

14 November 2014

Daniel Tangri
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Department of Communications
Canberra, Australia

By Email

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Dear Mr Tangri

RE: Consultation on Carrier licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014

Nextgen welcomes the opportunity to provide comment on the proposed Carrier Licence Condition for networks capable of supplying superfast carriage services to residential customers.

As outlined in the early assessment Regulation Impact Statement (RIS) which accompanied the draft Carrier Licence Condition, there have been sustained efforts to reform Australia's telecommunications sector in recent years. In order to resolve the problem of vertical integration which had long bedevilled the sector and limited both investment and competitive dynamics, the Rudd Government announced the establishment of NBN Co to build and operate a new National Broadband Network (NBN) in April 2009.

The NBN is a vehicle for increased investment in next generation broadband, centred upon an upgrade of the local access network with a corresponding reduction — over time — on use of the existing copper access network, which is owned by Telstra. In order to address competition issues:

- NBN Co was directed to operate on an open access, wholesale only and non-discriminatory basis;
- Legislation that would require Telstra to functionally separate unless it chose to structurally separate was introduced; and
- Amendments were introduced to the *Telecommunications Act 1997* (the Act), requiring new networks that were capable of providing download speeds of more than 25 Mbps to residential and small business customers to operate on an open access, wholesale only and non-discriminatory basis — these amendments are contained in Parts 7 and 8 of the Act.

In simple terms, the various measures above were geared towards the establishment of a level playing field for both NBN Co and other participants in the market — to paraphrase the RIS, “they mean service providers who do not own certain network assets are not disadvantaged by having to compete with operators who own their own networks and can advantage themselves over their competitors”.

While attention as to the impact of the above reform measures is generally focussed on retail markets downstream of the NBN, it should not be forgotten that establishment of the NBN — based spatially on 121 points of interconnect — also provided an opportunity for improving competitive dynamics in the **upstream** wholesale markets which underpin the availability of modern telecommunication services in Australia. Indeed, it was on this basis that Nextgen was supportive of the NBN initiative.

Following the election of the Abbott Government in September 2013, and the announcement of a transition to a multi-technology (MTM) mix rollout model for the NBN, TPG Telecom announced its plans to deploy a fibre-to-the basement (FTTB) broadband network — focussed predominantly on multi-dwelling units — utilising existing fibre assets. As these assets were established before 1 January 2011, parts 7 and 8 of the Act does not apply to them.

Although — as the RIS notes — TPG has not provided any details of the service it intends to provide over its network, the proposal itself clearly represents a threat to the competition objectives associated with the earlier reforms. TPG's proposal — especially if it were to be pursued by others — also represents a threat to the ongoing viability of the NBN construct because it reduces the ability for NBN Co to cross-subsidise services in regional areas with revenues from services in metropolitan areas.

In order to support the competition objectives embodied in the earlier reforms, and implicitly protect the commercial model associated with NBN Co, the Minister for Communications has proposed the introduction of a new carrier licence condition which would require the owners of high-speed networks, capable of providing broadband services faster than 25 Mbps and outside the scope of Parts 7 and 8 of the Act, to functionally separate their wholesale operations and provide access to competing service providers on the same terms as it is provided to their own retail operations, where they intend to provide services over those networks in competition with NBN Co.

Nextgen has previously indicated publically that it does not support the development of development of FTTB infrastructure which will compete with NBN Co. Indeed, this position was a central part of our recent submission to the Vertigan Review's 'Regulatory Issues Framing Paper'.¹

Noting that the 'Regulatory Issues Framing Paper' asked respondents to prioritise a range of working assumptions about NBN Co and domestic telecommunications sector policy — and the trade-offs between these — Nextgen opposed the possibility of competing FTTB infrastructure on the basis that this threatened various objectives associated with the structural model which we had signed up for several years earlier, namely structural separation, NBN Co's commerciality, competitive market outcomes and the long term interests of end users.

Significantly, in the submission referred to above Nextgen's opposition to the development of competing FTTB infrastructure had a corollary. That is, if measures were to be taken to protect NBN Co's remit to be the monopoly provider of local access network services then NBN Co should equally be subject to measures which constrain the activities which it is permitted to undertake.

Of particular concern to Nextgen is NBN Co's proposed Cell Site Access Service (CSAS), under which it would provide tower backhaul services to the operators of mobile phone networks.

Similar to the TPG proposal, there has been extreme reticence on the behalf of NBN Co when it comes to providing details about the proposed CSAS to market participants.

Similar to the TPG proposal, there has been no engagement with the regulator by NBN Co in relation to the proposed product.

Similar to the TPG proposal, NBN Co's proposed CSAS entails the use of assets held in one part of the market to gain advantage over competitors in another part of the market without the same assets (and indeed are restricted from having such assets).

¹ See: http://www.communications.gov.au/_data/assets/pdf_file/0017/217421/Nextgen_submission.pdf

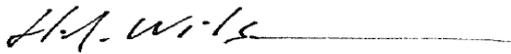
Similar to the TPG proposal, NBN Co's CSAS proposal threatens the broader competition objectives associated with the reform measures which have been implemented in recent years.

Distinct to TPG, NBN Co is a publically owned entity which is meant to comply with the principles of competitive neutrality wherever it canvasses moving into a market which is already competitive. Suffice to say, there has been no indication from NBN Co that it intends to adhere to this principle with its proposed CSAS, despite its reliance on extensive internal cross-subsidisation. In this context it is noted that the Vertigan Review was explicit in highlighting the need for NBN Co to comply with the principles of competitive neutrality and this area has also under close attention as part of the Harper Review.

In closing Nextgen — consistent with its earlier position — supports the Carrier Licence Condition which has been proposed for networks capable of supplying superfast carriage services to residential customers by the Minister, because this supports the pursuit of overarching competition objectives. That said, Nextgen would welcome a similar commitment by the Minister and the Government to the pursuit of these competition objectives when matters of scope creep by NBN Co — such as the proposed CSAS — arise.

Nextgen would welcome the opportunity to discuss this submission in more detail with the Department.

Yours sincerely



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NEXTGEN GROUP