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By email: Daniel.McCracken-Hewson@accc.gov.au

Daniel McCracken-Hewson
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Australian Competition and Consumer Commission

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Dear Daniel

Telstra TPG merger authorisation application (MA1000021)

- 1 We refer to your letter dated 18 November 2022 and provide this letter and its annexures in response on behalf of Telstra and TPG.
- 2 We welcome the opportunity to comment and respond to the matters set out in Attachment A to your letter (the **Attachment**). We note the ACCC's statement that the Attachment should not be understood as reflecting the ACCC's concluded views.
- 3 Based on the references included in the document, the views in the Attachment appear to be based principally on public, internet-based references. The Applicants submit that the ACCC should give greater regard to the detailed and substantial evidence filed with the ACCC by Telstra, TPG and other stakeholders on these points, including in the form of signed and verified statements from recognised global industry experts and senior executives. To the extent there is inconsistency in the inferences drawn from public sources and the evidence filed, the ACCC should prefer verified evidence.
- 4 We set out in **Annexure A** to this letter a paragraph-by-paragraph review of the Attachment with reference to the evidence that is before the ACCC that addresses those points.
- 5 In summary, however, we take the opportunity to raise the following observations:
- 6 *First, the Attachment does not properly or accurately take into account the nature of a Multi-Operator Core Network (MOCN) technology.*
- 7 A MOCN is not a commercial wholesale arrangement or a particular type of commercial structure. MOCN is a *network sharing technology* that allows more than one independent core network to use a shared radio access network (**RAN**) and spectrum. The commercial construct merely provides the means by which the technical solution can be implemented in a commercially agreeable way.¹

¹ The GSM Association recognises a MOCN to be a classification of infrastructure sharing based on the technology used where the operators share the RAN but not the core network. The form of business or ownership model assumed is separate to the

- 8 The forms of commercial relationship that support MOCNs globally are highly varied, depending upon their context. The only “common characteristic” of a MOCN is that it provides for two or more MNOs to independently operate their networks with extended and augmented coverage through a shared RAN.
- 9 *Second, the Attachment proceeds on the incorrect assumption that there is a “traditional” or “common” form of commercial structure for parties to implement a MOCN² and that consistency with this model is relevant to the counterfactual analysis to be undertaken.*
- 10 The Attachment infers that the Agreements reflect an unusual or uncommon form of MOCN, compared to other global examples – and therefore suggests that the form of the Telstra-TPG MOCN may limit TPG’s capacity to compete in the future.
- 11 For the reasons set out in Annexure A, the themes or characteristics identified as “common” are neither common nor central features of a MOCN technology. This is also clear in the extensive expert and direct evidence before the ACCC on this point.
- 12 The Applicants submit that there is no reasonable basis upon which to characterise the Telstra-TPG MOCN as unusual, uncommon or outside industry norms applicable to MOCNs.
- 13 In any event, the commercial features identified in the Attachment we submit are not relevant to the ACCC’s task. The analysis required to be undertaken does not require the ACCC to identify what it considers might be commercial deficits with the MOCN terms agreed between Telstra and TPG having regard to the ACCC’s understanding of other global MOCNs (itself derived from unverified, desktop analysis).
- 14 The Agreements reflect a deal that TPG negotiated with Telstra within a particular commercial context and in a competitive environment. The only relevant question for the purpose of authorisation is whether the Agreements, *in the form they have been agreed by the parties*, are likely to substantially lessen competition as compared with the real chance counterfactual and, if so, whether public benefits associated with the proposed transaction outweigh any detriments.
- 15 The Applicants submit that the evidence is unambiguous. TPG will better be able to compete in the national retail and wholesale mobile markets under the proposed transaction compared with any commercially realistic counterfactual.³
- 16 *Third, the Attachment reaches conclusions based on MOCNs in jurisdictions that are not comparable to Australia (or the limited, regional nature of the Telstra-TPG MOCN itself).*
- 17 In its Statement of Preliminary Views (**SOPV**), the ACCC reached a preliminary view that the nature of a MOCN is likely to be shaped, amongst other things, by the geographic characteristics of each market and the associated economics of a network roll out within that geography.⁴

fact that the parties are party to a passive or active sharing model and, within the latter, a MORAN or MOCN. See <https://www.gsma.com/futurenetworks/wiki/infrastructure-sharing-an-overview/> (section 1.4).

² Stropale at paras 33-34.

³ The evidence clearly shows that the proposed transaction will offer consumers and enterprises more choice of providers across more regions than in any counterfactual, which will lead to increased competitive pressure on the two largest providers and downward pressure on prices.

⁴ SOPV at para 4.21.

- 18 However, the MOCN References referred to in the Attachment refer to unverified descriptions of commercial terms adopted in Latin America, Denmark and Malaysia.⁵ The Attachment does not explain why these countries or MOCNs should be understood as more comparable to Australia and the Telstra-TPG regional MOCN than the MOCN solutions adopted in Canada and which were explained in signed statements provided by former senior executives at Canadian wireless operators, who personally negotiated and implemented them. Canada was one of the first countries to implement MOCN technology and a country with more comparable demographic and geographic features to Australia than any of those listed in the MOCN References.⁶
- 19 The Applicants have, on a number of occasions, made available to staff and Commissions expert witnesses and qualified individuals to explain and clarify the operation and features of a MOCN, in a way that would be public and verifiable by sworn testimony.
- 20 *Fourth, the Attachment does not accurately describe the non-discrimination obligation and infers that the Agreements impede TPG's future ability to compete in relation to Enterprise, NBIOT or FWA services.*
- 21 The Attachment does not accurately describe, and fails to properly appreciate, the operation of the non-discrimination obligation.
- 22 TPG's strategic focus was to obtain access to retail grade 4G and 5G mobile services on a non-discriminatory basis. This is what clause 4.2(a) of the MOCN Agreement achieves for TPG by requiring Telstra to provide TPG with access to its mobile network in the 17% Regional Coverage Zone without discriminating between TPG end users and Telstra retail end users. Telstra retail end users (i.e. those that use retail grade services) include enterprise and Government customers. The limitation in respect of enterprise-grade services (which TPG does not supply) is minor and affects a very small proportion of services that are supplied using the MOCN.
- 23 The Attachment does not accurately describe, and overstates, the competitive relevance of terms in the Agreements dealing with NBIOT and FWA services.
- 24 The limitations with respect to these services are minor and are not competitively meaningful. They have been included for legitimate commercial purposes,⁷ and were acceptable to TPG on that basis.⁸
- 25 The evidence provided to the ACCC makes clear that the non-discrimination commitment in the Agreements provides a significantly stronger assurance to TPG than other global MOCNs, which rely upon less robust, more complex operational and performance metrics in the absence of clear or blanket non-discrimination commitments.
- 26 Furthermore, in any counterfactual roaming arrangement with Optus, the likely position of TPG would be that it would not be able to utilise its spectrum or offer coverage for enterprise, NBIOT

⁵ Many of these arrangements relate to the roll out of a new technology (5G) across an entire country, rather than the sharing of a large existing regional footprint.

⁶ The geographic and demographic similarities that make the Canadian experience a valuable one for the ACCC are explained in some detail by Michael Strople. See Strople Statement, paras 11-13.

⁷ Including the practical limits on comparing "like for like" for these services and to ensure and manage the performance of the network.

⁸ See Annexure A, row 6; Authorisation Application, paras 205-207; Berroeta Statement, paras 48 and 59; Response to ACCC SOPV, p 68.

and FWA services within the 17% Regional Coverage Zone to the same extent that it is able to do under the proposed transaction.

- 27 *Fifth, the “common themes” identified in the Attachment would not exist in any commercially realistic counterfactual*
- 28 TPG does not accept that it is commercially realistic to expect that it would enter into a network sharing arrangement of any similar or comparable kind with Optus.
- 29 However, even if this occurred, it is highly unlikely that any arrangement with Optus would share the various “common features” referred to in the Attachment. Certainly, none of the roaming or other arrangements with Optus to date have included any such features and it is not clear why they would do so in the future. Further evidence in this regard is contained in Confidential Annexure B.

Yours sincerely

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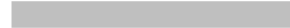
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