



**Australian
Competition &
Consumer
Commission**

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7 October 2011

Caroline Lovell
Principal, Regulatory Affairs
NBN Co Limited
By email: CarolineLovell@nbnco.com.au

Dear Ms Lovell

**NBN Co Limited - applications for authorisation A91271-A91273
- request for further information**

I refer to the above applications for authorisation lodged with the Australian Competition and Consumer Commission (the **ACCC**) on 29 August 2011 (the **Applications**).

The purpose of this letter is to request additional information from NBN Co Limited (**NBN Co**) to assist the ACCC in its assessment of the Applications. It may be necessary for the ACCC to request further information from NBN Co as the ACCC's assessment of the Applications progresses.

I note that some of the information requested by the ACCC may be commercially sensitive and confidential to NBN Co. For your information, I have enclosed a copy of the ACCC's publication *Guidelines for excluding information from the public register for authorisation, merger clearance and notification processes* for your information.

So that the ACCC's consideration of the Applications can proceed in a timely manner, the ACCC requests NBN Co provide its response to the questions below, including the provision of requested documents, by 4 pm on **20 October 2011**. Of course, NBN Co is welcome to provide material to the ACCC in tranches in advance of this date.

NBN Co's view of the likely future absent authorisation of the Optus HFC Agreement

1. In commenting upon the Applications and the Optus HFC Agreement entered into by NBN Co, Telstra Corporation Limited (**Telstra**) recently publicly stated:

There is a risk that the ACCC may not approve this agreement. The implementation of the agreement between NBN Co and Optus is not a Condition Precedent to the Proposed Transaction. If it is not approved (or does not come into effect for some other reason), Optus

may continue to service customers on its HFC network within the NBN Fibre Footprint. In these circumstances, the Proposed Transaction would still proceed (subject to the Conditions Precedent being satisfied or waived) and Telstra would be required to disconnect Copper Services and HFC Broadband Services provided to premises in the NBN Fibre Footprint at the relevant Disconnection Date. If this occurred, and Optus was successful in developing and marketing its HFC broadband services in competition with services provided using other existing networks and/or the NBN, there is a risk that there could be a material adverse effect on the value of the Proposed Transaction to Telstra, Telstra's earnings and its financial position and performance.¹

The ACCC seeks NBN Co's response and/or comments to the above statement, in particular, does NBN Co agree with the above statement by Telstra? If not, please provide reasons.

2. At paragraph 91 of NBN Co's submission dated 29 August 2011, accompanying its Applications (**NBN Co's submission**), NBN Co stated that '*the ACCC should assess the public benefits against any anti-competitive detriments arising from the Optus HFC Agreement, compared with the current state of competition in the relevant markets*'.

Please explain why NBN Co considers that current market conditions provide a suitable point of comparison for identifying the likely consequences of the Optus HFC Agreement coming into effect.

3. Further to question 2, what would the effect on NBN Co's investment in the NBN be if the Optus HFC Agreement were not to come into effect? In particular what would the effect be on the timing and scale of NBN Co's investment?
4. At paragraph 101 of NBN Co's submission it is noted that the progressive migration of customers from the Optus HFC network to the NBN is expected to enhance the take up rates of the NBN.

Please provide details of the expected rate of migration by Optus HFC subscribers to the NBN with the following assumptions:

- a. authorisation is granted to the Optus HFC Agreement (migration with the agreement); and
 - b. authorisation is not granted to the Optus HFC Agreement (migration without the agreement).
5. At paragraph 133 and 134 of NBN Co's submission it is noted that the Optus HFC network currently offers data download speeds of up to 20Mbps/1Mbps with a technical ability to provide a maximum download speed of 100Mbps/1Mbps. For each financial year up to and including financial year 2028, please provide NBN Co's projections regarding subscriber numbers for different speed tiers, for example:
 - a. download speeds of 12Mbps, 25Mbps, 50Mbps, 100Mbps, 250Mbps, 300Mbps, 500Mbps, 1000Mbps;
 - b. upload speeds of 1Mbps, 5Mbps, 10 Mbps, 12Mbps, 20Mbps, 40 Mbps, 50Mbps, 100Mbps, 200Mbps, 400Mbps.

¹ *Explanatory Memorandum for the resolution under item 2 at the annual General Meeting on 18 October 2011: Telstra's participation in the rollout of the National Broadband Network*, Telstra Corporation Limited, 1 September 2011, at page 22 – 23.

(see Exhibit 9.24 of NBN Co's Corporate Plan). Please provide the basis for these projections and any assumptions made.

6. Paragraphs 97 and 107 of the NBN Co submission state:

[The Optus HFC Agreement]... improves NBN Co's ability to achieve its targeted take up of services and projected financial returns.

Optus HFC customers are located in metropolitan areas. NBN Co anticipates that those customers are higher margin customers. ... The impact of demand and ARPU on NBN Co's expected Internal Rate of Return is illustrated in Exhibit 1.10 to NBN Co's Corporate Plan.

In assessing the likely effect of the Optus HFC Agreement on NBN Co's projected financial returns/internal rate of return, please identify the assumptions made by NBN Co, in order of importance, regarding the number of subscribers who would elect to use the Optus HFC network in preference to the NBN (i.e. if the Optus HFC Agreement did not proceed but the Telstra/NBN Co deal did).

7. Paragraph 90 of the NBN Co submission states:

that there can be no commercial certainty as to the likely future state of competition without the Optus HFC Agreement. Without the Optus HFC Agreement, the Government's NBN expectations, policy settings and regulatory framework are likely to require revision, including the semi-distributed POI structure and the implementation of uniform national wholesale pricing. However, the nature and extent of that revision is a matter for speculation.

See also section 6.2 of the NBN Co submission.

- a. Please provide reasons why NBN Co considers the Federal Government's NBN expectations, policy settings and regulatory framework including the semi-distributed POI structure and the implementation of uniform national wholesale pricing are likely to be revised in the absence of the Optus HFC Agreement. Please provide any supporting documentation.
- b. Does NBN Co expect that it would be unable to meet the uniform national wholesale pricing commitment or semi-distributed POI structure at all without the Optus HFC Agreement? If so, please provide the basis for this view.

Competition from competing platforms

8. The ACCC notes that at page 49 of NBN Co's Corporate Plan, a prediction is made that in financial year 2025 there will be circa 16 per cent of residential premises that are 'wireless-only' and that there are no 'wireless-only' businesses. Further on page 85 of its Corporate Plan, NBN Co states that '*...even in a situation where Definitive Agreements are entered into with Telstra, NBN Co will face competition from competing platforms (notably wireless)*'.

Would NBN Co's prediction that approximately 16 per cent of residential premises will be 'wireless-only' and that there will be no 'wireless-only' businesses change depending on whether the Optus HFC Agreement is authorised? If so, please provide details of how these changes would affect NBN Co's financial performance. Please provide substantiation for this view.

The 'anti-disparagement' provision

9. Paragraph 35 of the NBN Co submission provides that the Optus HFC Agreement prevents Optus from conducting a marketing campaign targeted at retail customers within the HFC serving area in respect of wireless data services which is disparaging of the performance or functionality of the NBN, being a marketing campaign that is expressly critical of or makes any expressly adverse statement about the performance or functionality of the NBN.

Please provide examples of statements or types of marketing campaigns that NBN Co considers would be likely to contravene this provision.

10. Paragraph 119 of the NBN Co submission provides (in part) that the anti-disparagement provision will have no effect on competition for wireless broadband services. It is further noted that Optus does not currently promote its wireless services with reference to either its HFC network or Telstra's copper network.

If the anti-disparagement provision will not have an effect on wireless competition or Optus' ordinary marketing approach, please explain why the anti-disparagement provision is necessary or integral to the Optus HFC Agreement. Please provide any supporting documentation.

Claimed public benefits

11. NBN Co has submitted that the Optus HFC Agreement improves NBN Co's ability to achieve its targeted take-up of services and projected financial returns by both residential and business customers, see for example paragraphs 97, 101-2, 107-8 of NBN Co's submission.

- a. Please provide a description of the assumptions and any sensitivity analysis that has been undertaken to support this view. Please also provide any supporting documentation.
- b. Please detail the risk analysis undertaken in respect of the effect of the Optus HFC Agreement on NBN Co's anticipated revenues and/or payments to be made to Optus under the Optus HFC Agreement. Please also provide any supporting documentation relevant to this analysis.

12. Paragraph 151 of the NBN Co submission suggests that the NBN may be more energy efficient than existing HFC networks.

- a. Please provide an estimate of the average energy requirement to support a subscriber on Optus' HFC network for a given period. For example, 'xx kW/h per annum per subscriber'. Please provide any supporting documentation and data.
- b. Please provide any further details supporting this claimed public benefit.

13. Paragraphs 136-139 of the NBN Co submission put forward the position that the Optus HFC Agreement supports the development of a 'vibrant wholesale market'.

- a. Please explain in detail what is meant by a vibrant wholesale market.
- b. Please explain in detail how the Optus HFC Agreement supports the development of a vibrant wholesale market.
- c. In the absence of the Optus HFC Agreement, please explain why the development of a vibrant wholesale market would be impeded. Please include whether NBN

Co considers it likely that Optus would participate in a wholesale market without the Optus HFC Agreement.

d. Please provide any supporting documentation for your responses to this question.

14. Paragraph 186 of the NBN Co submission provides that the Optus HFC Agreement, by preventing the use of the Optus HFC network for cherry picking, will increase the number of customers using the NBN. NBN Co submits that this will, in turn, maximise the economies of scale and scope that are inherent in the NBN.

The ACCC is interested in assessing the potential consequences for economies of scale and scope available to NBN Co as a consequence of the Optus HFC Agreement coming into effect. Please provide the following:

a. Economies of scale:

- (i) the ongoing 'fixed costs' - capital expenditure and fixed operating expenditure - as a percentage of the total cost to operate the NBN; and
- (ii) the change in the average cost per subscriber assuming
 - i. no shutdown of the Optus HFC network (and thus no migration of Optus HFC customers onto the NBN), and
 - ii. shutdown of the Optus HFC network and migration onto the NBN.

b. Economies of scope:

- (i) an estimate of the fixed common costs - the capital and fixed operating expenditure shared between broadband, voice, pay TV and other services on the NBN;
- (ii) an estimate of the incremental capital and fixed operating expenditure (if these services were provided on separate networks) - for broadband, for voice, for pay TV and for other services on the NBN; and
- (iii) the change in average cost per subscriber assuming
 - i. no shutdown of the Optus HFC network (and thus no migration of Optus HFC customers onto the NBN), and
 - ii. shutdown of the Optus HFC network and migration onto the NBN.

c. The nature of this cherry picking (including the number of subscribers and spend per subscriber).

d. The likely effects of this cherry picking on NBN Co's revenues and costs.

e. The likely effects of this cherry picking on NBN Co's profitability.

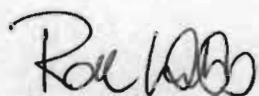
Please provide any supporting documentation.

15. With respect to each provision of the Optus HFC Agreement sought to be authorised, to the extent not already provided to the ACCC, please provide:

- a. detail on whether the provision is integral and/or necessary to the Optus HFC Agreement;
- b. a description of the public benefits and public detriments NBN Co considers are likely to arise; and
- c. the basis for this view including any supporting documentation.

This letter has been placed on the ACCC's public register. If you wish to discuss any aspect of this matter, please do not hesitate to contact Susan Philp (02 6243 1347) or Tess Macrae (03 9290 1835).

Yours sincerely



Rose Webb
Executive General Manager
Mergers and Adjudication Group

