



OFFICE OF
REGULATION REVIEW

INDUSTRY COMMISSION

**The Secretary
Department of Communications and the Arts
GPO Box 2154
CANBERRA ACT 2601**

Attention: Mr Tom Dale

**Office of Regulation Review (ORR) comments on
broadband cable access regime**

The ORR is responsible for advising on the Commonwealth Government's regulation review program. Amongst other functions, the ORR provides public advice on regulatory issues.

This letter responds to the public invitation of 23 December to comment on the broadband cable access regime contained in the draft Ministerial Direction to Austel. The ORR's comments are directed to the issue of access to facilities in circumstances where there are questions as to whether the facilities are 'essential' and whether natural monopolies exist.

The purpose of the draft Direction, according to the Minister's press release foreshadowing it, is to:

ensure that broadband services will comply with the provisions of the Telecommunications Act, relating to interconnection and non discriminatory access.

In the case of Pay TV however:

The Government is prepared to accept that for Pay TV usage of cable, the general interconnection and access principles of the Telecommunications Act will not be applied at least until 1 July 1997.

This exception will be reviewed in the lead-up to 1997. If there is appropriate competition in the delivery of Pay TV using cable, the Government will allow the exemption to continue for a period of 5 years (until 1999).

After that time, access will be open, consistent with the Telecommunications Act. (Minister for Communications and the Arts, *News Release, 24 November*



Benjamin Offices, Chan Street,
Belconnen ACT 2616
PO Box 80, Belconnen ACT 2616
Telephone: 06 264 2705
Facsimile: 06 264 3257

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With respect to this regime, the ORR agrees that if broadband cable is used to deliver telephony services then, until 1997 when the Act expires, the provisions of *Telecommunications Act* relating to access and interconnection should apply. It would be inconsistent to have the same service regulated in different ways depending on the method of delivery. The ORR understands that Optus Vision's original broadband cable proposal for delivery of telephony services did not present problems in this regard.

However, in the case of services not currently regulated by the Act, including Pay TV, the ORR does not consider that there is a strong rationale for requiring interconnection or open access via a specific access regime. In particular:

- 1. the open access provisions in the draft Ministerial Direction operate regardless of whether there is effective competition for broadband cable services; and moreover**
- 2. if the broadband cable network does prove to be an essential facility for the delivery of some services, the national competition policy legislative package, not the *Telecommunications Act*, provides the appropriate basis to guarantee access.**

On the first point, it is by no means certain that broadband cable infrastructure represents a natural monopoly and will be subject to inadequate competition. Natural monopoly is one of the defining criteria for an essential facility in the draft *Competition Policy Reform Bill 1994* "that no other facility exists that can economically provide the service" and "it would be uneconomic for anyone to develop another facility to provide the service" (National competition policy — draft legislative package, p.1.35). It may well be commercially feasible to have more than one cable network, in which case neither network would represent an 'essential facility'. If there is more than one network, strong competition to attract service providers could be expected. In this situation a government guarantee of access to the facility is not necessary.

Pay TV is a good example of why open access interconnection should not be automatically required of carriers. It is intended that there be an open access regime by 1999 at the latest. However, it is improbable that any infrastructure, cable or otherwise, could be considered an 'essential facility' for the delivery of Pay TV. This is so because, apart from the possibility of efficient duplication of a cable network, alternative delivery systems, such as satellite systems, exist for Pay TV, and they compete in many countries throughout the world. In this context, legislated open access for Pay TV delivery by cable is not required for competition. A

commercial incentive to sell access will exist. Indeed, the prospect of an obligation to sell access to other services providers could well prove a disincentive to invest in cable infrastructure.

On the second point, the ORR considers that if access to the broadband cable network does emerge as an issue for the delivery of some services in the future, the proposed National Competition Policy legislation is the appropriate mechanism to provide access. Such legislation will enable a thorough examination of the relevant issues, including the extent to which the broadband cable network is, in fact, a natural monopoly. Relying on general legislation has the advantage of avoiding judgements over what will, and what will not, be essential facilities in the future, and can be applied consistently across all sections of the economy. The draft Direction assumes that there will not be sufficient competition in the broadband cable market to allow competition in downstream markets. As discussed, the ORR does not consider such an assumption should, or can, be made at this stage.

**Paul Coghlan
Assistant Commissioner**

24 January 1995