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Director
USG Implementation
Department of Infrastructure, Transport, Regional Developments and Communications
GPO Box 2154, Canberra, ACT 2601

By email: new.developments@communications.gov.au

Dear Sir/Madam

Review of the 2015 Telecommunications in New Estates (TIND) Policy

This letter is in response to the Australian Government's proposed update to the 2015 Telecommunications in New Estates (TIND) Policy (**the draft TIND Policy update**), which was released for public comment on 27 April 2020.

1. Infrastructure competition is vital to ensuring optimum consumer outcomes

When introducing the 2015 TIND Policy, the Government stated its fundamental objective was to increase efficiency and broaden choice in the provision of telecommunications in new developments by encouraging fair competition and ensuring some recovery of costs up front. The Government now states the key objectives are to ensure access to modern telecommunications in new developments and to support a competitive and sustainable market for the provision of telecommunications infrastructure, fostering efficiency, innovation and choice.

OptiComm agrees with these objectives but considers that the competition objective is undermined in the draft TIND Policy update, which reverses several requirements placed upon NBN Co that recognised its abnormal market power and inherent ability and incentive to act in a manner that is detrimental to competition and which were designed to provide an environment that assisted the development of facilities based competition in the provision of telecommunications services in new estates.

The specific competitive issues in the draft TIND Policy update are:

- the removal of NBN Co's minimum developer charge; and
- giving NBN Co flexibility to overbuild existing fibre networks.

Removing these limitations will allow NBN Co to utilise Government funds and cross subsidies from its fixed line brownfield network to unfairly and inefficiently outcompete other carriers in the market for building networks in new estates. This will increase NBN Co's current market dominance for installing infrastructure in new estates and for the provision of wholesale telecommunications services to the detriment of competition and consumer choice and service. Diminished competition in upstream markets will lead to poor outcomes for consumers of telecommunications services who will increasingly be denied the benefits that competition brings to telecommunications markets, i.e. diversity of services, improved quality of service and lower prices for services.

We ask that the Government does not underestimate the importance of the TIND policy in promoting competition and providing an operating environment that encourages NBN Co to operate within the boundaries of competitive neutrality, particularly now that the NBN rollout is nearing completion. If the proposed updates are implemented, the Government risks long term competitive damage in telecommunications markets. We consider that the Government should take this opportunity to continue to promote competition by retaining the developer charging and no-overbuild obligations that currently apply to NBN Co in the 2015 TIND policy. Without the competition of fixed line competitors, there will be little incentive from NBN Co to operate efficiently and ensure that Australian consumers have access to world best telecommunications services.

If the Government decides to proceed with the proposed updates, we urge the Government to implement some minimum checks on NBN Co by:

- prohibiting NBN Co from overbuilding existing FTTP networks; and
- requiring NBN Co to apply a minimum developer charge.

2. NBN Co's market dominance

Despite the ability to rely on several laws designed to protect its market share[1], in its submission to the TIND Review NBN Co complained that its ability to compete is restricted because it is 'subject to regulation as if it were a monopoly'. Though it definitely does have a very significant degree of power in the markets for wholesale telecommunications services and the construction of networks in new estates, the regulation that NBN Co complains about is not necessary because NBN Co is a monopoly, it is necessary because without such regulation, NBN Co is likely to *become* and behave like a monopoly. This is a point that NBN Co appears to totally misunderstand or choose to ignore in several of its arguments and which the Government must be conscious of when setting policy.

NBN Co already has massive power in the market for broadband infrastructure into new developments. If not regulated, NBN Co will have the ability and incentive to use that market power, in conjunction with its access to the reserves of taxpayer funds, to implement actions to severely diminish competition and create a monopoly or near monopoly environment. Monopolies result in poor outcomes for consumers, with no incentive for diversity or innovation, inefficient operating costs and high end-user prices. Monopolies operate

[1] Such as Parts 7 & 8 of the Telecommunications Act

particularly poorly in technology industries such as telecommunications. Until the early 2010s, Australia suffered with fixed-line telecommunications services that by international standards were both expensive and technologically inferior because of Telstra's ability and incentive to operate inefficiently, hinder competition and delay network upgrades as a result of it enjoying a protective moat of near monopoly ownership of fixed line infrastructure combined with vertical integration. It was only after the ACCC arbitrated close to 100 disputes regarding the terms of competitive access to declared services on Telstra's fixed line infrastructure and the Government established an entity to build and operate the NBN that Telstra's stranglehold on the telecommunications industry was weakened. Recent history needs to be remembered when considering how to regulate NBN Co, as even though it is not vertically integrated its significant power in wholesale markets provides it with the ability to act in the same manner that Telstra did when it was in a comparable position.

This is why it is necessary to tightly regulate NBN Co's activities, including setting NBN Co's prices for supplying infrastructure to new developments. If NBN Co's pricing was not set and NBN Co installed network infrastructure at zero cost to the developer, with taxpayers or consumers in brownfield areas picking up the tab or cross-subsidising the underlying build cost, then alternative network providers with no access to taxpayer funds, massive multi-billion dollar loans or the opportunity for cross-subsidisation would find it increasingly difficult to compete with NBN Co for the new builds.

Alternative network operators have a small share of the market in comparison to NBN Co. No alternative operator has a significant share of the market for supplying networks in new developments. Even when all added together, alternative operators do not have a significant market share and have no market power to implement action that could have the effect of significantly decreasing competition or significantly decreasing NBN Co's market share. That is why alternative operators do not have to be subject to the same regulation as NBN Co. However, the existence of alternative operators provides a valuable and necessary competitive presence that is and can be used to evaluate NBN Co's performance.

With the NBN approaching completion, NBN Co will shift its primary focus from brownfield builds to extending its network into new developments. Ensuring NBN Co does not use its significant market power to damage competition in the market for the provision of telecommunications infrastructure in new developments has never been more important.

3. NBN Co is a strong and dominant competitor

NBN Co is an extremely strong and dominant competitor with significant power in the market for the supply of telecommunications networks in new estates. By OptiComm's calculation, since the introduction of the TIND policy in Sept 2015, NBN Co has controlled close to 80% of the builds in the greenfield market and will achieve over 95% of the total high speed fixed broadband market once the NBN is completed. It is therefore vital that the rules are not relaxed in a manner that increases NBN Co's competitive strength at the expense of other network operators. Any NBN Co claim that the TIND policy restricts its ability to win contracts for the installation of networks into new estates is shown to be incorrect simply by considering its success to date in achieving such a massive market share in new estates. Removal or relaxation of any of the obligations currently placed on NBN Co has the potential to be extremely damaging to competition in broadband markets.

4. Charging constraints

From its submissions in the 2015 TIND Review, NBN Co appears to believe that alternate providers are free to set any rate for the construction of networks into new estates and argues that this constrains NBN Co's ability to compete. This could not be more wrong. In order to remain commercially viable and provide adequate returns to their shareholders, alternate providers must recover the costs of building new networks. Having the financial backing of the Government and enjoying massive economies of scale, concerns about financial integrity and solvency are less front of mind to NBN Co than to other network operators, who are constantly scrutinising their costs. NBN Co's purported wish to work proactively with developers to reduce costs is disingenuous. What it wants to do is offer developers very low network construction costs so that it can enhance its already dominant market position. It is particularly important that the price NBN Co charges developers for the construction of new networks remains regulated.

NBN Co has publicly stated that its average cost to build FTTP in new estates is $2178.[2] This is substantially less than the $300 end-user contribution plus $600 (SDU) or $400 (MDU) developer contribution that is mandatory in the current TIND Policy and now proposed to be made a capped charge that NBN Co has discretion to reduce or waive. Clearly, NBN Co is already not recovering the cost of new network builds from developers and homeowners so this loss needs to be paid from Government revenue, cross subsidised by end-users on other parts of the NBN or recovered over many years from the wholesale charges paid by RSPs.

We consider that NBN Co's current developer charging obligations should remain in place, however, if the Government decides to proceed with its preliminary view of making these charges a cap, we consider that the Government must also impose a floor on NBN Co's developer charges, such that NBN Co cannot go beyond a certain mandated minimum charge – for example, minimum $300 (SDU) and $150 (MDU)

5. Overbuild

NBN Co should continue to be subject to rules preventing it from overbuilding a competitor's network when the existing network is NBN comparable. NBN overbuild of NBN comparable networks is an inefficient use of taxpayers' money and provides extremely limited, if any, advantages to end-users. The only reason that NBN Co would overbuild a NBN comparable network is to damage a competitor. The TIND policy should ensure that NBN Co adheres to its original remit and to the policy behind the NBN, i.e. to ensure that all Australians have access to modern telecommunications services, rather than seek to exploit its vast financial

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[2] NBN Co Annual Report 2019, p.47

backing and market power in efforts to damage its competitors by competing ‘in the market’ rather than ‘for the market’. This policy should continue to strictly apply after completion of the NBN, as the primary responsibility of NBN Co, to ensure national access to high speed broadband, will not change and is not facilitated by engaging in facilities based competition in estates and MDUs that already have access to NBN comparable networks.

We consider that the obligation to seek Ministerial approval for a planned overbuild should remain in place. It is not appropriate for NBN Co to make a self-assessment as to whether it is complying with its competitive neutrality obligations, particularly as there is realistic potential that without a requirement for Ministerial approval an overbuild decision could be made at the sales-staff level within NBN Co by a person with an eye on sales KPIs and bonuses and little, if any, knowledge of the intricacies of the competitive neutrality rules that apply to Government entities such as NBN Co.

Without Ministerial scrutiny, there would be limited scope for an affected carrier to seek review of NBN Co’s overbuild decisions and it is likely that the affected carrier’s concerns would be ignored.

The Ministerial approval should be based on both a commercial case for the overbuild and evidence that the existing network is not providing premises with NBN consistent outcomes.

The prohibition against NBN overbuild should be amended to clearly articulate that it does not only apply to the fixed line NBN but also prohibits NBN Co using its fixed wireless network, satellite network or any other network such as a third party mobile network to provide a service to premises within the footprint of an NBN comparable network operated by another network operator

If the Government decides to proceed with its preliminary view of allowing NBN Co to decide whether to overbuild an existing network, we consider that there needs to be a level of constraint on NBN Co. Though there may be a commercial argument for NBN Co to overbuild networks that are not fibre all the way to the premises, there is no plausible reason for overbuilding FTTP networks. We ask that the TIND Policy state that NBN Co must not overbuild an existing FTTP network without ministerial approval.