SUBMISSIONS FROM AGILE PTY LTD, CHIME COMMUNICATIONS PTY LTD, PRIMUS TELECOMMUNICATIONS PTY LTD AND WIDEBAND NETWORKS PTY LTD (*THE ACCESS SEEKERS*) IN RESPONSE TO THE ACCC'S DISCUSSION PAPER REVIEWING THE DECLARATION FOR THE DOMESTIC TRANSMISSION CAPACITY SERVICE (DTCS)

1. INTRODUCTION

The purpose of the ACCC's discussion paper reviewing the declaration for the DTCS (***the Discussion Paper***) is to clarify the scope of the DTCS service description and seek submissions about whether it is in the long-term interests of end-users (***LTIE***) for the DTCS service description to cover all commonly used interface protocols on transmission networks in Australia[1]. The Access Seekers welcome the ACCC's inquiry into these issues. The Access Seekers are hopeful that the ACCC's focus on these issues will lead to the ACCC going on to set indicative prices for the DTCS and arbitrating any access disputes that may arise in relation to the DTCS.

2. PROPOSED CHANGES TO THE DTCS SERVICE DESCRIPTION

The salient part of the current DTCS service description is as follows:

> *The domestic transmission capacity service is a service for the carriage of certain communications from one transmission point to another transmission point via network interfaces at a designated rate on a permanent basis by means of guided and/or unguided electromagnetic energy […]*

'Designated rate' is currently defined as:

> *a transmission rate of 2.048 Megabits per second, 4.096 Megabits per second, 6.144 Megabits per second, 8.192 Megabits per second, 34 to 35 Megabits per second, 140/155 Megabits per second (or higher orders)*

The ACCC is proposing to amend the definition of 'designated rate' in order to ensure that the Ethernet interface protocol is included in the DTCS service description. The ACCC's proposed definition of 'designated rate' is as follows (***the Proposed Amendments***):

> *a designated rate is a transmission rate of 2.048 Megabits per second or higher using Ethernet, PDH or SDH interface protocols.*
>
> *Ethernet, PDH or SDH interface protocols are Ethernet, Pleisiochronus Digital Hierarchy (PDH) or Synchronous Digital Hierarchy (SDH) interface protocols as established and amended from time to time by the International Telecommunications Union, Telecommunication Standardization Sector (ITU-T) or the Institute of Electrical and Electronic Engineers (IEEE).*

[1] Discussion Paper, p.1.

3. EFFECT OF THE PROPOSED AMENDMENTS ON THE LTIE

At the heart of the Discussion Paper are two fundamental questions:

1. Does the scope of the existing DTCS service incorporate Ethernet interface protocols?
2. Should the DTCS service description apply to Ethernet interface protocols (applying the LTIE test)?

The Access Seekers have considered a briefing paper provided by Telstra in response to the Discussion Paper[2]. It appears from Telstra's Briefing Paper that Telstra's answer to both of the above questions is no. While the Access Seekers agree that the answer to the first question above is no, the Access Seekers submit that in order to ensure consistency with the approach to regulation of the DTCS that the ACCC has taken since 2004, and thereby apply the LTIE test consistently, the answer to the second question should be yes.

The second question

The Access Seekers respectfully submit that if it is accepted that the DTCS service description should be 'generic'[3] and 'technologically neutral'[4] then it must follow that the service description should apply to all transmission interface protocols commonly used over the Australian network. It is respectfully submitted that in order to apply the LTIE test consistently with how it has been applied in the past in relation to the DTCS service, the ACCC needs to keep in mind the underlying rationale for regulating or not regulating particular transmission routes. That rationale can be conveniently referred to as the Principle of Contestability. The following extract summarises how the ACCC has applied this principle since 2004[5] (footnotes omitted):

> *On 25 November 2008, the Commission released its final decision on Telstra's transmission exemption applications: Telstra's domestic transmission capacity service exemption applications – Final decision, November 2008 (Final Exemption Decision). In the Final Exemption Decision, the Commission concluded that where there is effective competition or contestability in a transmission market, granting an exemption from the standard access obligations (SAOs) relating to the supply of the DTCS in that market would not be detrimental to the objective of promotion of competition. However, where the Commission is not satisfied that there is effective competition or contestability in relevant markets, it is likely that a bottleneck remains and that a declared DTCS should remain available to access seekers. Routes were considered competitive or contestable according to the '1 km criterion' discussed in the DTCS 2004 Final Report.*

Although it is possible to argue as to what is or is not a contestable transmission route[6], it is clear that a regulated service which does not apply to all transmission interface protocols commonly used over the Australian network runs the risk of becoming divorced from the guiding Principle of Contestability as applied by the

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[2] Telstra - *Ethernet briefing - Proposed DTCS variation 15 December 2009* (**Telstra's Briefing Paper**).
[3] ibid p.4.
[4] ibid p.8.
[5] *Domestic Transmission Capacity Service An ACCC Final Report on reviewing the declaration of the domestic transmission Capacity Service - March 2009* p.4.
[6] Such arguments are beyond the scope of the Discussion Paper and these submissions.

ACCC. For example, if the only transmission service that Telstra offers in a non contested transmission route is an Ethernet based service[7]or other service not at the 'designated rate', access seekers will have no recourse to a regulated service in respect of that transmission route even though that route is not contested[8]. It is submitted that in terms of the LTIE, this is a far greater 'evil' than any of the reasons put forward in Telstra's Briefing Paper which Telstra claims support the rejection of the Proposed Amendments.

Indeed, the 'double regulation' referred to by Telstra[9] is still possible even if only PDH and SDH interface protocols are within the scope of the DTCS service description. For example, an access seeker obtains a service from Telstra using STM 1. That access seeker supplies its spare capacity on a wholesale basis to other access seekers at a lower 'designated rate' thereby making that re-sale wholesale service also within the scope of the current DTCS service description. The Access Seekers submit that due to the very nature of a transmission service (i.e. it is possible for it to be divisible in terms of the capacity provided), it is not possible to regulate a transmission service on a 'generic' basis without creating, at least in theory, the possibility of 'double regulation'.

The importance of the DTCS

The Access Seekers note that in concluding that, subject to a number of exemptions, the continued declaration of the DTCS would be in the LTIE, the ACCC stated that the DTCS is a 'vital' input into a range of downstream services[10].

The importance of Ethernet

The Access Seekers believe that Ethernet layer services (as opposed to IP layer) are essential for connecting their IP DSLAMs back to their core networks. The lack of clarity about the application of the current DTCS service declaration to Ethernet interface and transport has detracted from the Access Seekers' ability to deploy DSLAMs at exchanges where only Telstra transmission is available. An inability to obtain reasonably priced access to Ethernet backhaul, if need be via an access dispute regarding price, has lead to access seekers having to purchase 34 Mbit/s backhaul and then move to STM-1 (155 Mbit/s) backhaul links depending on the level of traffic per access seeker DSLAM site. These big steps in capacity are inefficient and not in the LTIE. Ethernet capacity increments can be less than 1 Mbit/s, thus avoiding the unnecessary wastage of network capacity by an access seeker.

Indeed as is clear from the following information on Telstra's website, Telstra recognises the distinct advantages that Ethernet backhaul has to offer[11]:

> ***Ethernet backhaul enablement program***
> *A wireless network needs more than base stations - it needs a robust, superfast wireline network to connect to. The link between the wireline and wireless network is called backhaul and Telstra is enhancing the user experience for Next G™ customers by investing in Ethernet backhaul to carry all the speed-hungry, data-hungry requirements of a broadband enabled community. Upgrades to approximately 3,000 metro sites are now*

[7] Such a service would include a service that Telstra refers to as 'native Ethernet' - see Telstra's Briefing Paper p.8.
[8] i.e. regulation of that transmission route would be required to promote competition and the LTIE.
[9] Telstra's Briefing Paper, p.11.
[10] *Domestic Transmission Capacity Service, An ACCC Final Report on reviewing the declaration of the domestic transmission capacity service (March 2009)*, p.33.
[11] See: http://www.telstra.com.au/abouttelstra/csr/society/nextg-networks.cfm.

complete and the program continues to upgrade transmission to regional cities and towns as well as to approximately 2,000 rural and remote sites. The program is scheduled to continue through 2012.

It is submitted that regulated access of transmission services in non contested routes that does not include Ethernet services in circumstances where Ethernet services are the only transmission services available, would place Telstra at a considerable competitive advantage as compared to access seekers because Telstra will have access to cost based Ethernet services in respect of such routes whereas, absent regulation, access seekers will not. Such a situation is not in the LTIE.

4. CONCLUSION

As recognised by the ACCC, the DTCS is a 'vital input' into a range of downstream services. Due to its obvious efficiency advantages as regards the transmission of IP traffic, carrier and access seeker equipment is increasingly being manufactured to support only Ethernet. Therefore, it is obviously not in the LTIE for this 'vital input' not to include Ethernet transmission protocols. Furthermore, the risk that access to a regulated transmission service may not be available in non contested transmission routes if the existing service description is maintained, strongly weighs in favour of the Proposed Amendments.

5. ADDITIONAL POINT FOR CONSIDERATION

In addition to the above submissions which relate specifically to the Proposed Amendments, the Access Seekers wish to draw the ACCC's attention to a deficiency in the current definition of 'designated rate' in the DTCS service description. The current definition of 'designated rate' in the DTCS service description does not expressly include the commonly used PDH transmission speed of 45Mbit/s. Therefore, even if the ACCC concludes that the Proposed Amendments should not be made, the Access Seekers respectfully submit that the ACCC should nevertheless amend the definition of 'designated rate' to ensure that it expressly reflects all commonly used PDH and SDH data transmission rates.

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