

9th December 2022

ACCC

By email: superfastbroadbandinquiry@acc.gov.au

Re: Superfast broadband access service – access determination inquiry – Draft
Decision October 2022

Introduction

X Integration thanks the Australian Competition and Consumer Commission (ACCC) for the work it has carried out in relation to the Superfast broadband access service (SBAS) access determination inquiry. We welcome the opportunity to respond to the draft decision that the ACCC published for comment on 27 October 2022.

X Integration has been a retail service provider (RSP) on SBAS networks since 2016, firstly on the Opticomm network, and added LBNC0 and OPENetworks in 2017. Since that time, all three SBAS providers have been acquired and consolidated as part of Uniti group under the Opticomm network brand. We also presently provide services via the Lightning Wholesale network and are in the process of onboarding with several other SBAS networks. At present across all SBAS providers we have over 10,000 services in operation, primarily through our residential brand, Leap Telecommunications (Leaptel).

Our experience over the past five years with SBAS networks as an RSP gives us a clear understanding of the changing nature of the SBAS market and the importance of strong and clear regulation of SBAS networks for the benefits of consumers and RSPs.

The SBAs market can be separated into two distinct sections:

1. Networks that compete with the National Broadband Network (NBN).
2. Networks that have a fixed line monopoly on their network footprint and therefore don't compete with NBN.

Our response will primarily deal with SBAS networks that enjoy a fixed line monopoly. This is because our SBAS experience has been in dealing with these fixed line monopoly networks. It is also our belief that SBAS networks that directly compete with NBN are forced by this competition to provide some combination of better pricing and/or service to be viable.

Since the introduction of the previous SBAS FAD on 29 July 2016, there has been substantial consolidation in the SBAS market in the fixed line monopoly space. This has seen the establishment of a dominant SBAS network, the Opticomm network, owned by Uniti Group. This network competes primarily with NBN to win monopoly

fixed line status in greenfield developments, although there are also a handful of much smaller SBAS networks competing in this space.

As of 1 December 2021, the Opticomm network serviced 260,600 premises, a number which excludes the Velocity network which Uniti group is in the process of transitioning into the Opticomm network following its acquisition from Telstra.¹ While this premises number is dwarfed by NBN's footprint, it is a sizeable number of premises that needs strong regulatory protection to ensure service quality and price does not fall behind end user expectations with home internet increasingly seen by consumers as an essential service.

With the consolidation of the SBAS greenfield footprint under Uniti Group there has been a corresponding rise in ancillary charges that were not considered and regulated by the 2016 SBAS FAD.

Upon completion of its acquisition of Opticomm on November 2020, the new merged entity announced an increase in the service activation fee from \$69 to \$99. This fee is charged for all service activations and transfers, so each time an RSP orders a new customer connection it pays \$99 to Opticomm. Additionally, there was the introduction of a new fee, of a State Data Centre Aggregation (SDCA) fee of \$2 per service (irrespective of the speed tier of the service). Both the price increase on service activation and the SDCA took effect from 1 April 2021 following a pro-forma 90 days' notice from Opticomm.²

The SDCA was subsequently increased by 40% to \$2.8 in September 2022.³ We have seen other SBAS providers copy the introduction of the SBCA following Uniti's lead, such as Lightning Wholesale which charges \$2 for SDCA.

It is our argument that SBAS providers have demonstrated in the past that they will utilise non-benchmarked ancillary fees to deliver higher revenue than the NBN. This revenue is gained by constructing fees that appear on face value to be offsetting a direct cost but upon digging deeper into these charges it becomes clear that many ancillary charges are artifices designed to boost profitability at the expense of end users and RSPs.

The overall result has been that already very profitable SBAS providers have yielded even more lucrative returns, which culminated in the purchase of Uniti Group for \$3.6 billion by Morrison & Co and Brookfield Asset Management in the middle of this year.⁴

The substantial returns that have driven consolidation and acquisition has come at the expense of consumers and RSPs who pay more and receive less than equivalent level services on the NBN.

¹ Uniti Group Scheme Booklet, Appendix C – Independent Expert's Report, Page 22.

² Opticomm RSP Communique re changes to product pricing and inclusions, 31 December 2020.

³ Opticomm June Newsletter & Notification, 3 June 2022.

⁴ Australian Financial Review, Uniti signs \$3.6b deal with Morrison-Brookfield Group, 14 April, 2022. <https://www.afr.com/companies/telecommunications/uniti-signs-binding-3-6b-deal-with-morrison-brookfield-group-20220414-p5adfs>

The ACCC's draft decision represents a promising starting point to protect the interests of RSPs and end users supplied by SBAS networks in some areas. We agree wholeheartedly with the ACCC's key objective that RSPs and end users utilising SBAS networks, *"will not be any worse off than if they are supplied services through the National Broadband Network (NBN)."*⁵

We welcome the decision to regulate pricing on 50/20 Mbps services, and non-recurring charges such as connection, transfer and end user appointment fees. We also agree with the decision to require SBAS providers to provide greater transparency to RSPs on the performance of their networks.

However, despite these promising steps the draft decision does not go nearly far enough in regulating SBAS networks both in terms of price and non-price terms. There is far too much left unregulated and based upon our experience with SBAS providers over the preceding five years, we argue that SBAS providers will exploit unregulated pricing areas to deliver returns to their share holders at the expense of the long-term interest of end users (LTIE) who ultimately have to pay the costs associated with providing them with a service.

In particular it is imperative that the ACCC extend the benchmarking of speed tiers beyond the 50/20Mbps tiers into all the standard speeds that NBN providers.

The ACCC should also eliminate fees such as the SDCA and make it clear that similar recurring fees charged on each individual end user connection do not conform with the benchmarking principle of speed tiers. To do this, the ACCC needs to define a broad principle that gives it the ability to intervene against ancillary charges that go against the benchmarking principle and be strong in its enforcement approach with SBAS providers.

More broadly, it needs to be recognised that SBAS network do not exist in a vacuum despite their monopoly status in many areas where they provide service. Instead, they exist as part of a larger internet market in Australia where consumer expectations for pricing and service is set by their experience with NBN as the default provider.

Therefore, SBAS providers that exceed a certain size should be required to seek regulatory approval before revising their wholesale pricing for SBAS services. We propose that this threshold should SBAS networks that service over 100,000 premises.

With the largest growth of SBAS networks being in greenfield areas, it is imperative that SBAS networks also be pushed to deliver better outcomes for consumers than the default provider. It should not be the case that consumers moving into areas with a SBAS monopoly have a worse experience than they would if NBN was providing them with the fixed line service.

For SBAS networks, NBN should be the floor for service quality and the ceiling for service price, and anything short of this presents a failure of regulators to protect the interests of end users from private enterprise whose ultimate responsibility is to their

⁵ ACCC Superfast Broadband Access Service determination inquiry: Draft Decision October 2022, Page 5.

shareholders. It surely cannot be an economically efficient operation of a telecommunications network if it cannot match the offerings of the government owned default provider.

Our detailed responses to each section of the draft decision is provided below, but we want to highlight our severe concern that in several key areas the ACCC's draft decision falls short in achieving its key objective that RSPs and end users will not be any worse off than if the service was provided by NBN. As it currently stands the draft decision does not adequately support efficient outcomes nor promote the long-term interest of end-users (LTIE), ensure the economically efficient operation of a telecommunications network, and that ancillary charges reflect the direct costs of providing access to a declares service.

Fundamentally, as it stands, in the draft decision the ACCC has not adequately considered its requirements under Section 152BCA of the Competition and Consumer Act 2010.

Left unrevised, the draft decision as will be a perilous half-step that will leave end users and RSPs vulnerable to market power that SBAS providers enjoy through the monopoly protection that they have over most of their fixed line footprint.

3.1 SBAS pricing

Pricing methodology

X Integration fully supports the benchmarking methodology that the ACCC had decided upon. As noted in the draft decision, benchmarking is straightforward to implement and more importantly allows RSPs to offer comparable pricing to NBN to end users.

The ability to ensure access seekers are not paying more than for equivalent NBN services is however incumbent upon strengthening of regulation of ancillary charges, in particular fees such as the SDCA.

Regulated price components and anchor points

X Integration broadly supports the ACCC's decision that SBAS access charges should continue to be benchmarked against prevailing NBN pricing for similar wholesale access residential grade products.

As noted in our introduction, SBAS networks don't exist in a market vacuum but rather are integrated into a larger consumer fixed line internet market in Australia. End users' understanding of this market is dominated by NBN and the pricing set by NBN. End users expect to pay the price for an SBAS provider's service as they would for the same speed tier NBN service.

Additionally, in the case of SBAS networks which have monopoly fixed line areas, they have often gained the monopoly right by outbidding NBN for the installation of fixed

line services in the area. In the case where SBAS providers are outbidding the default provider then it is against the LTIE for them to charge more at the end user stage once their monopoly status is established.

While X Integration supports price regulation of the 50Mbps speed tier, we also strongly urge the ACCC to expand the price regulation across the entire residential traffic-class 4 (TC-4) speed tiers.

We strongly question the assumption that the current regulatory processes underway will leave the 25/5-10 Mbps and 50/20 Mbps tiers dominant in the market. Our assessment based upon the current SAU as proposed by NBN on 30 November 2022 suggests there will be a shift to higher tiers due to price reductions in these tiers and the incentive that an access only charge (with no Connectivity Virtual Circuit (CVC) overage) will offer to aggressively market these services by access providers.

We also note that in the time since the 2016 SBAS FAD entered into force in 2016, there has been a shift in uptake of 50Mbps at the expense of 25Mbps service. On 30 June 2016 the 25/5-10 Mbps speed tier comprised 52.21% of the market.⁶ The 50/20 Mbps speed tier comprised 3.69% of the market. As noted in the draft decision, the 50/20Mbps speed tier now represents 60% of the market, driven by pricing changes implemented by NBN with the introduction of bundled offerings in December 2017.

It seems likely that natural consumer demand for higher speeds, coupled with the potential for price changes on both 50/20Mbps and 100/20Mbps services will see substantial increase of 100/20Mbps services and a progressive increase in consumers taking up speeds beyond 100Mbps over the next five years. The final determination needs to be forward thinking and take this into account to protect the LTIE over the five-year life span of this SBAS FAD.

To protect the LTIE, at a minimum the 100Mbps speed tier should also become an anchor point in the benchmarking process, but higher speed tiers should also be referenced too. The removal of CVC overage by NBN as indicated in the current SAU will drive increased take up of speeds beyond 100Mbps as these services become cheaper and the speeds during peak periods become more consistent.

It is also unclear to us why end users on SBAS networks should face the prospect of paying more for these speeds than they would if they were on the government owned default network (NBN). Only by anchoring all speed tiers against NBN pricing can we ensure that the LTIE is sufficiently protected.

Pricing regulation and benchmarking should also be extended more broadly to less obvious, but still very important pricing structures impacting RSPs, such as overage CVC waivers. NBN currently provides a 1.5Gbps CVC overage waiver for all RSPs on its points of interconnection (POI). This allows all RSPs to be able to offer the full range of TC-4 plans to end users even before it has built up economies of scale on NBN POIs.

⁶ ACC NBN Wholesale Market Indicators Report 30 June 2016.
<https://www.accc.gov.au/system/files/NBN%20SIO%20RKR%20-%20Disclosure%20Tables%20-%2030%20June%202016.xlsx.xlsx>.

SBAS providers have been haphazard in their implementation of similar arrangements, but it is essential they be forced to match NBN's approach. On the Opticomm Network, Uniti Group, provides a 1.1Gbps of overage waiver, which is insufficient to be able to confidently offer 1Gbps TC-4 services. Some other SBAS providers provide only 500Mbps, which means RSPs must purchase large volumes of CVC overage to be able to offer 1Gbps services. This makes it very difficult for new RSPs to offer the full range of services on a SBAS provider's network until they can build up customer volume on the POI.

Building sufficient volume to offset CVC overage costs is often quite difficult on SBAS provider networks, due to the smaller size of SBAS provider networks. While some state based POIs on the Opticomm network are now approaching the size of an NBN POI, smaller markets such as South Australia are very small. In this circumstance, RSPs have to weigh up either providing an inferior level of service in these locations or pay significantly more per customer in CVC overage to support those locations. Where the decision is made to pay more per customer, the end user ultimately will pay for this with a combination of higher ongoing prices or less attractive discounting.

Fibre access broadband service

X Integration has no view on this aspect of the SBAS beyond supporting the continued regulated access prices during the prolonged migration underway from Telstra Velocity to Uniti Group's Layer 2 network.

Non-recurring and ancillary charges

The decision to regulate certain non-recurring and ancillary charges levied on access seekers by SBAS under the FAD is an important step forward, however the ACCC should fully embrace its responsibility to protect the LITE and prevent the detrimental impact these charges can have by enlarging the scope of its regulation.

Where an SBAS provider makes a case that an ancillary charge needs to be levied, the charge should reflect the direct cost of the ancillary charge, and not be utilised to cover general costs associated with the SBAS provider's operations.

In the past, the charges levied by SBAS providers on access seekers for service activation, service reactivation, service transfer, service transfer reversal and end-user premises appointments has been well above the costs for these actions. When Uniti Group raised the service activation costs for its Opticomm network from \$69 to \$99 in April 2021, it provided no justification for this price rise. In this case, almost all service activations were carried out by automated software processes and required no human intervention.

The decision of the ACCC to regulate these specific charges in particular is therefore a vital step that clearly conforms with section 152BCA of the CCA. It will ensure that end users and RSPs are not disadvantaged (in this respect) when moving into an area that falls under an SBAS monopoly.

Bringing these charges in line with NBN's charges will ensure that end users in SBAS network areas are not disadvantaged, in particular when it comes to moving RSPs.

We support the decision to mirror NBN Co's two-tiered approach that distinguishes between standard connections and a cost-recovery formula for non-standard connections. It is reasonable to allow SBAS providers to seek an up-front contribution to costs of a new connection where physical work is required.

However, despite the decision to regulate some charges, broader more specific regulation of ancillary charges needs to be implemented.

SBAS providers have proven themselves adept at utilising ancillary charges to maintain the perception that their charges are in line with NBN's speed tiers when in reality they charge more per service than an equivalent speed tier on NBN.

Network-to-network interface (NNI) services charges

The ACCC has specifically sought stakeholder views on whether to regulate charges levied by SBAS providers for NNI service charges.

X Integration believes that SBAS NNI service charges should be benchmarked against NBN's NNI service charges, while noting that NBN's NNI service charges are well above their direct costs, although there is some consultation underway by NBN on NNI management and charges.

The charges for NNIs whether by SBAS providers or NBN should reflect the direct costs for providing these services, and it is difficult to argue that a \$5,000 for a 10Gbps NNI setup reflects the true cost for the work done to setup that NNI.

High NNI service fees also reduce the number of RSPs that will onboard and sell an SBAS providers services, thereby reducing end user choice, impacting the LTIE. Once onboarded, the high costs to modify and upgrade NNI capacity becomes a barrier to RSPs, which can result in costs becoming an impediment to needed upgrades of NNIs, further impacting the LTIE.

NBN has actively sought consultation from RSPs as part of its Product Development Forum into whether upgrades should be discounted by previous setup costs paid, which would partially ameliorate the concerns around the cost to upgrade NNIs. SBAS providers should be required to follow similar processes should NBN implement them.

State-based aggregation service charges

The ACCC has specifically sought stakeholder views on whether to regulate charges levied by SBAS providers for the aggregation of backhaul to a state based single hand-off.

To briefly explain, NBN operates 121 POIs nationwide, reflecting its massive footprint that services over 8 million premises nationwide. The largest SBAS monopoly provider,

Uniti group, as of 31 December 2021, covers a footprint of 260,600 premises, excluding Telstra Velocity premises which have been or are in the process of being incorporated into the Uniti Group's Opticomm Network.⁷ This footprint covers all state and territories excluding Tasmania.

Even for a network of 260,000 premises and rising, without state based aggregation on behalf of RSPs, SBAS networks would not be commercially viable to wholesale. They rely upon state-based aggregation to build the economies of scale necessary to attract RSPs to retail their products on their behalf.

Uniti Group's State Data Aggregation Cost charge is currently levied at \$2.8 per month per individual service (irrespective of speed tier). The SDAC was implemented at \$2 per service from 1 April 2021 following Uniti's acquisition and consolidation of LBNCo, OPENetworks and Opticomm into one network.⁸

That one provider, Uniti Group, could with a only 90 days' notice and zero consultation or justification impose a \$2 charge on every single service on its network demonstrates the market power that SBAS providers in monopoly areas have.

Prior to its imposition, Communications Day in its 25 August 2020 Issue 5991 reported that the CEO of Uniti Group, Michael Simmons said the following at the AGM discussing the FY20 Results:

He said Uniti has more flexibility to mitigate the RBS levy given its own network is less costly than NBN's, meaning it can increase wholesale prices while remaining competitive. We do not have the high costs of POI backhaul that NBN imposes upon RSPs," he said. "The Uniti price for wholesale broadband access, combined with the Opti-Comm network, does provide us the opportunity to consider price increases in the future. And also, the transition to higher speeds will support further ARPU growth.⁹

Based upon this reporting, it seems the SDCA was introduced as a direct response to the imposition of the Regional Broadband Scheme Levy onto SBAS providers to mitigate some of the cost. If this is true, it would be directly at odds with the proposal in the current draft decision to prohibit on charging of the RBS Levy.

In addition, it was done upon the justification that the differences between the state-base aggregation model of SBAS providers and the 121 POI model of NBN would allow it to appear that the SDCA was covering a cost other than the RBS. To quote the same article's reporting of Mr. Simmons remarks, "And that does provide us with an opportunity to grow ARPU a touch as NBN is the benchmark in the market."¹⁰

More recently, on 3 June 2022 Uniti announced to RSPs through its monthly newsletter that it was providing 90 days' notice of an increase by 40% of the SDCA from \$2 per service to \$2.8 per service. In same newsletter Uniti provided the following justification for the increase:

⁷ Uniti Group Scheme Booklet, Appendix C – Independent Expert's Report, Page 22.

⁸ Opticomm RSP Communique re changes to product pricing and inclusions, 31 December 2020.

⁹ Communications Day Issue 5991, 25 August 2020.

¹⁰ Communications Day Issue 5991, 25 August 2020.

This change is necessary to recover increased costs of operating our State based POI's including increased data transmission over the intra and inter capital links. The increase also seeks to partially off-set increased input costs of our business operations in particular increased infrastructure and construction costs as well as significant increased energy and labour expenses amongst others. You will have no doubt observed all businesses are now operating in an increasingly inflationary economy, primarily a result of COVID-initiated increases in supply chain, energy, personnel, and other costs. Opticomm is no different.

While the first sentence directly relates to the costs of operating state based aggregation, the bulk of the justification does not relate to the cost that the SDCA is ostensibly meant to recover. Instead, the SDCA is being utilised to cover broader business costs.

In particular, costs such as infrastructure and construction costs relate to the competitive phase of Opticomm's operations, where it has to win business from greenfield developers at the expense of other SBAS providers and NBN. This means that Opticomm can potentially charge developer's less for the construction of its infrastructure in their greenfield developments, to win business, and recoup the lost revenue through current end users via the SDCA.

The SDCA is also a flat fee charged irrespective of the speed of the service. This means a 12/1Mbps service has the same SDCA fee as a 1Gbps service. Given the SDCA is meant to recoup a direct cost (that of backhaul and aggregation), the fee should vary depending on the speed tier. By being a flat tier it makes lower speeds that have more affordable prices, less attractive for RSPs to retail. As a result, RSPs are encouraged to upsell end users to higher speed plans that are more expensive and RSPs may consider removing lower speed tiers pre-emptively from the market.

The SDCA also does not reflect the real cost for state-based aggregation. At the present price of \$2.8, the Uniti SDCA represents a substantial premium on what would be considered normal backhaul pricing. POI based backhaul for metro and suburban POIs is available for rates between 15-30c per Mbps on 10Gbps waves. According to the June quarter 2022 NBN Wholesale Market Indicators Report the average CVC per user was 2.8Mbps.¹¹ Based on a cost of 30c per Mbps the average backhaul cost would be 84c per user. The current SDCA charge therefore is a significant premium over the real cost when compared to NBN POI backhaul.

The price increase by 40% in 18 months further illustrates this point. The cost of data transmission in the telecommunications industry continues to fall due to the high level of competition in the backhaul market. While there is growth in the amount of backhaul per customer, this increase transmission should be more than offset by the falling price per megabit of backhaul.

Based upon our knowledge of the backhaul market, it seems likely that SBAS providers are more than capable of offsetting increased transmission by seeking the most

¹¹ Opticomm Limited 2020 Annual Report, Page 2.

competitive backhaul arrangements. By just passing on an unregulated cost to end users, SBAS providers are not encouraged to pursue economically efficient operation of their network as they simply on-charge without consequence.

X Integration also argues that there is a significant degree of aggregation already built into NBN's AVC charges. NBN operates a significant number of POIs that it defines as regional, that cover large areas. For example, at the Shepperton NBN POI (3SHP), NBN hands off AVCs to RSPs from Mildura VIC, over 450km away. A NBN service in Mount Isa, QLD, is backhauled by NBN over 1300km to Rockhampton QLD, to be handed over to the RSP. If you have an NBN service in Broome, WA, NBN will backhaul your connection to Geraldton, WA, approximately 2,000km away before it hands it over to the RSP.

This tells us that backhaul aggregation is built into the NBN speed tiers already. Even in metro and outer-metro locations, NBN is carrying out backhauling and aggregation to get services across suburbs to the POI hand off location to RSPs. SBAS providers are privileged in that they can pick and choose what areas they will service, and can prioritise commercial return, whereas NBN cannot. They do not need to charge extra to aggregate their connections compared to NBN.

Furthermore, SBAS providers were extremely profitable prior to the introduction of the SDCA. In its FY20 annual report, prior to its acquisition by Uniti Group, Opticomm reported an earning before interest, taxes, depreciation and amortization margin of 54% for FY20, and a net profit after tax margin of 32%. Similarly, Uniti's Wholesale and Infrastructure division reported an EBITDA margin of 65% with a NPAT of 59%.¹²

SBAS providers actually operate in an extremely lucrative operating environment, where the wholesale prices set by NBN provide increased revenue for SBAS providers. A Lonergan Edwards & Associates Limited Independent Expert Report, produced by Uniti Group as part of Scheme Booklet Registered with ASIC for the acquisition of Uniti Group by Morrison & Co and Brookfield Asset Management in June 2022 states the following:

The NBN Co's requirement to derive a return on assets of 3.2% per annum has resulted in higher wholesale and connectivity virtual circuit (CVC) charges to RSPs. Whilst this has compressed margins for RSPs it has effectively determined the wholesale price and resulted in increased revenue for infrastructure providers (such as Uniti).¹³

The decision therefore to recoup further revenue by fees such as the SDCA, but more broadly from other unregulated ancillary charges, further inflates the revenue for SBAS providers when they're already able to more efficiently deliver fixed line services than the default provider. As one of the ACCC's goals is to "promote competition in the supply of services to end users through better price and service offerings", some of the efficiencies that SBAS providers derive from not having to service loss making areas should be passed on to RSPs. Competition between RSPs will then ensure that end users will benefit from this.

¹² Uniti Group Limited 2020 Annual Report, Page 14.

¹³ Uniti Group Scheme Booklet, Appendix C – Independent Expert's Report, Page 36.

To summarise, the SDCA charge should be regulated, or better yet, prohibited for the following reasons:

1. It is being used to mitigate the RBS levy (which the ACCC is proposing to prohibit SBAS providers from recovering).
2. It is, by Uniti's own admission, being used to cover costs other than just backhaul aggregation.
3. It does not accurately reflect the cost of backhaul to SBAS providers.
4. It is a flat fee, and not proportionate to the service plan, which makes lower speed tiers less viable and may lead to their withdrawal from the SBAS market, which will disproportionately impact low-income end users.
5. NBN carries out a significant degree of backhaul aggregation as part of the 121 POI model.
6. SBAS providers were already extremely profitable prior to the introduction of this fee.
7. SBAS providers already enjoy high wholesale fees because they are benchmarked against NBN.

Based upon the above, we argue that allows the continued charging of the SDCA is contrary to the ACCC's responsibilities under Section 152BCA of the CCA, in particular (1) (a), (d) and (g).

If the ACCC allows the SDCA to continue it will encourage SBAS providers to construct other ancillary charges that they believe they could reasonably charge to increase their revenue in line with their responsibilities to their shareholders.

If the ACCC does consider that some sort of fee should be charged for state data centre aggregation, at a bare minimum it should regulate the amount that can be charged, and SBAS providers should have to substantiate their claims regarding the increases in backhaul costs before raising the price of such fees.

Overall view on Ancillary Charges

Ancillary charges are a key cost difference between SBAS providers and NBN. It costs RSP more per service on SBAS networks to provide the same NBN. This is due to inflated once off charges, but also particularly the existence of fees such as SDCA.

For RSPs, ultimately any cost incurred in providing a service to an end user will be passed on. This means that on SBAS provider networks end users may pay more on a recurring basis, receive less attractive promotions and discounts, and potentially receive a lower quality service to offset the increased cost. Even in the case of service activation charges, while at face value some RSPs absorb the cost charged by SBAS providers, this cost is recouped somewhere else.

It is therefore in the LTIE that ancillary charges be strongly regulated.

While we've articulated in the previous section strong evidence as to why the SDCA should be directly addressed, the ACCC needs to consider a broader regulation of ancillary charges to stop the innovation of other charges by SBAS providers.

X Integration asks that the ACCC devise an overriding principle that should apply to all ancillary charges. This principle should make it clear that the following should apply to any ancillary charge that an SBAS provider levies:

1. Any ancillary charge must reflect the actual direct cost that it is paying for.
2. Any ancillary charge should not be recurring if it should reasonably be considered part of the normal supply of a superfast broadband service
3. The ACCC should reserve the right to make a direct ruling on whether an ancillary charge can be levied should the matter be raised by an RSP to the ACCC enforcement team.

Furthermore, given the evidence supplied above about how the SDCA charge was devised, and what it was used to pay for, the ACCC should implement a requirement that any amendments to the wholesale pricebook of an SBAS provider above a certain size should require consultation and review by the ACCC and key stakeholders. Otherwise, RSPs, and through them end users, will be vulnerable to the market power that monopoly based SBAS providers have.

We nominate a threshold of 100,000 connections so that the regulatory burden is not too onerous for the ACCC or small providers.

Regional Broadband Scheme Levy

X Integration supports the decision to preclude SBAS providers from recovering the cost of the RBS levy in addition to the regulated access charges.

As noted in the decision, the NBN already makes allowance for levy recovery in their own access prices through an internal cost subsidy.

We also note that allowing SBAS providers to add the RBS as a levy on top of their access charges would result in higher service costs for consumers in SBAS areas. This would mean that some end users would pay higher access charges than they would otherwise receive on the default provider network (NBN).

While there are legitimate concerns around the commercial impact of the RBS on SBAS providers, the financial results of SBAS providers make it clear that they are already very successful commercially. Furthermore, the purpose of the RBS levy is to ensure that SBAS providers contribute their fair share to the provision of regional broadband, not that a subset of end users pay more than other end users.

We also highlight that comments from Uniti Group suggest the SDCA was implemented to partially mitigate the cost of the RBS levy.¹⁴

¹⁴ Communications Day Issue 5991, 25 August 2020.

3.2 Non-price terms and conditions

X Integration has had firsthand experience with situations where the supply of SBAS services has not met the advertised levels of service from SBAS providers.

In particular we note situations of congested backhaul and wireless backhaul arrangements that result in end users experiencing internet dropouts and poor speeds. In such circumstances, RSPs are unaware that these circumstances exist until such time as end users report the situation. Once reported, it is very difficult for RSPs to obtain accurate information from SBAS providers on the cause of the issue, and the timelines for rectification.

While this is ongoing, end users are left to assess whether the cause of the problem is with the SBAS provider as the RSP contends, or with the RSP itself. This significantly undermines consumer confidence in their RSP, and can often result in end users transferring to another RSP in an effort to solve their service issues. Under the previous arrangement where service transfer fees were not regulated, this can result in SBAS providers making significant revenue from service transfers due to faults with their own network.

SBAS providers should therefore be required to pro-actively advise RSPs, but also end users, about ongoing service outages, including degraded services. Far too often SBAS providers refuse to publicly list ongoing service degradation as it may have a reputational impact.

Where an ongoing network event is reported by an SBAS provider, they should be required to provide rebates to RSPs that RSPs should then pass on to end users.

More broadly, rather than just requiring SBAS providers to report quarterly to RSPs requesting access on service attributes such as availability, performance, etc., SBAS providers should be required to provide this information to any RSPs currently purchasing services from the SBAS provider.

We support the decision by the ACCC to push for enhanced transparency by SBAS providers on the performance of their network. Both RSPs and end users should be able to see and evaluate the performance of the SBAS providers network, including historical performance for a defined period. We suggest this should be for the past 90 days.

Performance needs to be provided down to an estate/locality level, as in our experience service quality can vary significantly building by building and estate by estate on SBAS networks.

End users should also be able to know ahead of time what superfast broadband technology is installed at a location, and what speeds are available to them. This is available to consumers at present via the NBN public website for NBN service addresses and should be no different for SBAS providers.

Enhanced transparency is fundamental in the LTIE and SBAS providers should be expected to meet the same record keeping requirements of NBN.

We acknowledge that these considerations may be beyond the scope of the SBAS FAD but ask the ACCC to make further work on this area a priority given the sizeable footprint that SBAS providers already operate.

While additional non-price benchmarking will have a regulatory burden upon SBAS providers, such concerns should not be placed above the LTIE, and in particular the right of end users to be provided with services that conform with consumer rights and guarantees.

3.3 Exclusions for the SBAS access determination

Competition based exclusion

X Integration believes that in areas where multiple superfast broadband networks co-exist that regulation may not be strictly necessary, but we don't support an exclusion based around competition.

Given the benchmarking of the SBAS FAD against the default provider, any network operating in competition to NBN would almost certainly be offering better pricing to NBN to be viable.

Therefore, it would be more straightforward from a regulatory perspective for all SBAS providers to be regulated in the same manner for simplicity's sake.

Furthermore, there would be value in requiring SBAS providers in these areas to comply with the same operational reporting requirements as their competitors to ensure that RSPs and end users can make informed decisions about whether to choose to use the SBAS network.

Small network exclusion

We support the ACCC's decision to remove exclusions for any SBAS networks that fall under the small network exclusion regime. This decision supports a consistent approach and the LTIE.

3.4 Duration

X Integration supports the decision to align the term of the new FAD with the expiry of the declaration in 2026.

In doing so, we strongly encourage the ACCC to be open to initiating a new inquiry prior to that date if there is a significant change in the way superfast broadband services are operated or priced in Australia.

Should there be significant changes to the operation of NBN for instance, it may be necessary to re-evaluate decisions made about price anchoring.

CONCLUSION

Thank you for the opportunity to provide feedback on the draft decision for Superfast broadband access services – access determination. If the ACCC should have any questions or wish to discuss this matter further please feel free to reach out to us.

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