

NBN Co applications for authorisation in relation to the HFC Subscriber Agreement, A91271-A91273

Relevant material from Telstra's exemption application in respect of the Optus HFC Network

A number of issues relevant to Optus' submission on the current Authorisation application were considered by the ACCC and the Australian Competition Tribunal (the Tribunal) in the context of Telstra's 2007 application for exemption of the ULLS in Optus' HFC network footprint. This note contains some of this relevant material, including quotations from the decisions.

- 1. In its submission on the current Authorisation request, Optus submitted that its HFC network does not act as an effective constraint on Telstra because the competitive impact is constrained by its limited scale and the fact that wholesale access is not provided over the HFC network.**

The Optus HFC network's limited scale compared to Telstra's access network infrastructure was recognised by the Tribunal in its decision on Telstra's appeal of the ACCC's Final Determination in that matter. In its decision, the Tribunal stated that:

"Telstra is the largest provider of retail and wholesale services over its CAN.

*Telstra's CAN is separated into 5,069 ESAs."*¹

On the other hand the Optus HFC network is limited in scale, as was noted by the Tribunal:

"Optus has deployed an aerial HFC network in metropolitan Sydney, Melbourne and Brisbane which overlaps 262 of Telstra's ESAs."

The HFC network is not suitable for the supply of business services. As a result, both Optus and Telstra do not supply voice services to business and wholesale customers via their HFC networks. This was noted by the Tribunal and the ACCC:

*"Optus uses its HFC network to provide retail telephony, broadband and pay TV to residential customers. Optus does not supply services to business customers via its HFC network. Nor does it supply wholesale services via its HFC network."*²

*"The ACCC notes the possibility of supply by Optus of wholesale services over its HFC network, but observes that neither Telstra nor Optus currently supply wholesale services over their HFC networks, nor have they during the life of their HFC networks."*³

The ACCC further stated that switching to wholesale provisioning by HFC could have significant implications for both the wholesaler and wholesale customers and impede the process of competition.⁴

¹ Application by Telstra Corporation Limited [2009] ACompT1, para 37-40

² Application by Telstra Corporation Limited [2009] ACompT1, para 47

³ ACCC, Telstra's exemption application in respect of the Optus HFC network Final Decision, November 2008, p.12

- 2. In its submission on the current Authorisation request, Optus submitted that while the Optus HFC network passes 2.4 million premises, 1 million homes are not serviceable as they either cannot be technically connected to the HFC and/or the practical difficulties of connecting the premises outweigh the benefits of connecting the customer. A large percentage of these non serviceable homes are Multi Dwelling Units.**

Optus has previously submitted to the ACCC and the Tribunal reasons why some of these premises are not serviceable. The Tribunal noted the aerial nature of Optus' HFC network and it accepted that this limited its deployment for the reasons presented by Optus, namely:

"137B.1 in respect of single dwelling units:

- (i) location in a heritage area where overhead cabling is not permitted;*
- (ii) distance from the main HFC cable because the voice signal deteriorates;*
- (iii) the nature of terrain (for example, the minimum cross road height for a cable drop to the premises);*

137B.2 in respect of MDUs and commercial premises:

- (i) the radio-frequency design of the HFC Network does not accommodate MDUs;*
- (ii) the MDUs may be located in areas without power poles (for example because the power supply has been placed underground);*
- (iii) difficulty of securing access from bodies corporate;*
- (iv) masonry construction of MDUs with resulting lack of access for cabling to individual units; and*
- (v) unavailability of multi-line customer access units suitable for MDUs."*⁵

- 3. In its submission on the current Authorisation request, Optus submitted that it has no plans to expand the HFC network outside its current footprint, nor does it have any plans to undertake any further upgrades of the network.**

Optus has previously submitted to the Tribunal that it would not be rational or efficient for it to make the "infill" investment needed to turn unserviceable premises (described above) into serviceable premises.

The Tribunal accepted Optus' submission that as a matter of commercial common sense, that there is "no cause to justify any further major infill investment in its HFC network."⁶ The Tribunal accepted that this would continue to be the case in a future without the exemption sought by Telstra. The current situation before the ACCC on the authorisation application is analogous to this. When the NBN is rolled out, Optus will have access to that network and will accordingly have no cause to justify any further major infill investment to expand the reach of the HFC network. Accordingly, there is no basis for assuming in the counterfactual that Optus would expand the reach of the HFC network.

⁴ ACCC, Telstra's exemption application in respect of the Optus HFC network Final Decision, November 2008, p.12

⁵ Application by Telstra Corporation Limited [2009] ACompT1, para 88

⁶ Application by Telstra Corporation Limited [2009] ACompT1., para 100

The Tribunal went further and stated that infill investment which was in effect a duplication of Telstra's CAN and its HFC network would in fact be a socially wasteful investment:

*"Such duplication of this 'last half-mile' infrastructure, if it were to occur, would, on the face of it, be a socially wasteful investment."*⁷

There is no public benefit in socially wasteful investment.

Another relevant issue to consider when considering further investment in Optus' HFC network is Telstra's 50 per cent ownership of Foxtel. The ACCC has previously raised the concern that the control over content that Telstra retains through its ownership of Foxtel would appear to be a significant barrier to expansion. In particular, the ACCC stated:

*"...the high content costs faced by Optus are a significant barrier to expansion that limits Optus' ability to achieve potential economies of scope on its HFC network and to recover the costs of expanding or infilling the network by, for example, connecting up MDUs. This in turn affects the competitiveness of the Optus HFC network and makes the economic viability of such investments in Optus' HFC network clearly questionable."*⁸

⁷ Application by Telstra Corporation Limited [2009] ACompT1., para 115

⁸ ACCC, Telstra's exemption application in respect of the Optus HFC network Final Decision, November 2008, p.11