

9 January 2015

Assistant Secretary
Infrastructure Deployment
Department of Communications

By email to: migration@communications.gov.au

Dear Sir or Madam

On 7 January 2015 iiNet Limited (**iiNet**) provided a submission in response to the consultation paper entitled: *Variation of Telstra's migration plan – regulatory instruments: exposure drafts (the First Submission)*.

iiNet wishes to provide a supplementary submission which:

- identifies an issue which is relevant to the Migration Plan Principles which came to iiNet's attention after iiNet had submitted the First Submission;
- provides iiNet's view as to how the issue should be addressed; and
- provides iiNet's view on an additional issue relating to the potential curtailment of the ACCC's powers to declare a wholesale HFC service.

Please note that this submission contains confidential information which should not be published. This information has been highlighted in yellow and placed between the markers [CIC begins] and [CIC ends].

The Issue

The issue concerns the transfer of Telstra's HFC network to NBN Co. [CIC begins] [CIC ends]. This will give Telstra a significant and unfair advantage over its competitors, with obviously serious harmful effects to competition.

How the issue should be addressed

iiNet believes that this issue can be easily addressed by including the following additional specific principle in the Migration Plan Principles:

Specific Principle – installation of infrastructure or equipment for NBN Co use

- (a) *The Migration Plan must provide for appropriate safeguards to be in place that will prevent Telstra from gaining an unfair advantage from the performance of any obligations under the Definitive Agreements that require Telstra to install any infrastructure or equipment relating to a hybrid fibre-coaxial network.*
- (b) *The Migration Plan must include a prohibition on Telstra undertaking marketing activities while it is making arrangements for, and carrying out, the installation of any infrastructure or equipment relating to a hybrid fibre-coaxial network for NBN Co's use.*

iiNet notes that definitions for 'Definitive Agreements' and 'hybrid fibre-coaxial network' are already included in the draft revised Migration Plan Principles.

Potential curtailment of the ACCC's powers to declare a wholesale HFC service

Section 36 of the 2015 Migration Plan Principles provides:

The migration plan must provide that Telstra is not required to supply carriage services to wholesale customers or otherwise supply wholesale carriage services using a hybrid fibre-coaxial network (to the extent that such hybrid fibre-coaxial network is a separating network).

While iiNet acknowledges that it may be felt desirable to include in the 2015 Migration Plan Principles a principle that states that the Migration Plan itself cannot require Telstra to supply a wholesale HFC service, the Migration Plan should not affect the efficacy of the declaration of a wholesale HFC service under Part XIC of the Competition and Consumer Act 2010 if the ACCC deems declaration of an HFC wholesale service to be necessary in order to address any competition issues that may harm the long term interests of end users (noting that Telstra's is not the only HFC network). In order to avoid any potential issues arising due to the operation of sections 152AR(4)(e) and (f) of the Competition and Consumer Act¹, iiNet submits that section 36 of the 2015 Migration Plan Principles should be redrafted as follows:

¹ The effect of these sections is that the standard access obligations relating to a declared service do not apply where application of the standard access obligations would be inconsistent with Telstra's Structural Separation Undertaking or Migration Plan – therefore there is the potential that section 36 of the 2015 Migration Plan Principles could lead to a situation where a declaration of a wholesale HFC service will apply to other HFC network providers but not Telstra.

The Migration Plan must not include an obligation for Telstra to supply a wholesale service using a hybrid fibre-coaxial network (to the extent that such hybrid fibre-coaxial network is a separating network).

Yours faithfully

Stephen Dalby
Chief Regulatory Officer