to RSPs. That is, NBN Co has in some cases exempted itself, through the inclusion of technical limitations within its contractual and operational terms carved out its obligation to deliver the full 'advertised' speed for an Ordered Product – for example, the PIR or CIR objective applicable to FTTN/FTTB lines during the co-existence and remediation period. A direct implication of this obligation carve-out means that RSPs could be placed in a position where they may not be able to inform their customers over issues pertinent to the performance of the broadband service supplied; and consumers could be misled over the performance aspects of their broadband service.
- 3.30 Complicating this is the fact that NBN Co also prices these FTTN/FTTB services subject to a speed range, with the relevant price point based on the upper bound of the speed range while only committing to providing the lower bound of the speed range for the duration of the co-existence period. There is also currently no defined (or commitment to provide) expected end date of the co-existence period.
- 3.31 Meanwhile, RSPs are being criticised for being unable to deliver on performance aspects of the broadband services supplied to end-users. Failure to meet consumer obligations may lead to significant financial and reputational consequences for the RSP. In some cases, the cause of failing to meet the service performance expectations may be outside the control of the RSP, yet the RSP are being held liable for service performance issues even when it is outside of their control.
- 3.32 Many of these issues fall outside the direct control of RSPs. RSPs are resellers of NBN Co and are reliant on NBN Co to provide services as advertised. Where NBN Co controls the underlying aspects of the broadband service (e.g. lines under remediation or where NBN Co does not provide sufficient capacity on HFC access lines) RSPs should not be held liable for service performance issues that are outside of their control.
- 3.33 Optus considers that a rebate mechanism should be introduced to incentivise the efficient and effective resolution of co-existence and interference issues. In addition, NBN Co should not be able to sell a product that it is not technically able to deliver on all its 'advertised' service attributes, e.g. NBN Co should not be allowed to sell a 50/20 Mbps service (in this case, ordered as a 25-50/5-10 Mbps service) when it is only required to commit on delivering a 25/5 Mbps service. This means that for the duration of co-existence for the affected NBN lines, then RSPs are effectively paying an extra \$3-11 per AVC per month, for no additional service.
- 3.34 This could be addressed through the following terms:
- (a) NBN Co to restrict the price terms for all FTTN/FTTB lines to 25/5 Mbps until NBN Co is confident that the line can deliver on the 'advertised' service attribute.

- (b) NBN Co to continue to supply of all FTTN/FTTB lines under the current speed range construct, however during this period NBN Co will offer a rebate to compensate RSPs for any price differential until such time that NBN Co notifies the access seeker that the co-existence period has ended.

Commitment to ensure access lines are able to achieve AVC services sold

- 3.35 Optus notes that the AVC TC-4 bandwidth profiles provided in the form of a range (that is, 25-50/5-20 Mbps) apply to FTTN and FTTB service only. For all other access technologies, RSPs should expect that the AVC can deliver peak speeds at the specified AVC bandwidth profile speed tier.
- 3.36 Due to the nature of its network architecture, there may be some NBN access technologies where AVC services sold may not be technically capable of providing the bandwidth profile specified. As a result, Optus is concerned there may be capacity issues within the NBN network that may affect the service performance on access lines.

3.37 [CiC]

3.38 [CiC]

- 3.39 In these cases, NBN Co should be required to notify Access Seekers of any lines that may be subject to service performance issues, including specific information on the start and expected end date of any activities required to resolve the issues. This would similarly include any notification of updates to affected services.
- 3.40 In addition, NBN Co should be subject to rebate provisions for any access line that cannot meet the AVC PIR objectives sold to RSPs.

Summary

- 3.41 To address these concerns on information commitments relating to NBN line speeds, the SAU should be amended to provide the following:
 - (a) For all access technologies:
 - (i) NBN Co is required to ensure the Ordered Product is technically capable of providing the bandwidth profile specified.
 - (b) In addition, where it relates to FTTN and FTTB services:
 - (i) NBN Co is required to provide specific information on the start and expected end date of the remediation or co-existence period;
 - (ii) NBN Co is required to provide up to date performance information over the lines subject to remediation or co-existence; and
 - (iii) Provide rebates to RSPs that have acquired AVC with PIR or CIR objectives that are not able to be achieved over lines subject to remediation or co-existence.
 - (c) Also, where it relates to HFC services:
 - (i) NBN Co is required to provide up to date performance information over the lines that may be affected by interference events, including specific information on the start and expected end date of any activities required to resolve this issue;

- (ii) NBN Co to commit to ensuring HFC access lines has sufficient capacity to meet the purchased AVC capacity acquired by RSPs; and
- (iii) Provide rebates to RSPs that have acquired AVC with PIR or CIR objective that are not able to be achieved over the lines during the affected period.

3.42 Optus is concerned that absent these provisions, RSPs may be placed in a position where they would be unable to comply with their obligations under Australian Consumer Law; and consumers could be misled over the performance aspects of their broadband service. The LTIE would be promoted where NBN Co has back-to-back performance obligations consistent with RSPs ACL obligations.