

Mr John Williams
Telecommunications Inquiry
Productivity Commission
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Dear Mr Williams

Comments on the ACCC's supplementary submission to the Productivity Commission Inquiry

Thank you for the opportunity to comment on the ACCC's Supplementary Submission to the Review of Telecommunications Specific Competition Regulation in relation to Pay TV and Regional Telecommunications.

We are at a loss to understand the ACCC's submission which is based on a number of assumptions which are factually incorrect and which we have sought to address in our previous submissions to the Productivity Commission. Without reference to those submissions or any attempt to prove its assertions, the ACCC proceeds to recommend a complex and cumbersome new set of regulations with which to burden this already highly regulated industry, which is still operating at a loss.

We have attempted to discuss this matter directly with the ACCC (including in a letter to the Chairman of the ACCC from our Chief Executive as long ago as February this year) but we have had no response.

There are three key assumptions which drive the whole of the ACCC's argument which are factually incorrect:

- that the deployment of cable infrastructure is the only means by which broadband services will be deployed in regional Australia;
- that there are "exclusive" programming arrangements which mean that a cable operator would be prevented from obtaining the rights to pay TV programming; and
- that there is a high degree of vertical integration between AUSTAR (we assume) and pay TV content providers.

These assumptions are addressed below.

Cable Infrastructure

The ACCC talks of the need for facilities based competition to drive the development of broadband telecommunications services. AUSTAR does not necessarily disagree with this proposition.

However, the ACCC consistently assumes that cable networks are the only facilities which can achieve this end. While it is acknowledged in passing that there are other technological solutions (at paragraph 8.) it is asserted that "...factors which hinder the roll out of cable will significantly lessen or remove altogether the pressures on competitors to develop the technology to supply broadband services via these other methods."

No evidence is advanced to support this assertion. The remainder of the paper talks only of the need to facilitate cable deployment.

Not only is cable roll out unnecessary for the development of broadband services, it is in most cases an inappropriate technology choice for regional Australia, as the cost of cable deployment cannot be justified in the less densely populated regional communities. The centres where cable can economically be deployed are confined to built up areas. Regional towns tend to sprawl so that many residents of a district would be denied broadband services if cable were the primary delivery method.

Wireless, satellite and xDSL solutions, on the other hand, can be provided at significantly lower cost and with greater ubiquity. There are a number of parties which currently have access to these technologies in all or part of the regional market, including C&W Optus (satellite and LMDS), AAPT (satellite and LMDS), Unwired (3.4GHz spectrum), AUSTAR (satellite and MMDS) and Telstra (satellite and xDSL). Depending on the outcome of proceedings before the ACCC, there may be widespread reseller access to xDSL. In addition, satellite capacity is available from various satellite providers

Given the economics of their businesses these companies have a much better incentive and chance of rolling out broadband services in regional Australia using those technologies than would other cable companies, no matter what content those cable companies might have.

Perhaps the best evidence of such a deployment is the widespread roll out of services by AAPT in regional Victoria on the back of its VicOne Government contract.

Please note that AUSTAR does not operate in Canberra.

Exclusive Content

Even if geography and demographics supported the deployment of cable networks in regional Australia, the second factual assumption inherent in the ACCC's paper is also incorrect. This is the proposition that there are exclusive programming rights preventing a potential competitor to AUSTAR from operating in the regional market.

As AUSTAR has repeatedly made clear we do not have exclusive rights to distribute programming by cable. For that matter, we do not have any rights to distribute pay TV programming using 3.4 GHz spectrum, LMDS networks, xDSL, which may be appropriate to supply video services.

We do have the exclusive right to deliver a small number of channels (ShowTime, Encore, The Weather Channel, Channel [V], The LifestyleChannel, Nickelodeon, musicMax, Discovery Channel and arena) via satellite and MMDS in our regional markets.

The rights to distribute this programming by other means reside with other parties, including movie studios, Channel 7, FoxSports, Foxtel, C&W Optus and others. None of these rights holders hold an equity or other interest in AUSTAR.

The ACCC's statement that, "The direct impact of content foreclosure in the regional pay TV market is that it allows for a monopolistic provider of regional pay TV services (AUSTAR)" is, in our view, not substantiated. Content is available, it is just available at a cost which many operators do not want to pay.

Vertical Integration

This brings us to the issue of vertical integration, where again the ACCC seems to make a number of assumptions which are not supported by fact.

AUSTAR holds ownership interests in XYZ (50%), TVSN (51%), Main Event (33%) and The Weather Channel (100%). AUSTAR does not have any relationship with any other channel provider based on other than arms length contracts for content distribution.

Therefore, of the 36 channels which AUSTAR carries, it has an equity interest in only 10. This does not include any of the sports or movie channels, which are regarded as the key drivers for the take up of pay TV services. Even in relation to the XYZ channels, Foxtel and not AUSTAR, has the cable pay TV rights in regional Australia.

AUSTAR has long maintained that it pays too much for many of these channels and in addition, has recently been the subject of legal action from the Premium Movie Partnership, which supplies ShowTime and Encore. These are hardly the circumstances you would expect in a situation of vertical integration.

Conclusion

The ACCC is proposing a complex regulatory solution to a problem which does not exist. Whatever the issues cable network operators may have in establishing their businesses or obtaining pay TV content they are not primarily the result of the evils the ACCC describes.

The reality is that the development of broadband infrastructure in regional Australia is difficult and highly capital intensive. AUSTAR, as a player which wishes to participate in that market, knows this well enough, especially in light of the tightening of the capital markets.

However, we believe that the development of broadband infrastructure in regional Australia is possible, given appropriate technology choices and government action which encourages the development of sustainable markets. It would not be enhanced by regulatory intervention which rewards inappropriate technology choices or which forces various parties into fruitless access negotiations and arbitrations.

Please do not hesitate to contact me should you have any further queries on (02) 9394 9845, or by email at jknowler@austar.gov.au.

Yours Sincerely

Jeanette Knowler
Regulatory and Compliance Officer