

**RESTRICTION OF PUBLICATION OF PART CLAIMED
(pages 11-12, 20-21, 26, 28, 30-31)**

[PUBLIC REGISTER VERSION]



Submission to the Australian Competition and Consumer Commission

**in support of the
Application for Authorisation of
the HFC Subscriber Agreement between
NBN Co Limited and SingTel Optus Pty Ltd
and other Optus entities**

20 January 2012

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1. Introduction

- 1.1 This submission is made by SingTel Optus Pty Ltd, Optus Networks Pty Ltd, Optus Internet Pty Ltd and Optus Vision Media Pty Ltd (together, **Optus**) in support of the application for authorisation dated [] January 2012 and lodged by NBN Co Limited (**NBN Co**) relating to the Optus HFC Subscriber Agreement between NBN Co and Optus dated 23 June 2011, including the proposed amendment to clause 5.2(c) of that Agreement (**HFC Agreement**).

Executive Summary

- 1.2 Optus submits that the ACCC should authorise the relevant provisions of the HFC Agreement because the public benefits that will arise from the HFC Agreement will clearly outweigh any perceived public detriments.
- 1.3 Optus submits that the public benefits include:
- (a) promoting increased retail competition by ensuring that there is a level playing field;
 - (b) removal of inefficient infrastructure duplication and other efficiency gains through cost savings;
 - (c) enhancing competition in wholesale markets;
 - (d) ensuring that Optus HFC customers receive equitable treatment with other telecommunications users by ensuring that their transition to the NBN is seamless;
 - (e) allowing Optus to proceed with its fixed line strategy;
 - (f) improving the economic viability and reducing the risk profile associated with the roll-out of the National Broadband Network (**NBN**);
 - (g) ensuring consistency with the Government's public policy objectives for the NBN; and
 - (h) facilitating environmental benefits.
- 1.4 Optus further submits that there are no public detriments that will arise from the HFC Agreement.

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2. Optus and the Optus HFC network

- 2.1 Optus is a leading Australian integrated telecommunications company, delivering communications, information technology and entertainment services. Optus owns and operates one of the two major hybrid fibre coaxial (**HFC**) networks in Australia (the other is operated by Telstra). HFC technology uses optical fibre plus coaxial cable to supply telephony, broadband and pay TV services. The optical fibre forms the backbone within the access network while the high-speed coaxial cable runs from the fibre nodes to the customers' premises.
- 2.2 The Optus parties to the HFC Agreement include the Optus entities which supply services using the Optus HFC network (**HFC Network**). The HFC Network services households in Brisbane, Melbourne and Sydney. Maps showing the coverage of the HFC Network are at Confidential Annexure 3. As can be seen from these maps, coverage is provided on a street-by-street basis and there are gaps in the areas of metropolitan Brisbane, Melbourne and Sydney that are covered by the HFC Network.
- 2.3 Optus uses the HFC Network to supply fixed line telephony, broadband and pay TV to consumers within the HFC Network coverage area. Outside the HFC Network coverage area, Optus supplies fixed line telephony and broadband services using Telstra's copper network. Optus also uses the fibre optic cable that forms part of the HFC Network for its mobile network (providing connections to mobile base stations) and to deliver telecommunications services to business customers. This fibre optic cable is also integrated into the overall Optus fibre network, providing interconnection between Optus facilities such as exchanges, fibre access node sites and points of interconnect.
- 2.4 The deployment of the HFC Network began in February 1995 and by the end of 2000, about 21,000km of coaxial cable and 5,500km of fibre cable had been laid around the suburban residential areas of Brisbane, Melbourne and Sydney. Optus had originally intended to also roll out an HFC network in Adelaide, but decided against this in 1997.¹ Optus has no plans to further extend the HFC Network.
- 2.5 The HFC Network currently consists of 21,000 km of steel wire (strand) supporting 7,000 km of fibre and 25,000 km of coaxial cable strung across 550,000 poles. While the network passes 2.4 million homes, only around 1.4 million of these premises are deemed to be serviceable. The remaining 1.0 million homes are non-serviceable as they either cannot be technically connected to the HFC Network or the costs and/or 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 (**MDU's**).
- 2.6 The Australian Competition Tribunal (**Tribunal**) in its consideration of Telstra's 2007 application for exemption of the ULLS in Optus' HFC Network footprint (**Telstra ULLS**

¹ BIS, *Telecommunication infrastructures in Australia 2001*, A research report prepared for ACCC, December 2001, p.99

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Application) noted the aerial nature of the HFC Network and accepted that this limited its deployment for the reasons presented by Optus to the Tribunal, 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."*²

- 2.7 An HFC network is a contested network where a number of customers share each coaxial cable. As such, quality of service falls as the number of users increase and also as the level of use by existing users increases. As the coaxial cable is shielded, high speed connections are possible over reasonably large access networks.
- 2.8 Typically, HFC networks can provide download speeds of up to 30 Mbit/s however with upgrading to the DOCSIS (data over cable service interface specification) 3.0 standard, an HFC network can provide download speeds of up to 100 Mbit/s.³
- 2.9 Optus upgraded its HFC Network in 2010 to DOCSIS 3.0 technology to offer higher speeds in Brisbane, Melbourne and Sydney.⁴ This is the leading HFC technology currently deployed in Australia today to support mass consumer grade highspeed broadband services.
- 2.10 Optus has no plans to expand the HFC Network outside its current footprint, nor does it have any plans to undertake any further major upgrades of the network.

² Application by Telstra Corporation Limited [2009] ACompT1, para 88

³ ACMA, *Communications report 2009-10*, November 2010, p.40

⁴ Optus, "Optus upgrades cable broadband to deliver supersonic speeds in Brisbane, Melbourne and Sydney," Media Release, 2 August 2010

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- 2.11 The expansion of the HFC footprint by way of infill investment was the subject of consideration by the Tribunal in the Telstra ULLS Application. Optus submitted to the Tribunal that it would not be rational or efficient for it to make the “infill” investment needed to turn unserviceable premises into serviceable premises.
- 2.12 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.”⁵ The Tribunal accepted that this would continue to be the case in a future without the exemption sought by Telstra.⁶ 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.
- 2.13 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*
- 2.14 There is no public benefit in socially wasteful investment.
- 2.15 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*
- 2.16 See also the information at Confidential Annexure 1, page 34 regarding Optus' historical investment in the HFC Network.

⁵ Application by Telstra Corporation Limited [2009] ACompT1., para 100

⁶ See further Optus response to ACCC information request dated 23 September 2011: Confidential Annexure 1, p43

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

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Residential services on the HFC Network

- 2.17 Optus currently uses the HFC Network to provide telephony, broadband and pay TV services to residential customers. Currently, where residential customers' premises are serviceable by the HFC Network, Optus will supply telephony, broadband and pay TV services via the HFC Network.
- 2.18 As at 31 March 2011, Optus' HFC customer⁹ base comprised approximately 504,000 individual subscribers, of which there are approximately:
 - (a) 504,000 Local Access Telephone subscribers; and
 - (b) 426,000 High Speed Broadband subscribers.
- 2.19 Approximately 87% of HFC customers take more than one product.¹⁰

Business and wholesale customers

- 2.20 Optus does not supply business grade or wholesale services via the HFC Network.
- 2.21 The HFC Network is not suitable for the supply of business services because it is not capable of meeting business customers' typical requirements with regard to quality of service, including features such as availability, symmetric capacity and diversity.
- 2.22 Business customers typically require symmetric "business grade" upload / download capacity which the HFC Network is not able to deliver. Further, both business and wholesale customers require consistency of service. However, since the HFC Network is a shared network, capacity is affected by congestion levels and particular speeds cannot be guaranteed. This feature of the HFC Network also creates difficulties which limit the ability of wholesale customers to control the quality of service they provide to their customers (a typical requirement of wholesale customers).
- 2.23 Business customers also often require a diverse network, for secure continuous operation. The HFC Network is not a diverse network and is not able to provide this requirement. Consequently, Optus considers the HFC Network is not suitable for business services because it is not capable of meeting those customers' typical requirements with regard to quality of service, including features such as availability, symmetric capacity and diversity.
- 2.24 In relation to wholesale customers, in addition to the limitations referred to above, the HFC Network is not currently configured to enable wholesale access. Optus would need to undertake a major upgrade of the HFC Network which would require significant investment. Optus has no plans to make such an investment in the network.

⁹ SingTel, Singapore Telecommunications Limited and Subsidiary Companies, Management discussion and analysis of financial condition, results of operations and cash flows for the fourth quarter and year ended 31 March 2011, p.51

¹⁰ See further Confidential Annexure 1, page 36.

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- 2.25 Both the Tribunal and the ACCC in their consideration of Telstra's ULLS Application noted that Optus does not supply voice services to business and wholesale customers via the HFC Network.

*"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."*¹¹

*"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."*¹²

- 2.26 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.¹³

HFC Network and the NBN

- 2.27 The HFC technology will be surpassed by the Fibre to the Premise (**FTTP**) technology being deployed by NBN Co for the NBN. There are numerous technical differences between FTTP and HFC technology that will give the FTTP technology a significantly greater service capability both in the immediate and longer-term.
- 2.28 As mentioned above, the HFC Network is a contested network and the user performance is dependent on the network loading. Shared networks are designed to optimise the resources available by exploiting the characteristics of a large number of end users. In any one network not all users are active at the one time and of the active users not all users are actually utilising the network at the same time. This allows each user to achieve the peak data rate available on the network for the short periods that they are active on the network. However, as the network becomes more loaded the average throughput of users in a busy period can be reduced. The HFC Network will share the 100Mbps downlink with up to 200 users whereas the NBN GPON (Gigabit Passive Optical Network) will share 2500Mbps between 32 users providing over 150 times the average capacity per user than the HFC Network.
- 2.29 Whilst the HFC Network can offer peak speeds of up to 100 Mbps today, the NBN consumer service will offer peak speeds of up to 1,000 Mbps (this speed is limited by the throughput of the NBN end customer equipment) which is over 10 times the capability of the HFC Network. A further key differentiator of the NBN is that it will offer superior upload speeds. While the HFC Network can offer upload speeds of up to 2

¹¹ Application by Telstra Corporation Limited [2009] ACompT1, para 47

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

¹³ ACCC, Telstra's exemption application in respect of the Optus HFC network Final Decision, November 2008, p.12

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Mbps¹⁴, NBN Co proposes to offer upload speeds starting at 1 Mbps for an entry level service and up to 400 Mbps for higher level services.

- 2.30 Further, it is planned that the consumer fibre to the home technology will use 10Gbps GPON technology (shared between 32 users) in the near future and there are clear upgrade paths that will provide even higher speeds per user.
- 2.31 Whilst HFC networks also have an upgrade path to higher speeds allowing peak speeds of over 300Mbps, HFC technology will lag the capability of fibre to the premise technology. More pertinently, as mentioned earlier, it is unlikely that such future technology would ever be deployed on the HFC Network because it effectively requires significant re-engineering of the network through node splitting or extending fibre deeper into the network (this pushes the HFC Network to more closely resemble a fibre to the premise network with fibre being provided closer to the home and the coaxial portion shared with fewer users). This is costly and would require significant capital expenditure.

¹⁴ Note, this is the speed at which Optus has configured the network. The standard can provide higher speeds but Optus has not due to the incremental cost versus benefit.

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3. HFC Agreement and proposed conduct

- 3.1 Optus and NBN Co entered into the HFC Agreement on 23 June 2011. The HFC Agreement provides for the phased migration of Optus' HFC subscribers to the NBN from the HFC Network, with Optus acquiring wholesale access services from NBN Co. Once services have been migrated to the NBN, Optus will decommission the HFC Network.
- 3.2 Optus and NBN Co propose entering into an agreement to amend clause 5.2(c) of the Agreement which concerns wireless marketing by Optus.
- 3.3 Under the proposed terms of the HFC Agreement (as amended), Optus will:
 - (a) Actively migrate its HFC customers onto the NBN platform as it is built out in Optus' HFC footprint;
 - (b) Receive a fee for each subscriber migrated to the NBN over a 4-5 year timescale;
 - (c) Pay an ongoing wholesale access fee to NBN Co for each migrated customer, with a minimum commitment of 24 months;
 - (d) Progressively deactivate and decommission the HFC Network within 18 months of the NBN being completed in each HFC serving area (excluding those parts of the HFC Network that provide ongoing support for Optus' mobile infrastructure and business customers¹⁵);
 - (e) Make a 15 commitment (from the date the NBN is first available in an HFC serving area) to only use the NBN for fixed line services for mass market customers within the HFC footprint, along with granting a first right of refusal to build any point-to-point fibre Optus may require within that area; and
 - (f) Make a 15 year commitment (from the date of execution) not to conduct a marketing campaign in respect of wireless data services targeted at retail customers within the HFC serving area which is disparaging of the performance or functionality of the NBN in contravention of sections 18 or 29 of the *Australian Consumer Law*.

There are various ancillary provisions in the HFC Agreement that support these terms. A confidential copy of the HFC Agreement is enclosed with the NBN Co submission.

- 3.4 The Applications and NBN Co submission set out the specific conduct for which authorisation is being sought.

¹⁵ Optus plans to retain all fibre components of the HFC Network.

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3.5 Key provisions of the HFC Agreement (including those the subject of the authorisation application) are conditional on obtaining ACCC authorisation and the agreement will terminate if authorisation is not obtained. **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**

3.6]

3.7 This transaction helps to underpin Optus' future competitiveness in the fixed line market by enabling it to progressively decommission the parts of the HFC Network that do not provide ongoing support for mobile infrastructure and business customers and to assist in the orderly and early migration of its HFC fixed line customers to the NBN.

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4. The counterfactual

- 4.1 This section considers the relevant counterfactual against which the public benefits and detriments of the proposed conduct the subject of the authorisation application should be assessed.

HFC Agreement

- 4.2 As set out above, key provisions of the HFC Agreement are conditional on ACCC authorisation and the agreement will terminate if authorisation is not obtained.
- 4.3 The provisions the subject of the authorisation application are fundamental to the agreement reached by Optus and NBN Co. These provisions represent the principle obligations imposed on Optus in exchange for which Optus receives payment of the migration fee for migration of its HFC customers to the NBN. As noted in NBN Co's submission, it is not the case that the HFC Agreement could proceed without one or more of those provisions.
- 4.4 Optus submits that, if the HFC Agreement is not authorised, it is unlikely that Optus and NBN Co would reach a new agreement dealing with the same subject matter on substantially different terms. The HFC Agreement was reached after extensive negotiation between the parties.
- 4.5 Accordingly, the counterfactual against which the public benefits of the relevant provisions of the HFC Agreement must be considered is a future in which there is no HFC Agreement (or other similar agreement).

Telstra Transaction

- 4.6 One important consideration in identifying the relevant counterfactual against which the HFC Agreement is to be assessed is the agreement between Telstra and NBN Co.
- 4.7 On 23 June 2011, Telstra and NBN Co announced that they had reached a final agreement that will, amongst other things, involve the decommissioning by Telstra of its extensive copper network and the migration of customers from both its copper and HFC cable network to the NBN over the proposed roll-out period (i.e. the Telstra Transaction). The Telstra Transaction is conditional on ACCC approval of the structural separation undertaking and migration plan.
- 4.8 If the Telstra Transaction proceeds, Optus considers it likely that the NBN will proceed regardless of whether or not the HFC Agreement is authorised by the ACCC.
- 4.9 If however the Telstra Transaction does not proceed, then it is difficult to make assumptions as to what would be likely to happen. **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**

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4.10 In terms of the market more generally and the NBN in particular, Optus cannot speculate as to what is likely to happen. Given these uncertainties, Optus submits that the appropriate assumption to adopt is that the status quo will continue. The current state of competition in the relevant markets is summarised further in section 5 below. Optus submits that Telstra will continue to enjoy a dominant position in the fixed voice and broadband retail markets, and the wholesale market for fixed voice and broadband, as it has done for the past 15 years. Optus will continue to compete in the fixed voice and broadband retail markets as it has done to date, using both the HFC Network and the Telstra network to compete. As noted above, Optus has no current plans to expand or upgrade the HFC Network.

Relevant counterfactual

- 4.11 In light of the above, Optus submits that the relevant counterfactuals against which the authorisation application should be assessed are:
- (a) the status quo; and
 - (b) the Telstra Transaction and NBN proceeds but there is no HFC Agreement or similar agreement.
- 4.12 Optus is not able to state definitively at this time what it would do in connection with the HFC Network if the second potential counterfactual were to eventuate. It should be assumed for the purpose of the authorisation application, however, that Optus will offer services using the NBN as well as continuing to offer services on the HFC Network to those customers who are within the HFC Network coverage area.
- 4.13 However, it is important to note that legislation enacted as part of the Government's NBN reforms effectively means that Optus will not expand its HFC Network. This is discussed further in section 6 below.

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5. Relevant markets

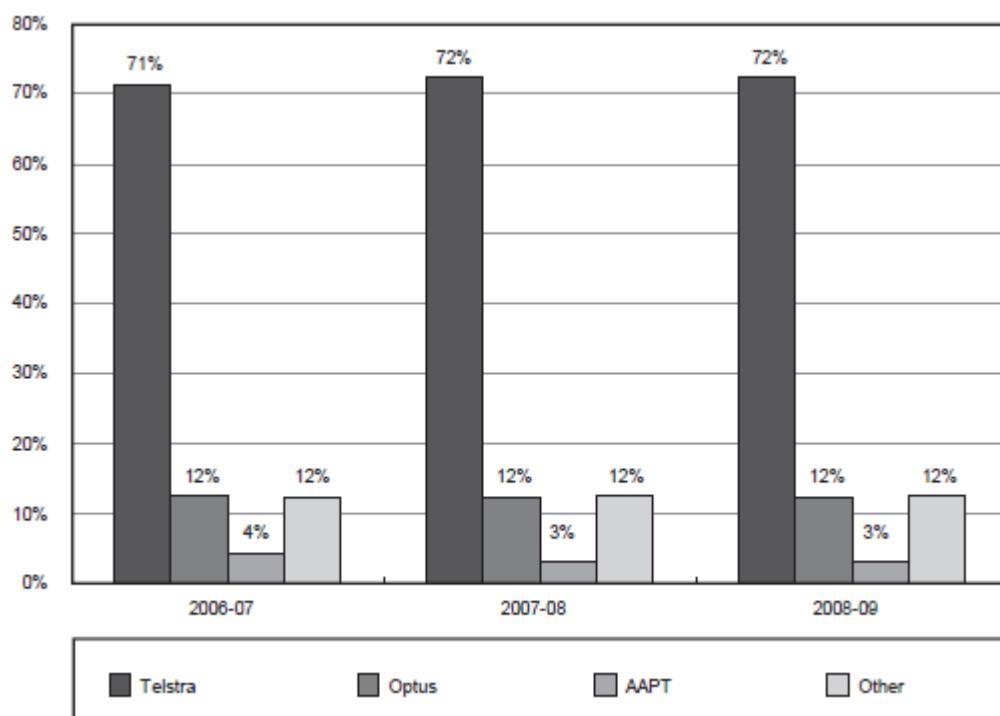
- 5.1 Optus submits that there are a number of markets that are relevant to the HFC Agreement, including:
- the market for the retail supply of fixed voice telephony services;
 - the markets for the supply of fixed broadband services; and
 - the wholesale markets for the supply of fixed voice and telephony services.

5.2 The current state of competition in each of these markets is examined below.

Market for the retail supply of fixed voice telephony services

- 5.3 Optus presently competes in the market for the supply of retail voice services using both its HFC Network and other infrastructure (specifically, by obtaining access to Telstra's copper access network via the unbundled local loop service (**ULLS**) and also by reselling Telstra services).
- 5.4 Optus submits that the market for the supply of retail voice services is not currently subject to effective competition. As the following table demonstrates, some 15 years after competition was introduced into the market Telstra retains a dominant market share in the fixed line telephony market.

Fixed voice service shares by subscriber numbers, 2006–07 to 2008–09¹⁶



¹⁶ ACCC telecommunications reports 2008–09

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- 5.5 However, this dominance is even more profound at the infrastructure level. Many of the competitive retail services captured in the above table are actually supplied over Telstra's infrastructure. For example, Optus currently supplies customers outside of the HFC Network footprint by obtaining access to Telstra's copper access network via the ULLS or reselling Telstra services (i.e. through wholesale line rental). Using the ULLS, Optus can provide voice and data services, connecting to the Optus network via DSLAM equipment installed at the Telstra local exchange. Optus resells Telstra services in geographic areas outside of Optus' DSLAM footprint.
- 5.6 Whilst there are a number of alternate fixed line networks deployed across Australia, including the HFC Network, around 90% of customer connections are provided over Telstra infrastructure. By contrast the HFC Network connects only 4.8% of customers.
- 5.7 The HFC Network's limited scale compared to Telstra's access network infrastructure was recognised by the Tribunal in its decision on the Telstra ULLS Application. 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."*¹⁷

- 5.8 On the other hand the 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."

- 5.9 The following table provides an analysis of the standard fixed line telephony services in operation.

Share of access Lines as at June 2010

	Subscribers (millions)	%
Telstra		
Retail Lines	7.41	70.0%
Wholesale Lines	1.25	11.8%
ULLS Lines	0.83	7.8%
<i>Telstra Total</i>	9.49	89.6%
Optus HFC	0.51	4.8%
Other	0.59	5.6%
Total	10.59	100.0%

¹⁷ Application by Telstra Corporation Limited [2009] ACompT1, para 37-40

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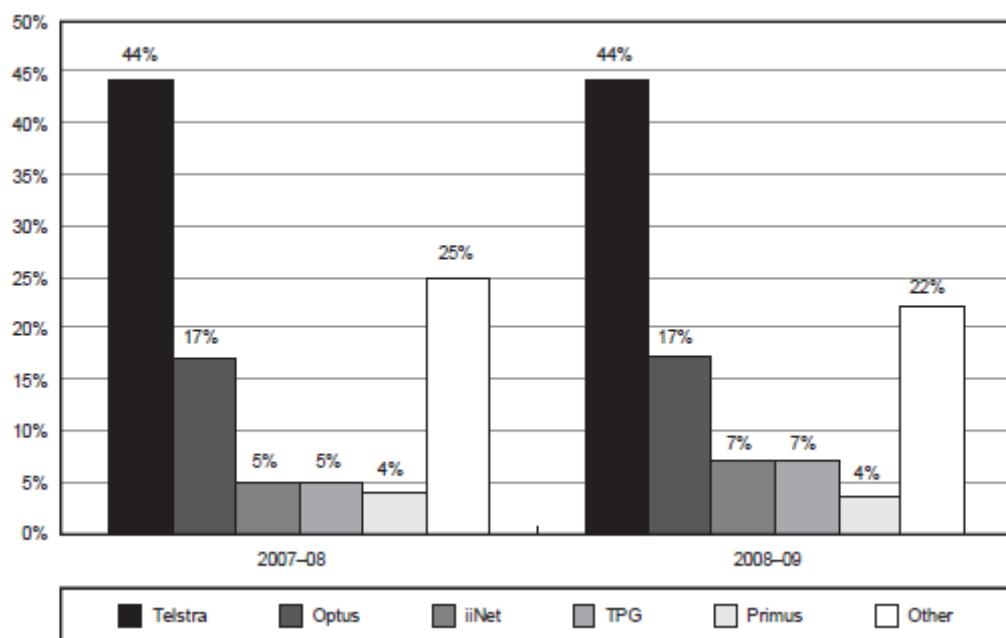
- 5.10 Telstra's dominance at the infrastructure level has been recently noted by the ACCC in its July 2009 report on Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR;

"Telstra still controls the infrastructure by which the overwhelming majority of fixed voice and fixed broadband services are provided and because of its vertical integration Telstra enjoys a strong position in fixed voice and fixed broadband services".¹⁸

Market for the retail supply of fixed broadband services

- 5.11 Competition is more developed within the market for the supply of retail broadband services with some 529 Internet Service Providers operating in the market as at June 2010¹⁹. Nevertheless, Telstra retains a dominant position in this market with a retail market share well over double that of its nearest rival Optus. This is demonstrated in the following table.

Retail fixed broadband (DSL and HFC) market shares by number of subscribers²⁰



- 5.12 Similar to the market for the supply of retail voice services, the majority of services provided by competing service providers are actually delivered over the Telstra local copper loop. Competing network infrastructure, such as the HFC Network, accounts for

¹⁸ ACCC report on Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, July 2009 – page 53

¹⁹ ACMA Communications report 2009–10, page 23

²⁰ ACCC telecommunications reports 2008–09

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a modest proportion of broadband services. As at June 2010, the HFC Network accounted for 4.8% of Broadband services in operation within Australia.

Wholesale market for the fixed voice and broadband services

- 5.13 Optus also currently competes with Telstra in the market for the provision of wholesale voice and broadband services.
- 5.14 Optus' wholesale access services are supplied using Optus DSL based infrastructure which relies on access to Telstra's copper loop (through the ULLS access services) as a key infrastructure input.
- 5.15 Optus does not provide wholesale access services over its HFC network. As described in section 2 above, it is not currently possible to do so and there are technical difficulties associated with providing wholesale access that would require a major upgrade to the network to be overcome. Optus has no plans to make a wholesale service available.
- 5.16 This means that at both the retail and wholesale levels, Telstra dominates the market for the provision of voice and broadband access services. This is a conclusion that the ACCC shares as evidenced by its comment in its July 2009 report on Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR

"Accordingly, it is the ACCC's view that both the wholesale and retail markets for the provision of fixed voice services, fixed broadband services and bundled fixed voice and fixed broadband services do not display the characteristics of effectively competitive markets".²¹

²¹ ACCC report on Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, July 2009 – page 53

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6. Public benefits of the HFC Agreement

- 6.1 Optus believes the NBN has the potential to positively reshape the fixed line telecommunications sector in Australia and deliver significant benefits to Australian consumers and businesses. In particular, Optus sees the role of the NBN to be one of pro-competition, levelling the playing field for fixed line services.²² The HFC Agreement supports the NBN to create a level playing field and puts Optus in a position to compete effectively in wholesale and retail fixed line markets. It also has a number of other benefits.
- 6.2 In summary, Optus submits that there are number of public benefits arising from the HFC Agreement, including;
- (a) promoting increased retail competition by ensuring that there is a level playing field;
 - (b) efficiency gains resulting from the operation of one network rather than two;
 - (c) enhancing competition in wholesale markets;
 - (d) ensuring that Optus HFC customers receive equitable treatment with other telecommunications users by ensuring that their transition to the NBN is seamless;
 - (e) allowing Optus to proceed with its fixed line strategy;
 - (f) improving the economic viability and reducing the risk profile associated with the roll-out of the NBN;
 - (g) ensuring consistency with the Government's public policy objectives for the NBN; and
 - (h) facilitating environmental benefits.

- 6.3 Each of these benefits is considered in more detail below.

Promoting increased retail competition by ensuring there is a level playing field

- 6.4 As discussed above, there is currently limited competition in retail markets due to the dominance of Telstra. Optus is currently Telstra's closest competitor. Optus' ability to compete effectively with Telstra in the future with the NBN is dependent on there being a level playing field for competition in the relevant retail markets. The HFC Agreement helps ensure that there is such a level playing field.

²² See further Optus Submission to the House Standing Committee on Infrastructure and Communications Inquiry into the role and potential of the National Broadband Network, March 2011

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- 6.5 If the Telstra Transaction proceeds but the HFC Agreement does not, Telstra will receive an advantage as a result of the proposed early migration of its customer base to the NBN while Optus, the other retail service provider which owns and operates a major fixed line network, will be at a relative disadvantage.
- 6.6 Optus submits that competition, and therefore consumers, will benefit if Optus is also in a position to migrate its entire customer base to the NBN at the earliest opportunity. While Optus' existing customers attached to the Telstra network will be migrated under the Telstra Agreement, the migration of Optus' HFC customers under the HFC Agreement will ensure that from day one there will be an alternative national scale player to Telstra providing access to retail services delivered over the NBN.
- 6.7 Further, if the HFC Agreement does not proceed, then Optus will be in a position where it is servicing its customers on both the HFC Network and the NBN. This will mean that Optus will be required to maintain duplicate sets of systems, processes, customer care functions and operational support capabilities to service its fixed line customer base. Clearly, this will raise Optus' costs of supply and will put Optus at a competitive disadvantage to its competitors, including Telstra and other retail service providers, who will be focusing all of their resources and efforts towards supporting services offered over a single fixed line access technology.
- 6.8 Optus submits that the HFC Agreement will put Optus on a level playing field with all other retail service providers accessing the NBN, including Telstra. This is because Optus will generate significant efficiency benefits through being able to decommission its HFC Network and offer services from the NBN. Specifically, Optus will be able to:
 - (a) manage a unified national range of products;
 - (b) operate uniform systems and back-office programmes;
 - (c) market services through unified sales and marketing campaign activities; and
 - (d) develop uniform customer care and technical support capabilities.

Other than Telstra (which has its own agreement with NBN Co), other retail service providers do not own and operate any comparable fixed line network for supply of fixed line telecommunications services to consumers and small businesses.

- 6.9 In summary, the HFC Agreement will put Optus in the best position for the roll out of the NBN, enabling it to compete as a strong, focused, national scale player in the retail voice and broadband markets. This will produce significant public benefits in the form of enhanced competition.

Operating a single network will create efficiency gains

- 6.10 The HFC Agreement will create efficiency gains as Optus will not incur the costs of maintaining two networks. These efficiency gains will enable Optus to supply better, more competitive services to its customers.

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- 6.11 The HFC Agreement will enable Optus to achieve savings in ongoing capital and maintenance costs in the order of **[RESTRICTION OF PUBLICATION OF PART CLAIMED]** post-migration of its services to the NBN. These savings will be generated because Optus will be able to progressively de-commission the HFC Network and support platforms.²³ **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**
- 6.12 Optus will face higher costs to serve its customers on both the HFC Network and the NBN if the HFC Agreement does not proceed and it is forced to continue to service its existing HFC customers on the HFC Network.
- 6.13 Without the HFC Agreement, the requirements for Optus to maintain two networks (unlike all other RSPs) will reduce its flexibility to match competitor offers.
- 6.14 Optus anticipates the per customer costs on the HFC Network will increase over time as Optus loses customers to the NBN.²⁴
- 6.15 Further, if the transaction does not proceed Optus' cost to serve each customer on the NBN will be higher. **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**

6.16]

HFC Agreement will enhance competition in the wholesale market

- 6.17 As set out in the NBN Co submission, the HFC Agreement is also consistent with promoting a vibrant wholesale market using the NBN.
- 6.18 The HFC Agreement will also ensure that Optus is in the best possible position to compete with Telstra in the wholesale market. The current market for the supply of wholesale voice and broadband services is fragmented. Whilst Optus competes with Telstra in key metropolitan areas (through its DSL infrastructure, not the HFC Network), Telstra does not face meaningful competition in much of regional and rural Australia. The NBN opens up the opportunity for a genuine national scale competitor to Telstra to emerge in the wholesale market. Optus plans to be this competitor.

6.19 **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**

Early and seamless migration of Optus customers to the NBN

- 6.20 A significant benefit of the HFC Agreement is that Optus and NBN Co will cooperate to develop a process for migrating Optus' HFC customers over to the NBN. This process is expected to make the migration of existing HFC customers to the NBN as efficient and as seamless as possible. It will also ensure that Optus' customers will receive equitable treatment to customers on the Telstra network and will have the ability to access the superior suite of services that will be offered over the NBN as soon as possible.

²³ See further Optus response to ACCC information request dated 14 November 2011, Confidential Annexure 2, pages 45-48

²⁴ Optus response to ACCC information requested dated 14 November 2011, Confidential Annexure 2, page 48

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- 6.21 Under the terms of the HFC Agreement, NBN Co and Optus are required to negotiate in good faith an Implementation Plan that will set out their respective actions to facilitate the migration of Optus customers to the NBN consistent with NBN Co's non-discrimination obligations.
- 6.22 Importantly what the HFC Agreement contemplates is a well developed and highly coordinated plan for the migration of Optus HFC customers to the NBN. It means the migration of existing HFC customers to the NBN will be as efficient and as seamless as possible such that Optus' HFC customers are likely to gain access to the NBN potentially earlier than would be the case without the HFC Agreement and through a process that will minimise any disruption to the customer.
- 6.23 If the HFC Agreement is not authorised, customers connected to the HFC Network will still have the opportunity to connect to the NBN (whether through Optus or through another service provider). However, existing HFC customers wishing to connect to the NBN will have to do so under their own initiative. This is likely to give rise to customer inconvenience and potentially additional costs than would apply if the HFC Agreement proceeds. As an example, customers under contract may face contract exit fees associated with a migration to the NBN or fees to connect to the NBN.
- 6.24 The HFC Agreement will also ensure that there is equity between customers attached to the Telstra copper loop and Telstra HFC networks and those attached to the HFC Network. The Telstra Transaction contemplates that Telstra will implement a migration process for customers directly connected to its network. This will mean that some 9 million or so customers connected to the Telstra copper loop and HFC network will be provided with the opportunity to partake in a coordinated migration to the NBN. If the HFC Agreement does not proceed some 504,000 customers currently connected to the HFC Network will be denied the opportunity to partake in a similar migration process.

HFC Agreement will allow Optus to proceed with its fixed line strategy

- 6.25 The ACCC will be aware that Optus has been one of the most vocal advocates for reform of the fixed line telecommunications markets. In particular, Optus has lobbied for structural and regulatory reform that will deliver a level playing field, thereby enabling competitors such as Optus to compete with Telstra in the fixed line market on equal terms. The NBN will deliver on this objective because NBN Co will operate as a wholesale-only provider and access will be provided on an equivalent basis to all retail service providers. Having advocated this reform, we plan to take full advantage of the opportunities the NBN will deliver. **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**
- 6.26 To do this Optus will be building new systems, processes and internal capabilities to provide the best in use broadband experience for its customers. Optus' ability to deliver on this strategy will be enhanced if all Optus' fixed line customers can be serviced off a single access platform with a unified set of systems and processes due to the efficiencies that will be created (as discussed above). Scale will be a vital point of differentiation in

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an NBN environment where retail service providers will have access to an identical set of wholesale services.

HFC Agreement is consistent with the Government's policy objectives

- 6.27 The Government has introduced a number of significant telecommunications policy reforms aimed at delivering major structural change in the fixed line telecommunications market and a significant improvement in competitive intensity in the sector. The NBN is an essential element of the Government's reform programme. It aims to deliver a level-playing field in the fixed line sector through the Government's commitment to ensuring that the NBN will operate as a wholesale-only, open access network that will provide the access platform for the vast majority of fixed voice and broadband services for Australian consumers and businesses.
- 6.28 To give effect to this policy objective, the National Broadband Network Companies Act 2011 was enacted. This Act requires NBN Co to be a wholesale-only supplier of services with clear restrictions on its ability to provide retail based services either directly to end-users or through related companies (Part 7 of Schedule 1 of the Telecommunications Act).
- 6.29 The NBN is intended to be a single national network servicing all of Australia, providing high speed broadband and avoiding the inefficiencies associated with infrastructure duplication. The HFC Agreement is consistent with the Government's policy and helps that policy be achieved by providing for the orderly migration of HFC customers to the NBN and decommissioning of the HFC Network.
- 6.30 A further key policy objective of the Government is to ensure that NBN Co treats all access seekers on an equivalent basis. The HFC Agreement will help to deliver on the Government's objectives since it will result in the decommissioning of the HFC Network and ensure that there is equitable treatment between the operators of the two sole mass market fixed line networks within Australia. Authorisation of the HFC Agreement will ensure that Optus receives equitable treatment to Telstra if the Telstra Transaction proceeds, which is consistent with the Government's policy objectives.
- 6.31 In addition, the National Broadband Network Measures - Access Arrangements Act 2011 (**NBN Access Act**) includes measures to extend this wholesale-only obligation to alternate highspeed broadband network infrastructure. This is defined to include both new infrastructure and existing infrastructure that is expanded or upgraded to offer competing highspeed broadband services. In practical terms these provisions will prevent the roll-out of any alternate network infrastructure to the NBN since there will be no investment case to support a second scale wholesale-only network in Australia. These measures reflect a strong policy desire to have a single national highspeed broadband infrastructure that operates on a wholesale-only basis. This was articulated in the Senate Committee debate on the Bill by Senator Conroy who noted in respect of these provisions that

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"the rules will mean that NBN Co. is not hindered in delivering its objective, particularly uniform national wholesale pricing, by strict regulatory requirements while competing against other, less regulated providers of superfast broadband".²⁵

- 6.32 In respect of the HFC Network these provisions will not prevent Optus from operating its existing services, but they will prevent Optus from expanding the HFC Network. That is, Optus would not be in a position to expand its network to serve its own retail customers in direct competition with the NBN. Should Optus wish to expand the HFC Network then it will only be able to provide wholesale based services over the network. There is no investment case to support such a scenario.
- 6.33 An additional implication of this policy is that whilst the NBN has a superior technical capability to the HFC Network today, this gap will grow as the NBN is upgraded and the HFC Network remains technically static.

²⁵ Senator Conroy, Hansard 24 March 2011.

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Improvements in the economic viability of the NBN

- 6.34 Optus submits that the ability for NBN Co to achieve early access to an additional 504,000 customers is likely to be of significant positive benefit to its business case. This is especially the case since these customers, who are already users of highspeed broadband services, are located in the more affluent suburbs of the capital cities of Sydney, Brisbane and Melbourne. Approximately 87% of Optus' HFC subscribers take more than one service, as compared to approximately 40% of Telstra's customers. As such these customers are likely to generate higher than average ARPU because of a higher than average propensity to take multiple services and higher tier broadband plan.
- 6.35 Optus notes that in its Corporate Plan, NBN Co indicates that demand and ARPU assumptions can have a significant impact on its expected Internal Rate of Return. Its IRR can drop 230 basis points from mid-demand high ARPU to a low demand low ARPU scenario. Clearly, the early migration of the Optus HFC customer base will improve both the demand and ARPU metrics that NBN Co is likely to be able to achieve.
- 6.36 In addition, the longer-term viability of the NBN will be advanced because it will have certainty that not only will it not face inefficient competition from the two largest telecommunications providers, those providers will have a direct interest in marketing the use of the NBN. This outcome will significantly reduce the risk profile of the roll-out. Optus' own experience with its investment in the HFC Network is that the market cannot efficiently support multiple fixed line networks of scale.²⁶ We note that NBN Co has valued legislative provisions that protect it from competition as having a 160 basis point impact on its IRR.
- 6.37 These benefits will not just accrue to NBN Co, they can be expected to flow through to all users. An improvement in the economics and risk profile of the NBN should result in lower access prices and therefore lower retail prices for end-users. The lower risk profile will lead to lower costs and better longer-term returns for the Australian taxpayer.

NBN Co's access costs are likely to be higher due to a lower customer base

- 6.38 Optus submits that NBN Co's access costs (and therefore its pricing) is likely to be higher if the HFC Agreement does not proceed.
- 6.39 If the HFC Agreement does not proceed, this will result in NBN Co having a much smaller customer base than it would otherwise have due to Optus' 504,000 HFC customers remaining on the HFC Network, at least in the short term. Accordingly, the public benefits of these cost savings would be lost.

²⁶ See further Optus Submission, Regulatory Reform for the 21st Century, June 2009, pp 60-61.

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Environmental benefits

- 6.40 Another benefit of the HFC Agreement is that the decommissioning of the HFC network will lead to lower carbon dioxide emissions.
- 6.41 Optus notes that FTTP networks such as the NBN are likely to have lower power requirements and will therefore have lower carbon dioxide emissions than the present HFC Network. This is because the HFC Network has active elements which translate from the fibre portion of the network to the coaxial portion of the network (this is at each node). The FTTP network does not have any such requirements being passive between the exchange and the end user premises. This is also discussed in NBN Co's submission.
- 6.42 Further, as noted in NBN Co's submission there will also be benefits arising from the removal of Optus' aerial cabling.

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7. No public detriment

7.1 Optus does not believe that there are any public detriments arising with the proposed deal.

The HFC Network will not act as a competitive constraint on the NBN

7.2 An issue that may be raised is the fact that the HFC Agreement could remove a potential source of competitive constraint on the NBN. Optus submits that this is not the case.

7.3 If the HFC Agreement does not proceed, there is no evidence or other basis for considering that the HFC Network will act as an effective competitive constraint on the NBN.

7.4 This is supported by the following:

(a) Optus does not currently have the technical ability to supply wholesale access services over its HFC Network and has no plans (or incentive) to upgrade the HFC Network to do so in the future;

(b) The HFC Network does not currently act as an effective competitive constraint on the Telstra copper network, or on RSPs supplying services over the Telstra copper network, including Telstra;

(c) The inherent limitations of the HFC Network means that it will be less able to compete against the NBN;

(d) **[RESTRICTION OF PUBLICATION OF PART CLAIMED]; and**

(e) The NBN will be subject to strict regulatory controls which limits the impact of any possible competitive constraint that the HFC Network could have on the NBN.

7.5 In addition, even if it were hypothetically possible for the HFC Network to act as an effective competitive constraint on the NBN, any loss of such competitive impact would be outweighed by the public benefits that would arise if the HFC Agreement were to proceed.

7.6 Further, as outlined in section 6 above, the promotion of infrastructure based competition to the NBN is inconsistent with the Government's policy objective for a viable national wholesale-only highspeed broadband network.

7.7 Each of these points are considered in more detail below.

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The supply of wholesale access services over the HFC Network

- 7.8 If the HFC Agreement does not proceed, the HFC Network will not provide an alternative platform for RSPs in the market for wholesale access services.
- 7.9 As explained above, Optus does not provide wholesale access services over the HFC Network and has no plans to do so in the future. It is not currently possible for Optus to supply wholesale access services over the HFC Network as there are technical difficulties associated with providing wholesale access that would require a major upgrade to the network to be overcome.²⁷
- 7.10 In Optus' response to the ACCC's information request dated 23 September 2011 provided on 10 October 2011 (October Response, see Confidential Annexure 1), we explained that Optus is unlikely to undertake the necessary upgrades to the HFC Network in the future. Upgrading the HFC Network to provide wholesale access services will require a significant capital investment.²⁸ There will be no incentive for Optus to make such an investment in a post-NBN environment because it is unlikely to recover its investment as a result of competitive pressures exerted by the NBN due to its superior technical capabilities, its nationwide coverage and the likely improved access arrangements that would be available on the NBN.
- 7.11 The possibility that Optus or a third party acquirer would invest the capital required to upgrade the HFC Network to compete for the supply of wholesale access services in a post-NBN environment has been considered in the Frontier report dated December 2011 submitted to the ACCC in support of the authorisation application (**Frontier Report**).
- 7.12 Specifically, in section 5.3 of the Frontier Report, it is recognised that, in its present form, wholesale services supplied over the HFC Network are unlikely to be attractive to RSPs due to its comparatively limited geographic footprint relative to the NBN.
- 7.13 Further, in relation to whether a potential acquirer would make the necessary investment, Frontier concludes that:

"However, to be able to compete with the NBN, a potential acquirer of these assets would need to invest considerable sums of capital in sunk assets in order to increase the coverage and capability of the Optus HFC network so that it would be able to provide wholesale services that would attract consumers to it instead of the NBN. Given the natural monopoly characteristics of investments in the infrastructure necessary to provide high-speed fixed broadband services, we do not believe such investment would be likely to be economic (and therefore attractive to a potential investor)."²⁹

- 7.14 Frontier also notes that it is questionable whether Optus would sell its HFC Network in totality given it intends to retain all fibre components of its HFC Network and that this

²⁷See paras 2.13-2.17. 5.13

²⁸Confidential Annexure 1, page 42.

²⁹Frontier Report, para 99.

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then would have potential consequences for any acquirer of the remaining parts of the HFC Network in light of the NBN Access Act wholesale-only requirements. In relation to this, Optus confirms that it would not sell the fibre parts of the HFC Network given that these are also used to support Optus' mobile and business customer services. Further, it is also important to note that the fibre components of the HFC Network constitute the backbone of the network and the other parts of the network are reliant on the fibre components.

- 7.15 Accordingly, there is clear evidence that the HFC Network will not act as a direct competitive constraint in relation to the supply of wholesale access services if the HFC Agreement does not proceed.

The HFC Network does not provide an effective competitive constraint on the Telstra copper network

- 7.16 A key indicator of whether the HFC Network could act as an effective competitive constraint on the NBN (either indirectly at the wholesale level, or on RSPs at the retail level) is whether the HFC Network has acted as an effective competitive constraint on the Telstra copper network. The NBN will be of similar size and scope to the Telstra copper network and will effectively carry the traffic of all services formerly connected to the Telstra copper network once that network is de-commissioned. Both networks provide connection to the customer premise for the purpose of carrying both voice and broadband services.
- 7.17 There is clear evidence to demonstrate that the HFC Network has not acted as an effective competitive constraint on the Telstra copper network.
- 7.18 As set out above in section 5, there is currently a lack of effective competition in the fixed line market today, which is dominated by Telstra.
- 7.19 Currently, only 4.8% of fixed line broadband services in operation in Australia are supplied over the HFC Network. The HFC Network has a limited geographic footprint and, as explained in the Optus' response to the ACCC's information request dated 14 November 2011, provided 22 November 2011 (November Response, see Confidential Annexure 2), in over 15 years, Optus has only been able to achieve a penetration rate of approximately 36% of serviceable premises in the areas it serves in competition with Telstra's HFC and copper networks.
- 7.20 As indicated in Optus' November Response, the number of customers on the HFC Network has remained static over the last few years. The HFC Network is a mature network **[RESTRICTION OF PUBLICATION OF PART CLAIMED]**.
- 7.21 While the HFC Network is technically superior to the Telstra copper network in many respects, it is Optus' experience that the limited scale and the fact that wholesale access is not provided over the HFC Network have been the key reasons why the HFC Network has not acted as an effective constraint on Telstra.

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7.22 These points have been recognised by the ACCC:

"The ACCC has noted in its consideration of the relevant markets in chapter 3 that alternative networks to Telstra's CAN, such as Optus' HFC network, may be a competitive alternative for the owners of these networks, however, they are confined to the extent to which they provide a competitive alternative for other access seekers. Optus' HFC network, which is the largest piece of alternative competitive infrastructure to Telstra's CAN, has a limited geographic footprint which ensures it can not act as a competitive alternative on a national scale".³⁰

- 7.23 As set out at paragraphs 6.7 and 6.8, the 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.
- 7.24 Accordingly, as the HFC Network does not currently act as an effective competitive constraint on the technically inferior Telstra copper network, it is very unlikely to act as a competitive constraint on the technically superior NBN (which will be of similar size and scope to the Telstra copper network) if the HFC Agreement does not proceed.
- 7.25 This is supported by the Frontier Report where it states:

"In the absence of the HFC Agreement, this is unlikely to greatly change in the future. Where Optus is only able to capture approximately 5% of fixed broadband services at present using its HFC network to compete against Telstra's copper network, it is unlikely it will be able to capture any more market share if it uses its HFC network to compete against services provided over the NBN. This is due to the increased functionality and performance of the NBN relative to Telstra's existing copper network, and the commitment of NBN Co to price its entry level products at levels comparable with those for existing broadband services".³¹

- 7.26 In many respects the HFC Network will have a lesser competitive impact on the NBN than it does today on the copper network. This results from:
- (a) the technical superiority of FTTP over the HFC technology; and
 - (b) the disincentives that will prevent Optus from effectively expanding its network in the future.

Inherent limitations of the HFC Network

- 7.27 The inherent limitations of the HFC Network mean that it will be less able to compete against the NBN and, as a result, it will struggle to retain customers on the HFC Network in competition with the NBN over time.

³⁰ ACCC, *Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision* July 2009, page 85

³¹ Frontier Report, para 109.

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- 7.28 In particular, as set out above, the NBN will have a number of advantages over the HFC Network in terms of:
- (a) The geographic scope of the NBN and the number of customers it will be able to supply;
 - (b) The technical capability of the NBN, which will be superior to the HFC Network both in the short term and the long term; and
 - (c) The fact that it will be an open access wholesale only network that will be utilised by a significant number of RSPs.
- 7.29 In addition, there are economic and legislative impediments to Optus upgrading or expanding the HFC Network. As explained at paragraphs 6.26 and 6.27 above, the NBN Access Act will prevent Optus from expanding the HFC Network to serve its own retail customers in direct competition with the NBN. Should Optus wish to expand the HFC Network then it will only be able to provide wholesale based services over the network. As noted above, there is no investment case to support such a scenario.
- 7.30 Accordingly, it is expected that the gap between the NBN and the HFC Network will grow over time as the NBN is upgraded and the HFC Network remains technically static.
- 7.31 This is supported by section 4.2.1 of the Frontier Report which concludes that any competition between Optus and NBN Co will be geographically limited and short lived. The Frontier report also states:

*"While it may be the case that Optus finds it economic to continue to provide services to some of its consumers using its HFC network in the future in the absence of the HFC Agreement, we do not believe this is likely to be significant over time. As indicated in section 4.2.1 above, any enduring competition from services provided over the Optus HFC network in the absence of the HFC Agreement is likely to be limited in duration."*³²

7.32 [RESTRICTION OF PUBLICATION OF PART CLAIMED]

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³² Frontier Report, para 110.

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7.39]

The nature of regulation on the NBN

- 7.40 A key distinction with today's environment is the nature of regulation on the NBN.
- 7.41 Unlike Telstra, the NBN will be structurally separated, and will act as a wholesale only operator. It will have no incentives to discriminate in favour of any RSP. In fact such discrimination is ruled out by a legislative obligation to treat all wholesale customers equally.
- 7.42 In addition, the NBN will be subject to strict oversight by the ACCC. The level of regulatory oversight in many respects reflects the anticipation that this will be a monopoly network that is subject to no effective competitive constraint.
- 7.43 Optus anticipates that the ACCC will ensure that NBN Co's prices are set to recover its efficient costs. On this basis, there is no need for alternate infrastructure, such as the HFC Network, to act as a competitive constraint on NBN Co's pricing.
- 7.44 As NBN Co's pricing will be subject to strict regulatory oversight, even if Optus were to attempt to compete on price, this is unlikely to have any real effect on NBN Co's pricing behaviour. As noted in the Frontier Report:

"In reality, however, we expect this constraint would be unlikely to be significant in this instance for two main reasons. First, NBN Co's access prices will be subject to strict regulatory arrangements such that it will not be able to freely set the prices of its services. In other words, the prices it will be able to set for services provided over its network will already be constrained to a large extent so that any additional constraint offered by retail services provided over the Optus HFC network is likely to be immaterial. Second, the geographic limitations of Optus' HFC network mean that any possible competitive constraint would be limited in its scope."³³

- 7.45 In fact, the hypothetical that the HFC Network could apply competitive constraint to the NBN opens up some real problems. For example, NBN Co may not be able to achieve its own cost recovery if it faces prices that are based on the marginal cost of sunk infrastructure such as the HFC Network. Potential price benefits for the 5% of customers on the HFC Network could raise prices for the 95% of customers on the NBN.³⁴

³³ Frontier Report, para 102.

³⁴ See further Frontier Report, section 7

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8. Conclusion

- 8.1 In conclusion, Optus submits that the ACCC should authorise the relevant provisions of the HFC Agreement as the public benefits associated with the HFC Agreement clearly outweigh any public detriment.