



nbn's submission on Telstra and TPG application for merger authorisation for proposed spectrum sharing in regional Australia

14 June 2022

Final



nbn welcomes the opportunity to comment on the merger authorisation application (the **Application**) lodged by Telstra and TPG (the **Applicants**) in respect of Telstra's acquisition of spectrum held by TPG.

We understand the parties are only seeking authorisation of those aspects of their arrangements that involve the acquisition or deemed acquisition of assets (which appears to be limited to the use of spectrum under the Spectrum Agreement) and are not seeking authorisation of the arrangements generally. However, the effects of the broader arrangements may be relevant to an assessment of the competitive effect or public benefits of the acquisition.

As **nbn** does not supply cellular mobile voice or data services we have limited feedback on issues of mobile competition. We note, however, that 5G mobile services are increasingly being marketed as alternatives or substitutes for **nbn** broadband services and as an alternative to a fixed voice service.¹ Internet-of-things offerings are also often supplied to fixed locations and therefore can be supplied via either a mobile or fixed service. **nbn** therefore faces competition from Telstra's and TPG's mobile voice and data services in the supply of voice-capable services, fixed broadband services and internet-of-things services. As a provider of fixed wireless broadband services, **nbn** has a particular interest in the implications of the transaction for spectrum as fixed wireless and mobile networks share the same ecosystem, with network operators generally competing to acquire spectrum in the same bands. We have therefore provided comments relevant to spectrum below.²

While not a primary consideration in the ACCC's assessment of this Application, we also have a keen interest in ensuring that the right settings for a level playing field are maintained for competition for broadband and voice-capable services including being subject to the Regional Broadband Scheme levy. This is given the levels of fixed line to fixed wireless substitution that is increasingly occurring. Given this we have provided comments relating to the competitive effects that the Applicants' fixed wireless services could have in the market for superfast broadband services *supplied to a premises*, particularly as a substitute for **nbn**'s fixed line and fixed wireless services within the Regional Coverage Zone.

Spectrum

We understand that the Applicants seek merger authorisation of the use by Telstra of spectrum held by TPG for a period of 10 years, with two options for TPG to extend the agreement by a further 5 years. Generally, the ability to have long-term certainty of access to spectrum is of significant investment value given the ability to amortise major network investments required to deploy the spectrum.³ The significantly long-term nature of the proposed agreement should also be considered against recent changes to the *Radiocommunications Act 1992* that enable spectrum and apparatus licences with a maximum term of 20 years compared to the previous maximum term of 15 years and 5 years respectively.⁴

We submit that the ACCC's assessment should consider Telstra's ability to enjoy access to TPG's spectrum for the proposed extensive duration and its impact on the primary market for spectrum (including as a result of its impact on relevant mobile markets) given the commercial considerations outlined below:

¹ The Applicants note this substitutability of 5G services for fixed broadband services in their Application: paragraphs 187(c) and 290.

² We understand that the ACCC is also due to provide its allocation limits advice to the ACMA for the 3.4 GHz and 3.7 GHz bands spectrum licence allocation by 1 August 2022.

³ See the 'Licence duration' section of the ACMA's 'Our approach to radiocommunications licensing and allocation, Implementing the Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020, March 2021' accessed at https://www.acma.gov.au/sites/default/files/2021-06/Our_approach_to_radcomms_licensing_and_allocation_information_paper.pdf

⁴ *Radiocommunications Legislation Amendment (Reform and Modernisation) Act 2020*.



- The pooled spectrum under the MOCN is to be used by the Applicants in proportion to their competitive position in the market with a six month first-mover advantage provided to Telstra for 5G and any future technology generations as agreed.⁵ The ACCC's assessment should consider the possibility that in the Regional Coverage Zone, if TPG does not in fact develop a substantial regional customer base,⁶ much of this spectrum may be used by Telstra allowing it to increase its market share in the Regional Coverage Zone, effectively circumventing the competition limits implemented in recent spectrum auctions following the ACCC's advice.⁷
- We do not have full visibility of the Application and pricing which would inform commercial incentives in relation to TPG's ability to withdraw its authorisation of spectrum on 6 months notice.⁸

General competition concerns

Separately, we note the Applicants' intention for the proposed agreement to provide Telstra and TPG with the ability to supply 5G fixed wireless services. Whilst not a primary consideration in the ACCC's assessment of this Application, **nbn** suggests that the ACCC maintain a watching brief on the competitive effects these fixed wireless services have in the market for superfast broadband services supplied *to a premises*, particularly as a substitute for **nbn**'s fixed line and fixed wireless services within the Regional Coverage Zone. In particular:

Superfast Broadband Access Service (SBAS)

Depending on the scale and scope of the Applicants' deployments, it may be reasonable for the ACCC to re-visit its 2021 decision to exclude fixed wireless infrastructure from the scope of the Superfast Broadband Access Service declaration.⁹

This is particularly relevant to TPG who have a stated ambition to '*bring NBN customers onto 5G fixed wireless services*' and who recently lodged a functional separation undertaking with the ACCC in respect of superfast broadband services supplied over its fixed networks.¹⁰ In this context **nbn** maintains our long-held position that where there is infrastructure competition, there must be a regulatory level playing field to best promote the long-term interest of end users.

Regional Broadband Scheme (RBS)

We note that 4G/5G fixed wireless services to the premises are not required to pay the RBS levy even though they are often marketed as direct substitutes for superfast broadband services supplied *to a premises*. This omission provides 4G/5G fixed wireless network operators a distinct competitive advantage and harms the ability of fixed line operators that contribute to the levy to effectively compete against fixed wireless competitors selling *substitutable services*. The churn of services from fixed line operators to fixed wireless operators will reduce the RBS funding base meaning that the levy will need to increase over time further deteriorating the ability of fixed

⁵ Application, see paragraph 241 and 139.

⁶ The sections of the Application relating to TPG's commercial rationale and counterfactuals are heavily redacted so it is difficult to comment. The ACCC should consider whether the transaction and pricing provides incentives to TPG to focus on its improved ability to compete in metro and urban areas (as highlighted in paragraph 235 of the Application) rather than on growing its customer base of end users located in the Regional Coverage Zone.

⁷ See Radiocommunications (Spectrum Licence Limits—850/900 MHz Band) Direction 2021 and Radiocommunications (Spectrum Licence Limits—3.6 GHz Band) Direction 2018.

⁸ Application, paragraph 125.

⁹ ACCC, Superfast Broadband Access Service and Local Bitstream Access Service declaration inquiry - Final Decision, July 2021

¹⁰ TPG, 2020 annual results, Feb 2021 <https://www.tpgtelecom.com.au/sites/default/files/asx-announcements/TPG%20Telecom%20-%20FY20%20Results%20Presentation%20-%20for%20release.pdf>



line operators to compete with fixed wireless operators. The purpose of the RBS levy is to sustainably fund the net costs of non-commercial broadband services over **nbn**'s fixed wireless and satellite networks, which provide access to essential broadband services predominantly in regional Australia. **nbn** considers that the ACCC should consider the substitutability of 4G/5G fixed wireless services for superfast broadband services as part of the next review of the Regional Broadband Scheme.