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Ms Patricia Scott
Secretary of the Department of Broadband, Communications and the Digital Economy
Department of Broadband, Communications and the Digital Economy
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Dear Ms Scott

REGULATORY FRAMEWORK TO SUPPORT A NATIONAL BROADBAND NETWORK

This submission is provided in response to the *Request for Proposals to Roll-Out and Operate a National Broadband Network for Australia* which was released for consideration on 11 April 2008. Specifically, as part of this document, the Commonwealth invites submissions on the regulatory issues associated with the National Broadband Network ("NBN"), including the consumer safeguards.

The Western Australian Government commends the Commonwealth for seeking to facilitate a broadband network which achieves a number of important objectives, namely:

- Broad coverage (the State's ultimate expectation is for ubiquity).
- High speed.
- Open access.
- Price equivalence.
- A competitive environment.

It is noted that the NBN shares several of the fundamental economic characteristics that have influenced, if not largely determined, the market outcomes experienced with the Public Switched Telephone Network ("PSTN"). The NBN may be characterised by natural monopoly in many local markets. That is, it may well be less expensive for a single firm to supply the entire local market than for a number of competing firms. This is because significant upfront and sunk investment in local NBN infrastructure is required to provide services to one or a few customers. The investment is so significant that an infrastructure provider is unlikely to make a normal profit unless they service hundreds if not thousands of customers. Thus it is likely that many regions around Australia could not sustain more than one owner of such bottleneck infrastructure.

In these circumstances, it is in the national interest to encourage (if not compel) the local monopoly bottleneck facilities owner to share its facilities with its competitors. The prospect of facilities sharing also increases if ownership of bottleneck facilities varies across local markets. If the key economic characteristics, i.e. the requirement to incur a large sunk cost and dependence on market density, are ignored then there is a risk of stifling ongoing investment and the NBN's geographic coverage may be smaller than it would otherwise be.

Consistent with this view, the Western Australian Government is also of the view that many populated areas, and the system as a whole, can sustain competition at the facilities level, although this may only be achieved if appropriate regulation is applied.

However, regulation has a significant impact on investment incentives. The significant public investment being committed by the Commonwealth Government in a new telecommunications network at this time presents an opportunity to adjust the current regulatory regime with minimal disruption to market outcomes. If the right changes are made then there is a good chance that a reformed regulatory framework will help to enhance investment signals. In turn, this would help maximise the opportunity for autonomous evolution, thereby 'future-proofing' Australia's telecommunications network.

Wherever possible, regulation should therefore look for opportunities to reinforce market signals, thus protecting investors, whilst providing an equitable and internationally competitive service.

Accordingly, the State's recommendations of regulatory measures to apply to an NBN are noted below. These comments reflect, in part, earlier observations made by the Western Australian Government in its *National Broadband Network Submission – Panel of Experts* of 27 March 2008 and, also through representation at the Online and Communications Council. It is imperative that regulation supports and, where necessary, mandates the objectives stated above.

Functional separation

There must be non-discrimination in the provision of access to infrastructure and wholesale services for all parties (both existing infrastructure and that provided as part of new investment in an NBN) and at every level of the network. Equivalence should be both on price and non-price terms, with all service providers treated in the same manner.

It follows that, to ensure that this can occur, the provider or providers of an NBN should be subject to formal separation of network control ('Network Operator') from the entity which offers the provision of services at a retail level ('Network Retail Business'). That Network Retail Business should then be subject to the same avenues for the provision of wholesale services as any other retail service provider ('Access Seekers'). The Network Operator should also be prohibited from providing retail services directly to the market. Wholesale is an integral part of access to the network and thus should not be separated from the infrastructure/Network Operator.

Open access regime

If service providers are able to share network resources, the cost of servicing customers will be minimised and choices available to consumers maximised. The challenge is in establishing the conditions governing how service providers share network resources and, in particular, returns to individual companies. Those that invest in a shared network should receive a fair return.

Notwithstanding, an open access regime should apply, where another party can seek and obtain access, on fair terms and conditions, to any part of the broadband network on a non-discriminatory basis. Access Seekers should be offered equivalence in the way the Network Operator provides key access services compared with its own Network Retail Business including, but not limited to:

- Taking all reasonable steps to ensure that the technical and operational quality of services and information supplied to the Access Seeker are equivalent to that which the Network Retail Business is provided in comparable circumstances.
- Services are made available to the Access Seeker within a timely period. That period is comparable with that for making services available to the Network Retail Business under comparable circumstances.
- Where an end customer determines that they wish to modify their service or to switch between service providers upon or after the expiry of a contract, this should also be possible without undue delay or complication by the Network Operator.

Fair pricing

Uniform, location independent pricing should apply throughout Australia. Wholesale prices should be set at a level that provides a fair return to infrastructure investors. Such price structures should be regulated both to prevent overpricing (i.e. economic rent seeking), nor predatory pricing that would unfairly undercut new market entrants. However, the same rules should, of course, apply to new entrants under such circumstances. The fair return to network investors should incorporate sufficient upside to encourage positive investment signals which would encourage the growth of the network into unserved and underserved areas.

In guarding against an incentive bias against investment in infrastructure, third party broadband service providers should be required to irrevocably pay for access services upfront and in advance of the services they require for a prescribed period of time. That is, Access Seekers should be exposed to the same downside risk as if they had invested in their own infrastructure. The effect of this change is the diminution of the incentive to 'cherry pick' the timing and location of competition. In turn, this helps protect the incentive to invest in upgrading and extending the network layer.

Role of the regulator

The Open Access Regime should be regulated by an independent regulator ("the Regulator") such as the Australian Competition and Consumer Commission ("ACCC") with powers commensurate with the level of monopoly created. This is dependent both upon the level of separation imposed upon the NBN provider and the level of duplication of infrastructure in the system.

In particular, consideration should be given to the Regulator being provided with powers to intervene where there is evidence of anti-competitive behaviour – without formal complaints necessarily being made. The identity of organisations and individuals providing such evidence should also be protected, at the discretion of the Regulator, where they are beholden to the NBN provider and where this might otherwise cause further discrimination.

Further separation of the Network Operator and Network Retail Business should be a tool available to the Regulator in the case of manifest abuse of market powers by those entities under common ownership or control. Early and clear articulation of this avenue would provide a strong incentive for appropriate behaviour by the NBN provider.

Appropriate governance

Further to the functional separation model, the network provider must provide a transparent, uniform and comprehensive template of terms and conditions, agreed by the Regulator, which serves as the model for access for both Network Retail Business and other Access Seekers.

Records of key contract terms, including type of service, price, period of delivery, length of contract, should be recorded by the Network Operator and made available to the Regulator periodically, or via occasional audit.

This would help ensure that the Regulator can make an informed assessment with respect to pricing of services, ensuring consistency over time and across regions.

Provision of network information

One important aspect of governance is the need to ensure information material to making investments in telecommunications is provided in a timely and transparent manner. It is recognised that explicit geographic and technical data on telecommunications infrastructure has been closely guarded on national security grounds in the past. However, it is the view of the Western Australian Government that there are also clear corporate advantages in doing so. It is believed that the security issues can be adequately managed as they are in other jurisdictions. The introduction of the NBN offers the opportunity to introduce an explicit, mandatory information disclosure regime. Information that is crucial to disclose is as follows:

- Capacity of the installed and activated telecommunications network.
- Location of network interconnection points along with ancillary information that indicates the condition/quality of equipment in use.
- Prices and services provided in the region in a reasonably aggregate form.

This would guard against revealing the specific contract arrangements between a service provider and an individual customer. Regionally specific indexed prices would show the degree of variation in price and service availability across Australia. This would extend to backhaul and wholesale services.

Mandatory co-location provision

As noted previously, the State supports fair and reasonably priced access at every level of the network. Further support for competition could be achieved by imposing a mandatory co-location provision. This means that competitors should be able to access and share buildings, street spaces, corridors, towers, interconnection points and other key network components on equal terms. The benefit of this change is that fixed costs are minimised across all service providers. In turn, this would provide reduced cost impact on customers.

Governing network upgrades

The rights of existing service providers who have invested in infrastructure need to be protected. The Network Operator may ascertain a need to upgrade, relocate or switch off infrastructure critical to an existing Access Seeker's retail service provision. In doing so, the Network Operator should be required to continue to provide access to enable that Access Seeker to continue to provide services at an equivalent or better level, and on comparable terms and conditions, to that available on the legacy network for the contractual period.

Where infrastructure is not considered by the Regulator to be obsolete, consideration should be given to requiring the Network Operator to first offer it for sale at a justifiable residual value, thus providing opportunity to introduce competition through an alternative delivery platform, albeit one that is dependent on an older technology.

The Western Australian Government is of the view that the regulatory measures outlined above provide the best possibility of introducing a successful National Broadband Network, which will see a sustainable level of competition, continued growth and ongoing innovation within the telecommunications market. It is noted that a number of providers already have in place infrastructure which could factor in to an NBN. This may, of course, provide unique challenges which cannot be pre-empted on a hypothetical basis. For this reason it is recommended that the Regulator be given adequate powers of intervention to protect against abuse of market power. It should also be recognised that whatever rules apply to the Network Operator and the Network Retail Business should apply equally to Access Seekers and alternative wholesale service providers. Accordingly, the Regulator should act swiftly to prevent or curtail abuse of market power at the local level as it would at the national level.

Thank you for the opportunity to comment upon this important matter. Should you require any further clarification of the issues raised herein, please contact Ben Peden of the Department of Industry and Resources on telephone (08) 9222-0919.

Yours sincerely

FRANCIS LOGAN MLA
MINISTER FOR ENERGY; RESOURCES; INDUSTRY AND ENTERPRISE

25 June 2008