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Mr Philip Mason
Assistant Secretary, Market Structure
Department of Communications and the Arts
38 Sydney Avenue
FORREST ACT 2603

Dear Philip

Public version

Proposed carrier licence conditions – networks in new developments

Thank you for the opportunity to respond to the proposed declarations[1] and associated Regulatory Impact Statement[2] regarding carrier licence conditions in new developments. OptiComm installs and operates networks in Greenfield developments, as such the proposed regulation is very relevant to our operations and we consider that we are in a unique position to provide insight that will assist the Department in its deliberations.

Commercially sensitive information that is designated by [c-i-c starts and c-i-c ends] has been redacted from this version of the submission. We do not consider that this information alters the submission in any meaningful way but we ask that the Department maintain the confidentiality of this information and the submission is provided on this basis. This public version of the submission may be published.

Overall, OptiComm broadly agrees with the Department's assessment of the potential problem, that without targeted regulation homeowners in new developments may end up with poor quality networks. We consider it appropriate for the Department to address this issue to minimise the adverse effect this could have on end-users and therefore support the decision to impose regulation. We do, however, have serious concerns regarding aspects of the regulation in its draft form. In particular, we consider that placing NBN Co in the position of being a quasi-standards and price setting body is a dangerous mistake that is very likely to create an anti-competitive environment in the telecommunications industry and this is exacerbated by excluding Telstra and NBN Co from the proposed CLCs. Further, we consider that it is a mistake to mandate the provision of Free to Air TV and Pay TV services by telecommunications carriers when such services are not within the scope of our industry and are already very well provisioned by the existing broadcast entities that make such services commercially available.

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[1] *Carrier Licence Conditions (Networks in New Developments Reporting Requirements) Declaration 2016* and *Carrier Licence Conditions (Networks in New Development) Declaration 2016*

[2] Department of Communications and the Arts, *Quality Telecommunications Outcomes in New Developments – Regulation Impact Statement*, Draft for Comment – 18 December 2015

This submission explains OptiComm's concerns and contains suggestions on how the proposed regulation can be improved in order to meet the Government's objectives but lessen the adverse impact on competition presented by the current draft CLCs.

A. Executive Summary

- OptiComm agrees with the Department's assessment that regulation of networks in new developments is prudent.

- NBN Co and Telstra are participants in the telecommunications industry and should be subject to the same regulation as any other carrier. To do otherwise places NBN Co and Telstra in the position where they could use their significant market power to damage competition, which ultimately is detrimental to the long-term interests of end-users of telecommunications services.

- NBN Co must have absolutely no role as a standards setting body. This is the role of Communications Alliance. If NBN Co is given this role, it is likely it will use it to damage competition.

- NBN Co must not have the ability to set prices for the industry. This is the role of the ACCC. If NBN Co is given this role, it is likely it will use it to damage competition.

- Telecommunications carriers should not be required to ensure that their networks support the provision of broadcast Free to Air television or subscription TV services.

B. Regulatory Impact Statement

As noted in the Regulatory Impact Statement (**RIS**), current Government policy[3] seeks to increase efficiency and innovation in the provision of telecommunications infrastructure by encouraging competition and also to ensure that occupants of new developments receive timely access to high quality telecommunications services, and for occupants in new developments to receive good quality high speed broadband services[4]. These are very reasonable policy objectives and in our view the objectives can be achieved mutually, without one objective cancelling out achievement of another. We consider it vital that the competition objective is given the weight that it deserves when regulatory options are considered and is not placed in second position to an option that seemingly attempts to mandate replication of the NBN Co in all new developments. The promotion of competition is an established and important objective that forms the framework of Australian telecommunications legislation. It is an object of both the Telecommunications Act[5] and the telecommunications specific provisions of the Competition and Consumer Act[6] that is aimed at promoting the long term interests of end-users of telecommunications services.

[3] Telecommunications Infrastructure in New Developments policy
[4] RIS, pp 1-2
[5] *Telecommunications Act 1997* (Cth) , s.3
[6] S.152AB(2)(c)

We are concerned that the Department's assessment of the problem and the options to resolve the problem demonstrate inadequate regard to the promotion of competition for services in new developments by placing it secondary to the promotion of homogenous networks designed by a single and dominant player in the market, NBN Co. This ignores competitive neutrality and the benefits that innovation and competition bring to consumers and the economy. Whether this has been done inadvertently or not, if left uncorrected such a strategy will create an environment where NBN Co will have an ability and incentive to implement actions that will damage its competitors. In particular, these conditions arise because of the Department's preliminary proposal that wholesale pricing and network specifications should reflect those of NBN Co. In effect, this results in NBN Co being the able to set service standards and industry prices. This is an extraordinary situation given that NBN Co will be the dominant player in the market for the supply of wholesale telecommunications services. There is no doubt that NBN Co has the incentive to implement actions to damage competition in the market in which it operates. Combining this incentive with a regulated ability to damage competitors makes it extremely likely that NBN Co will use this position to its competitive advantage and that this will lead to poor outcomes for end-users. OptiComm considers that the responsibility for the regulation of wholesale pricing and service standards should rest with the independent organisations that have traditionally fulfilled this role, Communications Alliance and the ACCC.

C. The RIS Questions for Consultation

1. *Do you agree with the problem description? Why or why not?*

   Yes. There is potential for a carrier (or a developer) to install a network of poor quality and for an inadequate number of RSPs to agree to acquire wholesale services from a carrier servicing a new development. We do not, however, necessarily agree that Telstra's decision to not provide services over another carrier's network relates solely to concerns about network quality or the need to invest in alternative platforms. Given Telstra's current dominant position in the provision of wholesale telecommunications services and its likely ongoing dominant position in the provision of retail telecommunications services, we consider that Telstra's non-connect decision is based upon its commercial decision not to enter into contractual arrangements that assist its wholesale competitors.

2. *Do you agree with the assessment criteria? Why or why not?*

   OptiComm in principle agrees with the Department's five assessment criteria outlined on Page 6 of the RIS though we note that the criteria are framed in a manner whereby they are subjective, lack clear measurement criteria and have no clear base-line for comparison or assessment.

   We consider that a glaring omission from the listed criteria is the need to ensure the promotion of competition and therefore recommend the inclusion of the following criterion:

   - *Does this option promote market competition?*

Further, we consider the criteria should assess whether each option assists in providing interconnection between wholesale and retail service providers, i.e. through enabling development of a standard B2B interface. This would promote competition and assist the integration process when one carrier is taking over operation of another carrier's network. Currently, with multiple interfaces RSPs are reluctant to connect to networks of further carriers. A common interface would result in a higher level of RSP acceptance.

3. *Do you agree with the assessment of options? Why or why not?*

   Broadly speaking, OptiComm agrees with the Department's assessment of the four available options and that the imposition of CLCs is likely to be the most effective means to minimise the problem and lead to favourable outcomes for the residents of new developments.

4. *Do you agree with the tentative preferred option? Why or why not?*

   As stated above in relation to Question 3, OptiComm agrees that declaration of CLCs is the preferable option, with some important caveats:

   - The CLCs must also apply to NBN Co and Telstra.
   - NBN Co should have no role in setting standards or prices that apply to industry participants because of the CLCs, whether that role is explicit or indirect such as being regarded as the benchmark for compliance.
   - The CLCs must have regard to independent organisations such as Communications Alliance and the ACCC in order to assess compliance with any applicable specifications, service obligations, and price structures.
   - The provisioning and fault rectification time frames should be included as amendments to the CSG Standard, applying to all internet services and all providers, and as such benefitting all consumers rather than being included in a CLC of limited scope that will only benefit a small number of consumers.

   We provide further detail about our concerns in regards to the application of CLCs and how these concerns can be overcome below, in relation to specific provisions of the draft declarations.

5. *What are the main cost drivers for each option? What is the estimated cost of each driver?*

   Compliance with Options 2, 3, or 4 will impose additional costs on carriers, such as paying for certification and administration of reporting obligations. We do not have

any data to supply estimates of these costs.

6. *What are the estimated costs to comply with the proposed reporting and certification requirements in the CLCs?*

   We do not have any data to supply estimates of these costs.

7. *What would be the cost of retrofitting a development with telecommunications infrastructure relative to the cost of installing infrastructure of specified quality upfront?*

   This is a difficult question to answer as it depends entirely of the standard of the existing infrastructure being upgraded or retrofitted. Assuming the pit and pipe is built to meet the G645:2011 guidelines, the cost of active headend and NTD equipment would be in the vicinity of [c-i-c starts c-i-c ends] per dwelling. To replace the in-street passive cabling could be an additional cost of [c-i-c starts c-i-c ends] per dwelling. Retrofitting FTA and Pay TV services would be expensive and would have to be passed on to consumers. The cost of replacing an ONT that is not RF capable would be about $400 and the homeowner would have to pay several hundred dollars to install coaxial cable through their premises to the NT location. Given the homeowner is most likely to already have a TV antenna on their roof, this seems like an unnecessary extra expense for homeowners to incur.

8. *Would your infrastructure meet the network quality and integration standards set out in the CLCs? If no, what is the estimated increase (in % terms) in up-front rollout costs to meet those requirements?*

   OptiComm networks would fully meet the standards of service delivery and reliability as set out in the CLCs. As there are no standards defined for the interface, OptiComm cannot confirm that its networks are compliant. OptiComm builds networks to Australian and international standards and is willing to comply with any minimum standard or specification defined by Communications Alliance.

9. *Would you have to implement any new business practices and training programs as a result of the CLCs? If yes, how many estimated hours of training and documentation redesign would be required to align with the new requirements?*

   Yes, however we do not have data to provide an estimate of the time and work hours that it would take us to undertake the required work.

10. *Would your current business practices meet the service connection and repair timeframes in the CLCs? If no, what is the estimated increase (in % terms) in your operating costs to meet the higher service standards?*

    We currently provide service level agreements (**SLAs**) to our RSPs for fault rectification, however, we do not meet the provisioning and fault rectification timeframes set out in the draft CLCs. We consider it would be very expensive to

meet those timeframes. In comparison to telephone faults, broadband faults are often far more complex and technical, taking more time to repair. To attempt to meet the CLC's time frames, carriers would at a minimum be required to employ far more field staff in far more locations. These are costs that would have to be passed on to consumers and result in higher fees.

The draft CLC's service connection and repair timeframe provisions impose obligations on carriers that are a very significant addition to the Customer Service Guarantee Standard (**the CSG**), i.e. by in effect applying the CSG's regulation to broadband services and not to solely the standard telephone service as is the case with the CSG. It is entirely unreasonable that this could apply only to carriers other than NBN Co or Telstra. If the Department wants to ensure that consumers are provided with reliable broadband services with mandatory provisioning and fault rectification time frames, then the obligations must apply to all carriers. Making this obligation a condition of a carrier's licence leaves carriers open to significant civil penalties for any failures to comply, which potentially goes well beyond the established compensation provisions in the CSG. We consider it astounding that this regulation would be applied to any carriers in new developments except NBN Co and Telstra and ask that the Department seriously reconsider why those two carriers are given a free pass to act as they please. We note that NBN Co's wholesale business agreement (**WBA**) does not provide SLAs to its RSPs for failing to meet reasonable timeframes in broadband connections and fault rectification and during negotiation of the WBA, NBN Co fought hard and long to avoid even having to accept any obligations relating to the CSG for delays in connecting or repairing faults in standard telephone services even though the CSG is long standing regulation put in place by the Government to ensure that consumers have reliable access to an essential service.

We consider that the Government's objective would be better achieved through amendment to the CSG so that it captures all service providers and all broadband, including HFC, FTTN, wireless and ADSL as opposed to only networks in new estates that are serviced by networks that are captured by a narrowly targeted CLC. We believe that customers on other networks should be entitled to the same service levels as in new developments.

11. *How many individual developments do you rollout infrastructure in per annum?*

OptiComm rolls out infrastructure in several hundred new stages across our developments each year.

D. CLC (Networks in New Developments) Declaration 2016

We consider that several important amendments must be made to the draft CLC (Networks in New Developments) Declaration in order to provide a level playing field amongst carriers, to promote competition, and to ensure the best outcomes for end-users of telecommunications services in new estates. Of particular importance:

- The CLCs must capture all market participants, including Telstra and NBN Co.

- NBN Co must have no unilateral role in setting standards or prices that apply to other market participants and its direct competitors, whether directly or indirectly. NBN Co's role should be limited to assisting the appropriate regulator where required.

- Telecommunications carriers must not be required to ensure that their networks support the provision of free-to-air broadcasting services or subscription broadcasting services. This would result in far higher costs for consumers and for very limited benefit considering broadcasting companies already provide this service very well.

- The provisioning and fault rectification time frames should be included as amendments to the CSG Standard, applying to all internet services and all providers, and as such benefitting all consumers rather than being included in a CLC of limited scope that will only benefit a small number of consumers.

We provide the following comments regarding specific provisions in the draft declaration:

Definition of "specified carrier" – this definition must not exclude Telstra and/or NBN Co. Both carriers are competitors in the market and must be subject to the same CLCs as other market participants in order to ensure a level playing field and to avoid encouraging market conditions that promote anti-competitive behaviour. Imposing strict regulation only on other carriers implies that the Department believes that only Telstra and NBN Co can be trusted to build and operate high quality networks with high levels of service to end-users and RSPs. This is unfair and easily demonstrated as incorrect given NBN Co's frequently reported poor track record for meeting network rollout time frames and numerous instances where Telstra's disregard for both its retail and wholesale customers has required protracted regulatory intervention. Given NBN Co and Telstra will be dominant market players, it is fundamentally necessary that they are subject to the same regulation as other carriers.

Definition of "specified new development network or network" – this definition needs to specify that it only means networks that came into existence after the commencement of the CLCs. If this is not done, the application of section 4(1)(b) will result in "old" networks being subject to the CLCs merely because of a change in control, which is likely to have unexpected consequences such as no carrier being legally able to operate an old network.

Definition of "type 1 premises" – this definition needs to be more specific, namely that it means that the carrier NTD (ONT) is installed and ready for retail services to be provisioned.

Definition of "type 2 premises" – this definition needs to provide some level of flexibility, for example by the addition of "and there is no impediment reasonably preventing or delaying the provision of services to the premises" to the end of the definition.

For example, though network infrastructure may be within 500 metres of the premises, the provisioning may be made difficult or impossible because of several reasons, such as the 500 metres containing land that the carrier cannot access including areas of environmental, aboriginal or cultural heritage significance[7]; particular types of land use such as a freeway, an airport or defence facility; geographic considerations such as surface rock or a lake; or a landowner that objects to the carrier attempting to access the site.

4(1)(b) – please see our comments above regarding the definition of specified new development network or network.

5(3)(b)(i) – NBN Co is a competitor in the market for the provision of wholesale broadband services, not a standards body or a regulator. The nature of competition is that competitors will do anything they can legally get away with to damage their competitors. As the incumbent operator, Telstra has done this repeatedly and there is no reason to believe that NBN Co will act differently.

The underlying concept of this clause is reasonable, i.e. that new networks must be capable of being upgraded in line with technological improvements, however it would be a fundamental error to tie this obligation to NBN Co's network or its business plans. We consider it important to recognise that the regulation should be designed to promote good service outcomes for consumers rather than make any attempt to stipulate the type of technology used to provide that service outcome. In particular, NBN Co should not be able to specify the type of technology used to provide a service outcome.

This clause must be amended to provide that an independent industry body is responsible for setting acceptable technological standards that networks are required to be capable of meeting. We consider that Communications Alliance is the appropriately experienced body to fulfil this role, which allows for full and open industry participation in decisions as well as regard to international technological improvements. An obvious example of how NBN Co will use this clause to damage its competitors is to implement a technological change that for some reason is difficult or prohibitively expensive for other carriers to replicate, thus placing them in breach of the CLC. The construction and provision of telecommunications networks is a long game that involves considerable investment in sunk infrastructure. The current drafting of this provision would allow NBN Co to plan and implement technological changes behind closed doors and under a blanket of commercial secrecy, leaving its competitors in a

[7] Pursuant to s.2.5 of the *Telecommunications (Low-impact Facilities) Determination 1997*, carriers cannot use the carrier land access powers provided by Schedule 2 of the *Telecommunications Act 1997* to install facilities in areas of environmental significance.

position of having to make considerable unplanned expenditure to alter an existing network and further, without that alteration necessarily improving services to end-users.

5(3)(b)(ii) – OptiComm assumes the principle behind this clause is that in the event a carrier goes into administration, it is technologically possible for another provider to take control of and continue to operate the failed provider's network. OptiComm accepts the principle of integration, however, carriers should be allowed to implement different technologies, protocols and network designs. If all networks are forced to implement the same vendors and configuration, it will stifle innovation and will increase costs. We consider that any assessment of whether a network is capable of integration should be based upon internationally accepted standards and assessed by an independent industry body such as Communications Alliance and definitely not be a unilateral decision by an industry participant such as NBN Co.

5(3)(c)(iii) & (iv) – under no circumstances should the delivery of free-to-air broadcasting services or subscription broadcasting services be a CLC. There are adequate and highly developed FTA and Pay TV broadcast network across Australia. There is no need to add costs to already expensive telecommunications networks to provide services that are not part of a licenced telecommunications carrier's requirements. We consider it unreasonable to expect that homeowners would be required to pay additional amounts to enable networks to provide FTA TV and Pay TV when those services are already very well provided for by broadcasting companies.

5(3)(d) – OptiComm accepts the principle underlying this clause, however the minimum standards should be stipulated by Communications Alliance and not by NBN Co.

5(3)(e) – OptiComm accepts the principle underlying this clause, however the minimum standards should be stipulated by Communications Alliance and not by NBN Co.

5(4) – OptiComm accepts the principle underlying this clause, however, the certification must be on an estate by estate basis, not on a stage by stage basis in a development as this will substantially increase the cost of compliance and result in significant provisioning delays. Once the headworks in a new development have been completed and the first premises connected and certified within the estate, the remainder of stages should be deemed as compliant, as long as no substantial changes are made to the design.

5(6) – OptiComm objects to any potential publication of its commercially sensitive information and we do not agree to the publication or other dissemination of our developer agreements. For example, NBN Co could use this commercially sensitive information against its competitors and damage competition. We do not object to developer agreements being provided to the ACMA or ACCC for the purposes stated in the note preceding section 5(6) and if confidentiality is maintained, however the limitations on the regulators' use of the agreements must be stated in the section itself rather than in a note that provides no protection as it has no legislative weight, even if included in the Declaration's explanatory memorandum.

5(6A) – OptiComm strenuously objects to the publication of its commercially sensitive information and we do not agree to the publication or other dissemination of our developer agreements, wholesale price list, our Master Services Agreement (MSA) or our Service Level Agreements (SLA).

This is an astounding provision, particularly as in the current draft CLC, it does not apply to NBN Co or to Telstra. Telstra, for example has vigorously defended the confidentiality of its wholesale agreements on numerous occasions. In the vast number of ACCC access disputes, Federal Court, Australian Competition Tribunal, and High Court proceedings concerning the fairness of Telstra's wholesale access agreements for declared services, Telstra always successfully demanded that the actual access agreements be kept confidential, such that they were never disclosed in the ACCC's final determinations or in the Court transcripts or publicly available evidence. It beggars belief that the Department considers that similar regard should not be given to the commercially sensitive information and business interests of other carriers, when the ACCC and all Australian Courts have on numerous occasions considered that Telstra's commercially sensitive information should be kept confidential even when it was the actual subject of proceedings. We consider that this provision should be deleted.

5(7) – OptiComm accepts this clause only if it is subject to the payment of connection fees prior to installation of the NTD (ONT). An end-user cannot insist on installation of the NTD to meet licence carrier conditions time frame without acceptance of the payment terms.

5(11) – NBN Co is not a pricing or competition regulator and therefore must not be delegated the power to set technological standards, service specifications or market prices. That is the role of the ACCC and Communications Alliance.

5(12) – (15) – There is a material difference between on one hand, the imposition of a CLC imposing mandated provisioning time frames for the provision and fault rectification of broadband services, and on the other hand, NBN Co 's commercial obligations in its WBA and Telstra's provisioning and fault repair time frames with regard to the standard telephone service in the CSG. It is wrong of the Department to consider it is reasonable to compare the three situations as the repercussions for failing to meet a CLC are extremely material in comparison to the low materiality impact of breaches of the NBN Co WBA or the CSG.

For example:

- the WBA provides very limited recourse if NBN Co fails to achieve reasonable provisioning or fault rectification timeframes and the reality is that beyond NBN Co having an obligation to pay CSG compensation for delays relating to the standard telephone service only, NBN Co caused delays will damage the reputation of the relevant RSP rather than have a negative impact on NBN Co. This is simply reflective of NBN Co's dominant market position and steadfast refusal to negotiate reasonably with its RSP customers.
- Telstra may be liable to pay compensation under the CSG for delays relating (only) to

the standard telephone service (not broadband services), but the amounts of compensation payable are low, ranging from $14.52/day for a residential phone line up to $48.40/day after the first 5 days.

Whereas, s.68 of the *Telecommunications Act 1997* provides that compliance with a CLC is mandatory and that failure to do so is a breach of a 'civil penalty provision'. Section 570(3)(a) of the *Telecommunications Act 1997* provides that the penalty for breach of a civil penalty provision is up to $10 million for each contravention. This means that though NBN Co or Telstra may have to pay $14.52/day for a breach of the CSG, if another carrier fails to activate or repair services in a new development then that carrier faces penalties of up to $10 million for each service affected by the delay. This is another glaring example of how the Department's failure to include NBN Co and Telstra in the CLCs is fundamentally anti-competitive.

If the Government's aim is to ensure that consumers are provided with reliable provisioning and fault repairs for their internet services, then the CLC's provisioning and fault rectification time frames should be included as amendments to the CSG Standard, expanding it beyond the standard telephone service, and applying to all internet services and all providers. This would benefit all consumers rather, which is not done by inclusion in a CLC of limited scope that will only benefit a small number of consumers in new developments.

5(12) – it needs to be made clear that these time frames only apply when the development and the network have actually been constructed. If this is not done, then it will lead to the absurd situation where a carrier that receives a connection request will be in breach of a CLC even though the development is not completed and practical completion of the network has not been achieved or a compliance certificate as contemplated by s 5(4) has not been obtained.

5(16) – again the Department seems to be unaware of the repercussions and anti-competitive impact of the CLCs. The reporting obligations require carriers to admit via publication on its website if it has been in breach of a CLC. Firstly, this is obviously damaging to the carrier's brand and reputation. Telstra and NBN Co will enjoy a competitive advantage in not having to comply with this and as such they will always appear untarnished and better than their competitors. Secondly, the Department is requiring carriers to admit to a CLC breach, which because of s.570(3)(a) of the *Telecommunications Act 1997* places the carrier in the position where it is making itself liable to pay a penalty of up to $10 million for each and every contravention.

E. CLC (Networks in New Developments Reporting Requirements) Declaration 2016

Definition of "Development" – this should include Telstra and NBN Co for exactly the same reasons that the Department considers it prudent to capture the network information of other carriers. Given the vast resources of Telstra and NBN Co it is inconceivable that the reporting obligations would be any more of a burden to them than they will be to their competitor carriers.

Yours faithfully,
For and on behalf of OptiComm Co Pty Ltd

Phil Smith
Chief Regulatory Officer