

## CVC Pricing Discriminates

The ACCC's Draft Decision on the NBN Special Access Undertaking (SAU) in April 2013 ignored<sup>1</sup> a major critique of CVC pricing in my earlier (December 2012) submission on the SAU. Even on its own interpretation of discrimination, the ACCC has failed to recognise that CVC pricing discriminates significantly against small access seekers.

It is also argued that the ACCC is reading back into the legislation the exceptions to the prohibition on non-discrimination which were removed from the legislation by Senator Xenophon's amendments.

### The ACCC view

The ACCC notes<sup>2</sup> that the legislation does not define what constitutes 'discrimination' or 'discrimination between access seekers'. In considering the meaning of these terms, the ACCC does not consider that any differences between the terms, conditions, or a manner of treatment between access seekers are necessarily 'discriminatory' under Part XIC.

For the ACCC, differences in prices are not discriminatory if they satisfy the "two limbs" of its non-discrimination principle (summarised)<sup>3</sup>:

- a) Equal opportunity to receive the same terms
- b) Be consistent with the long-term interests of end users

### Equal opportunity to receive the same terms

Having a common CVC pricing schedule offered to all access seekers is not an equal opportunity as the discrimination is inherent in the pricing model. Access seekers purchase blocks of CVC capacity to carry traffic. The unit cost is the cost per Gigabyte (GB) of traffic carried (or per customer served). Since CVC capacity has to be purchased in blocks, the more traffic (or customers) carried on those blocks, the lower the unit cost per GB (or per customer). This block approach has the same effect as volume discounting [substituting "carry" for "purchase"]:

*A volume discount means that an access seeker that [carry] a large volume of services will receive a lower per-unit access price relative to access seekers that [carry] a smaller volume of services. This will result in different per-unit access prices for different access seekers<sup>4</sup>.*

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<sup>1</sup> My objection to CVC pricing could have been considered at pages 98, 106, 108 and 124 of the Draft Decision report – it has been ignored.

<sup>2</sup> P4 - Explanatory material issued under section 152CJH of the CCA — consultation process and ACCC response to submissions.

<sup>3</sup> P10, ACCC, April 2012, Explanation of Non-discrimination provisions were introduced into Part XIC of the *Competition and Consumer Act 2010* (CCA) as part of the National Broadband Network (NBN) reforms.

<sup>4</sup> P15, ACCC, April 2012, Explanation of Non-discrimination provisions.

Even if this is not accepted, so that there is no “direct” discrimination, there is certainly unlawful “indirect” discrimination:

*The ACCC considers that indirect discrimination refers to circumstances in which uniform terms and conditions between access seekers have different impacts or outcomes for different access seekers<sup>5</sup>.*

As noted by NBN Co., “CVCs can be used as proxies for usage charging”<sup>6</sup> and there are no efficiency grounds for using the CVC (block) approach<sup>7</sup>. If the traffic charge was per GB, there would be no difference between “purchase” and “carry”; and no discrimination.

### **Be consistent with the long-term interests of end users**

*As a guiding principle, differences which lead to outcomes that are consistent with the objective of Part XIC — the long-term interests of end-users — will not be considered by the ACCC as discriminatory.*

In determining whether a difference in opportunity is consistent with the long term interests of end-users, the ACCC will have regard to whether the differences:

- undermine the promotion of competition in markets for listed services;
- hinder any-to-any connectivity in relation to carriage services that involve communication between end-users; and/or
- discourage the economically efficient use of, and economically efficient investment in, infrastructure by which telecommunications services are supplied and any other infrastructure by which telecommunications services are, or are likely to become, capable of being supplied.

### **Promotion of competition**

The difference in wholesale costs imposed by CVC pricing between access seekers of different sizes is material. The difference in costs between the smallest and largest wholesale customer shown in the following chart is \$12.35 per customer per month; which is over 10% of the retail prices being offered on NBN 100/40 plans<sup>8</sup>.

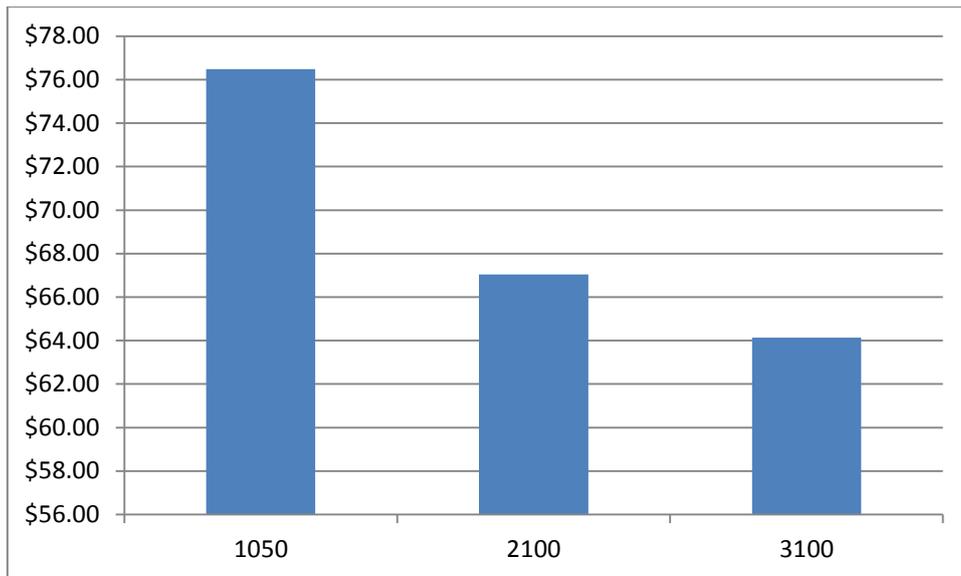
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<sup>5</sup> P28, ACCC, April 2012, Part XIC non-discrimination guidelines

<sup>6</sup> P103, NBN Corporate Plan, Dec 2010

<sup>7</sup> See de Ridder J, December 2012, Submission to ACCC on the SAU (“NBN Pricing Should be Rejected”) for details of NBN’s cost structure and the implications for pricing

<sup>8</sup> From Table 5 in de Ridder, December 2012, Submission to the ACCC on the SAU



When access seekers first objected to CVC pricing, NBN Co. introduced “transitory credits” to help smaller access seekers. But, the maximum credit is less than \$3 per month.

*When assessing the impact on competition, the ACCC would consider the likely state of competition ‘with or without’ the difference in opportunity. For example, it would consider whether the differentiation is likely to raise barriers to entry for certain access seekers.<sup>9</sup> (emphasis added).*

Consider new entrants from left-field; say, Woolworths or Virgin or Google. With CVC pricing, they have to stump up \$3,000 in CVC fees to hook-up their first customer. CVC pricing is a significant barrier to entry for new access seekers.

### **Any-to-any connectivity**

The forced use of an intermediate aggregator (discussed more fully in the next point) adds another link to the chain of connectivity. The purchaser may also find constraints imposed by the aggregator that would not be encountered when having a direct relationship with NBN Co. Google, for example, may want a service that an aggregator is unable or unwilling to provide.

### **Efficient use of and investment in infrastructure**

The ACCC considers the following factors in assessing the economically efficient use of and investment in infrastructure:

- *whether the difference in opportunity reflects material and quantifiable differences in the underlying cost to the network access provider of supplying services to different access seekers;*

There are no such differences to account for the choice of CVC (block) pricing over, say, charging for traffic directly as GB delivered.

<sup>9</sup> P13, ACCC, April 2012 Part XIC non-discrimination guidelines

- *whether the differences cater to underlying differences in technical or operational characteristics that promote more efficient network usage; and*

CVC (block) pricing does not promote more efficient use of the network. NBN Co. is the natural agent to manage traffic and capacity across the access network.

- *the extent to which any difference in opportunity reduces (or increases) the incentives for investment and/or innovation.*

CVC (block) pricing distorts investment decisions. It is a pricing construct that unnecessarily forces smaller access seekers into the arms of aggregators; which re-sell access acquired from NBN Co. It is unnecessary because replacing CVC fees with a traffic fee (\$ per GB) would not have that effect – all seekers would acquire capacity directly from NBN Co, which is the natural aggregator. NBN Co. has the scale and the incentive to encourage access seekers to compete for retail business.

### **Another view**

The ACCC has not shifted its position much between December 2011 and April 2012, despite the amendments to the Competition and Consumer Act 2010. The amendments were introduced by Senator Xenophon were intended to remove the ACCC's discretion in deciding what is discrimination<sup>10</sup>.

Because the legislation does not define discrimination, the ACCC's interpretation may have to be decided by a Federal Court.

### **An opportunity to establish an enduring model**

Pricing frameworks which are independent of technology will almost always be in the long term interests of end users and are also more likely to survive technology innovation and changes of government. Simpler per gigabyte pricing with every customer getting the full speed of the access lines<sup>11</sup> would maximise the benefits of past and future investments and would still apply if copper were incorporated into the NBN – a not insignificant possibility.

John de Ridder

1<sup>st</sup> May 2013

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<sup>10</sup> Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011 - C2011A00023 Assent 12 April 2011  
<http://www.comlaw.gov.au/Details/C2011A00023>

<sup>11</sup> Speed tiers are another issue with NBN pricing discussed in de Ridder, December 2012, Submission on the SAU.