

9 April 2015

Dr Richard Chadwick
General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO BOX 3131
Canberra ACT 2601

By email Richard.Chadwick@accc.gov.au

Dear Dr Chadwick

NBN Co Limited – application for revocation of authorisations (A91290-A91292) and substitution of new authorisations A91479-A91481 – ACCAN submission

NBN Co welcomes the opportunity to respond to the issues raised by ACCAN in their submission dated 26 March 2015.

ACCAN raises a concern about potential detriment to consumers through reduced competition. ACCAN argues that there is potential public benefit from competition between wholesale providers because:

- competition at the wholesale level could provide consumers with choice in the HFC area and potentially lower prices for some entry level broadband services through competing retailers that price locally; and
- competition may also put pressure on the national prices as it would provide a benchmark that could help inform the market and increase discipline on NBN Co.

NBN Co acknowledges that such outcomes may be theoretical possibilities. However, given that the most likely counterfactual is a continuation of the Original Subscriber Agreement such outcomes will not eventuate. Even if the Optus HFC network could compete with the NBN it is unlikely that it would provide any material competitive constraint to the NBN. These arguments are set out in detail in the material before the ACCC - in particular:

- NBN Co's public submission in support of the application for revocation and substitution of a replacement authorisation (**NBN Co Submission**); and
- Optus' public submission in support of the application for revocation and substitution of a replacement authorisation (**Optus Submission**)

Existing contractual arrangements between NBN Co and Optus

In its submission ACCAN notes the Government's policy is to encourage competition at the infrastructure level and goes on to suggest that "under the current policy environment it is feasible that Optus HFC could compete with the NBN Co MTM". However this argument ignores the fact that, as detailed in the NBN Co Submission at paragraph

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88 and in the Optus Submission at paragraph 4.4, both NBN Co and Optus state that in the absence of the Amended and Restated Subscriber Agreement, the Original Subscriber Agreement is likely to continue.

As detailed in NBN Co's public submission the Restated and Amended Subscriber Agreement and the Original Subscriber Agreement share provisions with common core features. While the Amended and Restated Subscriber Agreement includes provisions for the continued use of identified assets by NBN Co as well as variations reflecting the change to an MTM model for the roll out of the NBN, the Original Subscriber Agreement will continue absent the Amended and Restated Subscriber Agreement coming into effect.

If the Original Subscriber Agreement were to continue, the Optus HFC network would not be a network competitor to the NBN going forward. The consequences of this would be:

- a. NBN Co would continue to roll out the NBN consistent with the Government's expectations, although it may well do so using a different mix of access technology and at a different time than would be the case under the Restated and Amended Subscriber Agreement; and
- b. Optus would continue to service existing customers and to the extent possible migrate them as the NBN rolls out, as well as progressively decommissioning the HFC network, receiving migration payments and preferring NBN Co's fixed line services.

Even if the Original Subscriber Agreement were not to continue, the Optus HFC network is unlikely to provide any material competitive constraint given:

- a. that the Optus HFC network has a limited footprint and Optus has no plans to expand it;
- b. that Optus is unlikely to undertake significant upgrades or investment in the HFC network;
- c. that competition between the HFC network and the NBN would be unlikely to endure in the long term due to the NBN's economies of scale; and
- d. the nature of the regulatory framework under which NBN Co operates.¹

Accordingly, NBN Co notes that while in theory an existing HFC network could compete with the NBN, the nature of the contractual arrangements between Optus and NBN Co make this an improbable scenario and, in any event, such competition is likely to be limited.

No material change in circumstances

In its submission ACCAN states that there has been a material changes in circumstances since the authorisation was originally granted. In this regard ACCAN highlight that NBN Co is now using a mix of technologies to deliver its broadband obligations and the government is promoting competition at an infrastructure level.

NBN Co does not agree that there has been a material change in circumstances since the original authorisation was granted. In particular the revised Statement of Expectation (issued on 8 April 2014) requires NBN Co to complete the rollout of the NBN with the objective of ensuring that all Australians have affordable access to very fast broadband. The shift to MTM simply provides NBN Co with the flexibility to decide which technology to use to achieve this objective based on that which is best suited to meet consumer demand at lowest cost and expedited rollout. Despite this mix of technologies NBN Co intends to offer services which are comparable, in speed and functionality, across the various technology platforms.

¹ Optus submission paras 1.11, 4.7, 6.8 - 6.21; see also NBN Co submission 178-182

While the Government's policy is to maximise competition at all levels of the telecommunications industry, including at the wholesale level, it would be incorrect to say that the Government intends there to be competition between existing HFC networks and the NBN. To the contrary, the Government's revised Statement of Expectations specifically requires that NBN Co will integrate existing HFC networks into the rollout where this is feasible and economically beneficial.

Accordingly, while NBN Co acknowledges that since 2012 there have been changes to NBN Co's rollout strategy and to the Government's policy settings these do not give rise to a relevant change in circumstances for the purposes of considering the authorisation application.

If you would like further information about any of the issues raised in the letter please do not hesitate to contact me.

Yours sincerely



Caroline Lovell
Chief Regulatory Officer