



28 March 2008

Mr Robert Wright
General Manager
Compliance & Regulatory Operations Group
Communications Group
Australian Competition & Consumer Commission
Melbourne VIC
By email:robert.wright@accc.gov.au

Dear Robert

Telstra ULLS Undertaking – Unreasonable Confidentiality Conditions for Access to the Telstra Efficient Access Model

I refer to Telstra's unconditioned local loop service (ULLS) undertaking lodged to the Australian Competition and Consumer Commission (ACCC) on 3 March 2008. This undertaking was lodged at the same time as Telstra withdrew its ULLS undertaking dated 21 December 2007.

In support of Telstra's ULLS undertaking, Telstra has submitted to the ACCC a revised Telstra Efficient Access (TEA) Model.

On 25 February 2008, Telstra sent Optus confidentiality undertakings that set out the proposed terms of access to the TEA model (the "TEA CU's"). There are two versions of confidentiality undertakings: one version for execution by Optus' employees and the second version for execution by Optus' external advisors and consultants. For the purposes of this letter, the two versions of the TEA CU's are identical.

Optus believes that some of the terms of the TEA CU's are unreasonable, not related to confidentiality issues, inconsistent with the law and/or put Telstra's commercial interests ahead of the ACCC's obligation to implement the required undertaking process.

It is Optus' understanding that Telstra has provided the same terms to all interested parties.

Optus requests the ACCC to require Telstra to remove and/or amend the unreasonable clauses in the TEA CU's for all interested parties. Also, Optus seeks that the ACCC enquire as to whether interested parties have had reasonable access to the TEA model information. If reasonable access has not been provided the ACCC should give no weight to the TEA Model information supporting the ULLS undertaking.

Optus' Concerns are Similar to the ACCC's Concerns

In the ACCC letter to Telstra of 5 March 2008, the ACCC informed Telstra that *"interested parties require reasonable access to (amongst other things) the TEA model –in terms of both sufficient review time and the terms and conditions on which they access the model"*. Optus concurs with the ACCC.

Optus also notes that the ACCC is under a statutory obligation to publish the ULLS undertaking and invite people to make submissions within a specific timeframe.

Optus notes that the ACCC wrote to Telstra on 14 January 2008 and 5 March 2008 rejecting six conditions of access to the TEA model. The reasons for rejection provided by the ACCC are similar to the reasoning of Optus in relation to Optus' access to the TEA model information. Optus' reasoning is set out below.

Unreasonable Confidentiality Conditions

Optus believe that the TEA CU's contain many terms that are unreasonable. Optus' major concerns are set out below (the clause references are to the TEA CU to be executed by Optus employees).

1. *Clause 12b: I will bring any suggested changes to the model to Telstra's attention in a timely manner so that they can be considered, in the course of the process relating to the Undertaking or otherwise, for future versions of the model.*

On 5 March 2008, Optus requested Telstra to remove this clause from the TEA CU as Optus believes it has nothing to do with confidentiality.

Telstra has rejected Optus' request on 10 March 2008 and stated that the clause is designed to facilitate fulsome and meaningful consultation with access seekers. Optus understands Telstra seeks to promote an open and transparent consultation process but it believes that the following reasons support the removal of this obligation and out weight Telstra's reasoning.

a. Optus is provided with a limited timeframe in responding to the issues raised in the consultation process in regard to the ULLS undertaking and it may not have time and capacity to inform Telstra of all suggested changes to the TEA model.

b. It is unclear what would constitute a "suggested change".

c. It is unclear what would satisfy a "timely" requirement.

d. There is no statutory basis for Optus to provide Telstra with any suggested changes and therefore this is not a reasonable term of access to the TEA model information.

e. Such obligation would result in Optus assisting Telstra in developing its TEA Model. There is no statutory basis that requires Optus to assist Telstra with the development of the TEA model and therefore this is not a reasonable term of access to the TEA model information.

f. To some extent this occurs anyway, as Optus' submission will be publicly available and therefore Telstra will be aware of any criticisms Optus has of the TEA Model.

2. *Clause 3(c)(ii): To the extent that any changes are made to the TEA Model itself, or the inputs to the model, by anyone other than Telstra, when referring to the model in that altered form or the outputs from the model in that altered form for the Approved Purposes, I must acknowledge that the model has been altered and not represent explicitly or implicitly that the model in that altered form is the version of the model created by Telstra, or that the outputs from the model in that altered form are outputs from the version of the model created by Telstra.*

Optus agrees with the ACCC, in its letters to Telstra that this clause is impractical in the circumstances.

As Telstra pointed out in its TEA Model Overview, “a primary advantage of the TEA Model lies in its flexibility. The model can be run with any set of inputs chosen by the user and at any level of disaggregation.” It is therefore inevitable that access seekers would be required to change the inputs when assessing the model and that it remains an undeniable fact that the original model was created by Telstra.

Optus would accept a lesser obligation to clearly indicate that alterations had been made to either the model or its inputs and to note the original model was the TEA model as developed by Telstra.

3. *Clause 12a: When Telstra provides a revised version of the TEA Model, that version of the model supersedes all previous versions and I will refer to each version of the model by its proper version name.*

Optus agrees with the ACCC that parties are sometimes obliged to refer to previous versions of the TEA Model in a consultation process and that failure to do so might result in administrative error. In the event that Telstra misses its deadline to lodge a new version of the model and/or the ACCC have declined to consider its new version, this clause would prohibit Optus from accessing the previous version and to provide appropriate comments in the consultation process. Optus would however be willing to correctly name each version of the TEA Model used.

4. *Clause 4 & 5: Subject to paragraph 5, I will not disclose any of the Telstra confidential information to any other person without the prior written consent of*

Telstra. This list of exceptions does not allow Optus to disclose the Confidential Information if the disclosure is required by law.

Optus believes that disclosure of the TEA model information should be expressly allowed to occur, without Telstra's consent, if required by law.

Optus believes this clause is unlawful as a contractual arrangement cannot override a statutory duty.

Optus would accept an obligation to inform Telstra of the lawfully required disclosure if reasonable in the circumstances.

Optus' Additional Concerns with the TEA CU's

Redacted version

Telstra has indicated to Optus that it will provide two different versions of the TEA model information to Optus. The version of TEA model information provided for use by all Optus employees will have some highly sensitive TEA model information masked. The version of TEA model information intended for Optus' external advisors will have all of the relevant TEA model information included.

Optus objects to Telstra's proposal to only provide a subset of the relevant TEA model information to all Optus employees.

Optus considers it essential for all relevant access seekers employees to gain access to all of the TEA model information, otherwise an accurate assessment the TEA Model cannot be made.

This differentiation by Telstra undermines the need for the TEA CU's because, despite the access seeker employers agreeing to the strict conditions imposed on the individuals, individuals that need to see the TEA model information are not able to receive it.

This differentiation puts the commercial interests of Telstra ahead of the regulatory regime being implemented by the ACCC. Optus believes that the implementation of the regulatory regime is paramount and does not believe there is any regulatory support for the withholding of TEA model information in the circumstances where the provision of that TEA model information is essential for access seekers to take part in the regulatory process.

Telstra's plan to prevent Optus employees from receiving all of the TEA model information is contrary to what Telstra told the ACCC in its letter to the ACCC of 3 March 2008.

Telstra's letter of 3 March 2008 said that it intends to provide the complete set of TEA model information to "*the access seekers external consultants, legal advisors and people employed by the Access Seeker in a purely non-commercial role. This*

version [the masked version] will be made available to persons employed by the access seeker in a fully or partially commercial role.”

The difference is that the ACCC may be under an impression that Telstra has agreed to provide the full set of the TEA model information to “*the access seekers external consultants, legal advisors and people employed by the Access Seeker in a purely non-commercial role.*” Telstra is not providing this level of access to Optus.

Optus would be satisfied if were to provide the access seekers external consultants, legal advisors and people employed by the Access Seeker in a purely non-commercial role with a full set of the confidential TEA model information.

Related Issues

None of the requirements at issue that we have set out in this letter were required by Telstra in the confidentiality undertakings that Telstra previously accepted from Optus employees, and Optus’ agents and consultants, in relation to access to Telstra’s PIE II model. There has been no explanation from Telstra as to why the additional, more onerous, terms are required.

Regardless, Optus does not believe there is any good reason for these more onerous terms as the content is the same: being contractual protection of an economic model that prices ULLS.

It is Optus’ understanding that Telstra has provided the same terms to all access seekers.

Optus are concerned that the unreasonable TEA CU terms may result in it, and other access seekers, being restricted from participating fully in the regulatory process. This restriction may occur by virtue of an interested party not receiving the TEA model information, an interested party receiving only part of the TEA model information or an interested party receiving the TEA model information with not enough time to provide a considered response

Summary

In summary, Optus suggests that the conditions proposed by Telstra in the TEA CU’s as set out in this letter are:

1. in all cases unreasonable;
2. in some cases are not related to confidentiality issues;
3. in some cases are inconsistent with the law; and
4. in all cases put Telstra’s commercial interests ahead of the ACCC implementing the regulatory regime.

As such, Optus submits the ACCC should request Telstra to remove and/or amend those clauses in the TEA CU’s used by interested parties.

Also, Optus requests that the ACCC obtain details from Telstra in regard to the provision of the TEA model information to interested parties. This will allow the ACCC to determine if all interested parties have been provided with a reasonable opportunity to access the TEA model information and reply within the timeframe required.

If the TEA CU's are not amended and/or interested parties have not been provided with a reasonable opportunity to access the TEA model information and reply within the timeframe, Optus requests that the ACCC attach no weight to the TEA model information supporting the ULLS undertaking.

Please indicate how the ACCC intends to respond to this issue.

Please contact the writer if you require any information or assistance.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Tim Sparks', written in a cursive style.

Tim Sparks
Manager, Regulatory Economics