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**11 November 2022**

By email: [REDACTED]

Ms Liza Carver  
Commissioner  
Australian Competition and Consumer Commission  
Level 28, 135 King St  
Sydney NSW 2000

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Dear Ms Carver

**Telstra and TPG proposed MOCN arrangements – joint response to Optus’ submissions in response to the ACCC’s Statement of Preliminary Views (SOPV)**

- 1 Telstra and TPG (**Applicants**) jointly provide this letter and its **annexures** in response to the submission and supporting statements and expert reports submitted by Optus to the ACCC in opposition to the proposed transaction the subject of the Authorisation Application MA1000021-1.
- 2 We provide this response noting our ability to engage meaningfully with Optus’ submissions has been hampered by the limited access.<sup>1</sup> In particular, we have had no opportunity to review any substantive information related to the central premise of Optus’ response – a contention that it would enter an alternative network sharing deal with TPG and its business case.
- 3 The essence of Optus’ contention is that the ACCC should not grant authorisation and accordingly terminate the proposed transaction on the following basis:
  - (a) Optus explicitly wants to avoid the additional competitive pressure from TPG and Telstra’s reduced costs, more efficient spectrum use, better TPG coverage and improved services arising from the proposed transaction. Absent visibility over these submissions, we assume it is to the effect that, rather than invest and compete with TPG and Telstra in regional areas, Optus threatens to retreat from 5G investment.
  - (b) Optus accepts that any deal it could offer to TPG would not be as attractive as the proposed transaction.<sup>2</sup> It can be ascertained from Optus’ evidence that it was in the process of offering TPG an alternative roaming arrangement but was out-competed by Telstra with the proposed transaction.<sup>3</sup> Now, having had the benefit of seeing the proposed transaction and its terms, Optus wishes to use the authorisation process to remove Telstra as a competitor in relation to network sharing and leave it free to impose a less attractive, alternative transaction on TPG.

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<sup>1</sup> More than half of Optus’ SOPV Response dated 26 October 2022 (**Optus SOPV Response**) has been redacted and even more of the supporting material, and no access has been provided to the Applicants to the underlying content.

<sup>2</sup> Optus SOPV Response at para 51.

<sup>3</sup> Optus Statement of Kelly Bayer Rosmarin at paras 28-29.

- (c) Optus accepts that any speculative alternative deal Optus offers would take time and be subpar for TPG,<sup>4</sup> and impair customer service in regional areas for Telstra's customers.<sup>5</sup> Optus says the ACCC should nonetheless prefer protecting Optus from competition to make it easier for Optus to compete and improve its returns. In exchange for protection, Optus says that it will be more likely to use the windfall revenue it gains from less competition to invest in regional Australia.
- 4 Optus' theory of harm is remarkable. An individual competitors' business case prior to the proposed transaction cannot be the benchmark for competition. Competitors need (and are expected) to adjust their business case in response to unexpected moves by other competitors. As Mr Feasey notes, *"it is quite reasonable for the management of Optus to wish to reduce these risks [investment risks]. But it does not follow that the consequence of a higher risk environment in which to make investment decisions is that Optus will undertake less investment"*.<sup>6</sup>
- 5 In Optus' case, it has a substantial network in the 17% Regional Coverage Zone, powerful incentives to continue investing in network in the coverage area to maintain its competitiveness in metropolitan areas, and it has a tested investment strategy of incremental investment in regional and rural areas to disrupt consumer perceptions of superior Telstra network coverage.<sup>7</sup>
- 6 As Mr Feasey states, regulators should not accept arguments that Optus would cease investment without considering the underlying incentives of the complainant and the economic basis on which such claims are founded.<sup>8</sup> In light of the above evidence, it would be a perverse outcome and dangerous precedent for a competitor in the position of Optus to ultimately be successful in having the ACCC reject an otherwise pro-competitive transaction by threatening to withdraw their investment in the face of increased competition.
- 7 Telstra and TPG invested more than a year of significant management time, ingenuity, and capital to innovate and develop a proposed transaction that is the 'first of its kind' in Australia. The proposed transaction addresses – for a period of time – highly complementary needs in a limited (~17% population coverage) but challenged area for investment:<sup>9</sup>
- (a) For Telstra – it has deployed significant active infrastructure in this area but lacks sufficient spectrum to support the increased demand by customers for data; and
- (b) For TPG – it has low-band spectrum which can be used for 4G and 5G mobile services in regional areas but lacks active mobile infrastructure to utilise this spectrum.
- 8 Telstra and TPG have done so in a way that addresses pressure from regional communities, Government and even the ACCC<sup>10</sup> to address the challenges of mobile investment in regional Australia. It is overall directed to better consumer experiences and a more competitive market.

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<sup>4</sup> Delivering a less competitive outcome for its wholesale and retail customers.

<sup>5</sup> Optus SOPV Response at paras 89-90.

<sup>6</sup> Annexure B, Further Reply from Richard Feasey at para 31.

<sup>7</sup> See Applicant's Response to SOPV, at section 3.

<sup>8</sup> Richard Feasey, Supplementary Report, at para 87.

<sup>9</sup> Application at p 9.

<sup>10</sup> ACCC, Domestic mobile roaming declaration inquiry - Final Report (October 2017), at pp 22-23, 89-90. See also ACCC submission to the RTIRC at p 8 *'if active infrastructure sharing is limited to deployments in areas where there is otherwise no*

- 9 Telstra identified the opportunity and negotiated the proposed transaction on the understanding throughout that it was likely competing with Optus for the commercial opportunity to support TPG in regional Australia. The proposed transaction is the fruit of a competitive market outcome.
- 10 Optus lost. Unsurprisingly, it does not like it. Optus now realises it missed its opportunity<sup>11</sup> and wants the ACCC to use this authorisation process to prevent Telstra from competing as a supplier of network sharing in regional Australia in the future – giving Optus another opportunity to force TPG to accept a worse deal for itself and for competition.
- 11 Given the public and vocal concern Optus has expressed about the inability of its business or investment plan to withstand or respond to improved competition from TPG in regional areas, it can be assumed that any Optus deal would not deliver strong, independent TPG mobile services to regional Australia.
- 12 Under the proposed transaction, TPG can re-test the market for network sharing (or other technological solutions) at the end of the initial, 10-year term. Competition for this market between Telstra and Optus would be real and offer a meaningful benefit for TPG and customers.<sup>12</sup> Without the proposed transaction, no competition can exist in that market and TPG will remain limited indefinitely to rely upon Optus as the only permitted supplier of network access in regional areas.
- 13 While we have not had the benefit of reviewing most of the Optus SOPV Response or evidence (which is substantially redacted), there are a number of material inconsistencies and errors, which are addressed in the **annexures** to this letter (listed below).
- 14 The Applicants respectfully submit that the evidence produced to date is sufficient for the ACCC to unconditionally authorise the proposed transaction.
- 15 Nonetheless, should the ACCC consider conditions are warranted, the proposed draft s 87B Undertaking is sufficient to remove any remaining doubt that the proposed transaction might give rise to uncertain, but longer term, effects on competition.
- 16 The Applicants submit that the proposed transaction offers a real and meaningful opportunity to demonstrate that competitive market incentives and commercial innovation can travel hand in hand with community expectations around solving demand for improved services and choice for regional Australians.

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*commercial incentive to provide services, it is reasonable to assume that the benefit of such arrangement is likely to far outweigh any competition risk.*

<sup>11</sup> Optus Statement of Kelly Bayer Rosmarin at paras 28-29.

<sup>12</sup> Noting over time a range of other new wholesale providers such as LEOSats would also participate.

Yours faithfully

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#### List of Annexures

<b>Annexure A</b>	Applicants Response to Optus' submissions
<b>Annexure B</b>	Further Reply from Mr Feasey dated 10 November 2022
<b>Annexure C</b>	Further Reply from Aetha dated 10 November 2022
<b>Annexure D</b>	Further Reply from Dr Padilla