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Model Non-Price Terms & Conditions Determination 2008

Trade Practices Act 1974

The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this Determination under section 152AQB of the *Trade Practices Act 1974*.

Dated 2008

Chairman

Australian Competition and Consumer Commission

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MODEL NON-PRICE TERMS AND CONDITIONS

Important Notice: The model clauses herein are intended to be indicative only and to be used as a guide. Their application and suitability may differ from case to case and therefore persons wishing to use or rely on the model clauses should obtain independent professional advice. The ACCC disclaims any responsibility in relation to any loss or damage arising as a result of the use of or reliance on the model clauses.

A. BILLING AND NOTIFICATIONS

- A.1 The access seeker's liability to pay Charges for a Service to the access provider arises at the time the Service is supplied by the access provider to the access seeker, unless the parties agree otherwise.
- A.2 The access seeker must pay Charges in accordance with this agreement, including but not limited to this clause A.
- A.3 Subject to clause A.4, the access provider shall provide the access seeker with an invoice in respect of Charges payable for Services and associated work supplied in each billing period. A billing period shall be a period of one calendar month, unless the parties agree otherwise. Other charges shall be invoiced by the access provider at the following times:
- (a) as stated in an applicable price list;
 - (b) as stated in any applicable billing and settlement procedures;
 - (c) as stated in or incurred under this agreement; or
 - (d) as otherwise agreed by the access provider and the access seeker or, failing agreement, at the option of the access provider, on completion of the relevant work or when the outstanding amount reaches \$50,000 (as the case requires).

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- A.4 As a statement of general principle, the access provider may invoice the access seeker more frequently than once a month, where there has been a decline in the access seeker's creditworthiness as assessed in accordance with clause B.
- A.5 The access provider shall be entitled to invoice the access seeker for Charges which have been previously uninvoiced or Charges which were understated in a previous invoice, provided that:
- (a) the Charges to be retrospectively invoiced can be reasonably substantiated to the access seeker by the access provider; and
 - (b) subject to clause A.6, no more than 6 months have elapsed since the date the relevant amount was incurred by the access seeker's customer, except:
 - (i) where the access seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or
 - (ii) to the extent that the Charges relate to a new Service being billed for the first time, in which case such Charges may be invoiced up to 8 months after the relevant amount was incurred by the access seeker's customer, subject to agreement with the access seeker (such agreement not to be unreasonably withheld); or
 - (iii) to the extent that the Charges relate to services supplied by an overseas carrier and the access provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the access provider shall invoice such amounts as soon as is reasonably practicable.
- A.6 The parties must comply with any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to billing.
- A.7 Subject to any Billing Dispute, an invoice is payable in full on the due date for that invoice or such other date as agreed between the parties and the access

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seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the access provider. All amounts owing and unpaid after the due date shall incur a liability for interest at the rate per annum of the 90 day authorised dealers bank bill rate published in the Australian Financial Review on the first Business Day following the due date for payment, plus 2.5%.

- A.8 In addition to charging interest in accordance with clause A.7 or exercising any other rights the access provider has at law or under this agreement, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute, the access provider reserves the right to take action, without further notice to the access seeker, to recover any such amount as a debt due to the access provider. For the avoidance of doubt, this clause A.8 shall be subject to the Billing Dispute Procedures.
- A.9 Unless the parties otherwise agree, there shall be no setting-off (*i.e.* netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise the administration and financial costs, the parties shall consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- A.10 The access provider must, at the time of issuing an invoice, provide to the access seeker all information reasonably required by the access seeker to identify and understand the nature and amount of each component of the invoice. Nothing in this clause A.10 is intended to limit subsections 152AR(6) and 152AR(7) of the TPA.
- A.11 If the access seeker believes a Billing Dispute exists, it may, by written notice to the access provider, invoke the Billing Dispute Procedures. A Billing Dispute must be initiated only in good faith.

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- A.12 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory (for example, initiates an arbitration under Part XIC of the TPA) proceedings in relation to any Billing Dispute.
- A.13 If a Billing Dispute Notice is given to the access provider by the due date for payment of the invoice containing the Charge which is being disputed, the access seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. Otherwise, the access seeker must pay the invoice in full in accordance with this agreement (but subject to the outcome of the Billing Dispute Procedures).
- A.14 Except where payment is withheld in accordance with clause A.13, the access provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- A.15 A Billing Dispute Notice may not be given to the access provider in relation to a Charge later than 6 months after the due date for the Charge.
- A.16 The access provider shall acknowledge receipt of a Billing Dispute Notice within 2 Business Days by providing the access seeker with a reference number.
- A.17 Each party shall, as early as practicable after the notification of a Billing Dispute pursuant to clause A.11, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
- A.18 The access provider shall try to resolve any Billing Dispute as soon as practicable and in any event within 25 Business Days of receipt of a Billing Dispute Notice (or longer period if agreed by the parties), by notifying the access seeker in writing of its proposed resolution of a Billing Dispute. That notice shall explain the access provider's proposed resolution and any action to be taken by:

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- (a) the access provider (*e.g.* withdrawal, adjustment or refund of the disputed Charge); or
- (b) the access seeker (*e.g.* payment of the disputed Charge).

A.19 Any withdrawal, adjustment or refund of the disputed Charge by the access provider or payment of the disputed Charge by the access seeker (as the case may be) must occur within as soon as practicable and in any event within 1 month of the access provider's notice, unless the access seeker escalates the Billing Dispute under clause A.23.

A.20 Where the access provider is to refund a disputed Charge, the access provider shall pay interest (at the rate set out in clause A.7) on any refund. Interest shall accrue daily from the date on which each relevant amount to be refunded was paid to the access provider, until the date the refund is paid.

A.21 Where the access seeker is to pay a disputed Charge, the access seeker shall pay interest (at the rate set out in clause A.7) on the amount to be paid. Interest shall accrue daily from the date on which each relevant amount was originally due to be paid to the access provider, until the date the amount is paid.

A.22 If the access seeker is not satisfied with the access provider's proposed resolution in relation to a Billing Dispute, or if the access provider has not provided the access seeker with a proposed resolution to the Billing Dispute within the timeframe set out in clause A.18, the access seeker may escalate the matter under clause A.23. If the access seeker does not do so within 25 Business Days of being notified of the access provider's proposed resolution (or a longer period if agreed by the parties), the access seeker shall be deemed to have accepted the access provider's proposed resolution and clauses A.19 and A.20 shall apply.

A.23 If the access seeker wishes to escalate a Billing Dispute, the access seeker must give the access provider a written notice:

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- (a) stating why it does not agree with the access provider's proposed resolution; and
- (b) seeking escalation of the Billing Dispute.

A.24 A notice under clause A.23 must be submitted to the nominated billing manager for the access provider, who shall discuss how best to resolve the Billing Dispute with his or her counterpart in the access seeker's organisation as nominated and made available by the access seeker for that purpose.

A.25 If the escalated matter cannot be resolved under clause A.24 within 5 Business Days of notice being given under clause A.23:

- (a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation shall be conducted in accordance with the mediation guidelines of the ACDC; or
- (b) if the parties either do not agree to proceed to mediation or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.

A.26 The parties shall ensure that any person appointed or required to resolve a Billing Dispute shall take into account the principle that the access seeker shall be entitled to be recompensed in circumstances where the access seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a "**Backbilling Loss**"), provided that:

- (a) such principle shall apply only to the extent to which the Billing Dispute is resolved against the access provider; and
- (b) such principle shall apply only to the extent to which it is determined that the Backbilling Loss was due to the access provider unnecessarily delaying resolution of the Billing Dispute.

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- A.27 Each party must continue to fulfill its obligations under this agreement during the pendency of a Billing Dispute and the Billing Dispute Procedures.
- A.28 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause A.24 (or their respective nominees).
- A.29 There shall be a presumption that all communications between the parties during the course of a Billing Dispute are made on a “without prejudice” and confidential basis.
- A.30 If it is determined by the Billing Dispute Procedures or by any other dispute resolution procedure (including arbitration under Part XIC of the TPA or litigation) or by agreement between the parties that three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more, then, for the purposes of clause A.20, the interest payable by the access provider in respect of the overpaid amount of the invoices in question shall be the rate set out in clause A.7, plus 2%. The remedy set out in this clause A.30 shall be without prejudice to any other right or remedy available to the access seeker.
- A.31 If three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more, then without prejudice to any other right or remedy available to the access seeker, the access provider shall be deemed to have breached this agreement and the seeker shall have a right of damages for such a breach.

B. CREDITWORTHINESS AND SECURITY

- B.1 Unless otherwise agreed by the access provider, the access seeker must (at the access seeker’s sole cost and expense) provide to the access provider and maintain for the term of this agreement, on terms and conditions reasonably required by the access provider and subject to clause B.2, the Security (as shall

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be determined having regard to clause B.3 and as may be varied pursuant to clause B.4) in respect of amounts owing by the access seeker to the access provider under this agreement.

B.2 The access seeker acknowledges that unless otherwise agreed by the access provider, it must maintain (and the access provider need not release) the Security specified in clause B.1 for a period of 6 months following the last to occur of termination of this agreement and payment of all outstanding amounts under this agreement.

B.3 The Security (including any varied Security) shall be of an amount and in a form which is reasonable in all the circumstances. As a statement of general principle the amount of any Security shall be calculated by reference to the aggregate value of all Services likely to be provided to the access seeker under this agreement over a reasonable period or the value of amounts invoiced under this agreement but unpaid (excluding any amounts in respect of which there is a current Billing Dispute). For the avoidance of doubt any estimates, forecasts or other statements made or provided by the access seeker may be used by the access provider in determining the amount of a Security. Examples of appropriate forms of security, having regard to the factors referred to in this clause B.3, may include without limitation:

- (a) fixed and floating charges;
- (b) personal guarantees from directors;
- (c) bank guarantees;
- (d) letters of comfort;
- (e) mortgages;
- (f) a right of set off; or
- (g) a combination of the forms of security referred to in paragraphs (a) to (f) above.

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- B.4 The access provider may from time to time where the circumstances reasonably require, request from the access seeker Ongoing Creditworthiness Information to determine the ongoing creditworthiness of the access seeker. The access seeker must supply Ongoing Creditworthiness Information to the access provider within 15 Business Days of receipt of a request from the access provider for such information. The access provider may, as a result of such Ongoing Creditworthiness Information, having regard to clause B.3 and subject to clause B.6, reasonably require the access seeker to alter the Security, and the access seeker must provide that altered Security within 20 Business Days of being notified by the access provider in writing of that altered requirement.
- B.5 The access seeker may from time to time request the access provider to consent (in writing) to a decrease in the required Security and/or alter the form of the Security. The access provider must, within 15 Business Days of the access seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to clause B.3). The access provider may request, and the access seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause B.5.
- B.6 In the event that the access seeker provides Ongoing Creditworthiness Information to the access provider as required by this clause B, the access seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the access provider.
- B.7 For the purposes of this clause B, **“Ongoing Creditworthiness Information”** means:
- (a) a copy of the access seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
 - (b) a credit report in respect of the access seeker or, where reasonably necessary in the circumstances, any of its owners or directors

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(“**Principals**”) from any credit reporting agency, credit provider or other independent party. The access seeker shall co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the access seeker’s creditworthiness. To that end, the access seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the access provider to:

- (i) obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
 - (ii) disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
 - (iii) obtain and use a consumer credit report;
- (c) a letter, signed by the company secretary or duly authorised officer of the access seeker, stating that the access seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and
- (d) the access seeker’s credit rating, if any has been assigned to it.

B.8 The access seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

B.9 Subject to this clause B, the access provider may, in its absolute discretion, deem a failure by the access seeker to provide Ongoing Creditworthiness Information or an altered Security in accordance with clause B.4 as:

- (a) an event entitling the access provider to alter the Security of the access seeker; or

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(b) a breach of a material term or condition of this agreement.

B.10 Any disputes arising out of or in connection with clause B shall be dealt with in accordance with the procedures in clause D.

C. LIABILITY (RISK ALLOCATION) PROVISIONS

C.1 Except to the extent expressly set out in this agreement this clause C shall regulate the Liability of one party to the other party under and in relation to this agreement.

C.2 If a party breaches any condition or warranty implied by law which cannot lawfully be excluded, to the extent permitted by law the liability of that party is limited, at its option, to:

(a) in the case of services, the re-supply of, or payment of the cost of re-supplying, the service; and

(b) in the case of goods:

(i) the replacement of the goods or the supply of equivalent goods;

(ii) the repair of the goods;

(iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or

(iv) the payment of the cost of having the goods repaired.

C.3 Except as otherwise expressly provided in this clause C, a party has no Liability to the other party:

(a) for or in respect of any consequential, special or indirect liability, loss, damage, cost, charge or expense, including without limitation any loss of profits or data;

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- (b) for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any customer of a party or any third person not under the direct control of a party.

C.4 The aggregate Liability of a party to the other party at any time (“**Relevant Time**”):

- (a) in any 12 month period ending on the day before an anniversary of the date of execution of this agreement; or
- (b) in a period of less than 12 months from the date of execution of this agreement or an anniversary of the date of execution of this agreement to the date of termination of this agreement,

shall not in any circumstances exceed a cap (“**Annual Liability Cap**”), being the greater of:

- (c) the aggregate amount paid or payable by the access seeker to the access provider under the agreement during the financial year which ended immediately prior to the Relevant Time (if any); and
- (d) where applicable, the aggregate amount paid or payable by the access provider to the access seeker under this agreement during the financial year which ended immediately prior to the Relevant Time (if any); and
- (e) *[\$insert agreed amount]* million.

C.5 The Annual Liability Cap shall not apply to any obligation of a party under this agreement to pay Charges for Services or to Liability under clauses C.7, C.8, C.11 or C.12. The Annual Liability Cap shall not apply to Liability under clause C.10 to the extent that the claim relates to death or personal injury or the making good of property damage.

C.6 Subject to clause C.5, the Liability of the Indemnifying Party to the Innocent Party for an Event described in any of clauses C.7 to C.12 shall, unless otherwise agreed between the parties, be limited to the remedies identified in those clauses respectively.

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- C.7 Each party indemnifies the other party against all awards, judgments, costs, charges and expenses directly and reasonably incurred by the other party as a result of a claim against it arising out of a death of or personal injury to any person, to the extent that such damage or loss is caused by a negligent act or omission or an act or omission intended to cause death or personal injury, by the Indemnifying Party or any of the Indemnifying Party's People.
- C.8 Each party indemnifies the other party against all Loss (including consequential and indirect loss and damage) arising from or relating to any damage to or loss of any equipment, Facilities, Network or other tangible property of the Innocent Party or any third person to the extent that such Loss is caused by a negligent act or omission or an act or omission intended to cause Loss by the Indemnifying Party or any of its People.
- C.9 Each party indemnifies the other party against all costs, charges and expenses directly and reasonably incurred in relation to making good any damage to or loss of equipment, Facilities, Network or other tangible property of the Innocent Party or any third person to the extent that such damage or loss is caused by any act or omission of the Indemnifying Party or any of its People.
- C.10 Subject to clause C.11, each party indemnifies the other party against all Loss arising directly from or incurred in connection with a claim by a third person against the Innocent Party to the extent that the claim relates to any negligent act or omission of the Indemnifying Party or any of its People in relation to this agreement.
- C.11 The access seeker indemnifies the access provider against all Loss arising out of the reproduction, broadcast, use, transmission, communication or making available of any material (including data and information of any sort) by the access seeker or an end-user of the access seeker using a Service.
- C.12 The access seeker indemnifies the access provider against all Loss arising out of any breach of a person's rights or defamation of a person (or allegation of such a breach or defamation) involving use of a Service.

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- C.13 The Indemnifying Party is not liable to the Innocent Party for or in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party or a third person with whom the Innocent Party has a contractual relationship (including a Standard Form of Agreement) to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such liability actually was excluded or reduced), by the Innocent Party in its contract with such end-user or third person.
- C.14 The Indemnifying Party is not obliged to indemnify the Innocent Party under this clause C to the extent that the Liability the subject of the indemnity claim is the direct result of a breach of this agreement, or a negligent act or omission, by the Innocent Party.
- C.15 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of the Event giving rise to an indemnity under this clause C. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party shall be reduced as is appropriate in each case.
- C.16 A party's liability to the other party for Loss of any kind arising out of this agreement or in connection with the relationship established by it is reduced to the extent (if any) that the other party causes or contributes to the Loss. This reduction applies whether the first party's liability is in contract, tort (including negligence), under statute or otherwise.
- C.17 Except as expressly provided in clauses C.18 to C.21, a party shall have no Liability to the other party in relation to any Event or series of related Events relating to or arising out of this agreement:
- (a) for any act or omission of:
 - (i) any Correspondent of the first party (other than the first party's People); or

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- (ii) any third person involved in the operation or maintenance of any equipment or Network used in connection with an international carriage service (other than the first party's People);
- (b) for:
 - (i) any delay in the initial supply of, any failure to supply or any interruption in the supply of a Service by the first party;
 - (ii) any failure of the first party's Network or any part of that Network;
or
 - (iii) any error in or omission from information transmitted through either party's Network.

C.18 If the access provider delays in establishing a POI, the sole remedy available to the access seeker is:

- (a) if practicable the access provider must provide a temporary alternative POI during the period of delay, in which case:
 - (i) the access seeker shall not be required to bear any additional costs caused by the use of the temporary alternative POI (rather than the proposed POI) during the period of delay; and
 - (ii) the parties shall consult in relation to the location of any temporary alternative POI with a view to minimising the costs to be borne by the access provider in providing the temporary alternative POI;
- (b) if it is not practicable for the access provider to provide a temporary alternative POI, once the delayed POI has been established the access provider must, for the Fee Waiver Period, waive the Applicable Percentage of the Recurring Charges for the supply by it of domestic interconnection at the delayed POI.

C.19 If the access provider delays the original supply of an interconnection service which is supplied in connection with a Service, (other than a delay covered by clause C.18), the sole remedy available to the access seeker is:

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- (a) the access provider may provide temporary alternative arrangements which provide the access seeker with a comparable Service at no additional cost to the access seeker; or
- (b) if the access provider does not provide temporary alternative arrangements:
 - (i) the access provider must not charge for Services which cannot be provided to the access seeker due to the delay; and
 - (ii) once the delayed interconnection service has been provided, the access provider must, for the Fee Waiver Period, waive the Applicable Percentage of the Recurring Charges for the supply of its delayed interconnection service and any charges applicable to operations and maintenance support specific to the delayed interconnection service.

C.20 If the access provider delays the original supply of any Service (not covered by clauses C.18 or C.19), the sole remedy available to the access seeker is:

- (a) the access provider may provide temporary alternative arrangements which provide the access seeker with a comparable Service at no additional cost to the access seeker; or
- (b) if the access provider does not provide temporary alternative arrangements, once the delayed Service has been provided the access provider must, for the Fee Waiver Period, waive the Applicable Percentage of the Recurring Charges for the supply of its delayed Service in the affected service area.

C.21 In relation to any interruption to the supply of a Service (measured from the time of the giving of notice of the interruption by the access seeker to the access provider), in excess of the Outage Period for that Service, the sole remedy available to the access seeker shall be a pro-rata reduction in any Recurring

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Charges for the Service attributable to the period of such interruption in excess of the Outage Period. Accordingly:

- (a) subject to clause C.2, there shall be no additional remedy available to the access seeker in relation to any interruption of a period within the Outage Period; and
- (b) the access provider shall not be required to waive any Charges in respect of an interrupted Service in relation to any period after the restoration of the interrupted Service.

C.22 Clause C.3(a) does not apply to Liability under clauses C.18 to C.21.

C.23 The parties shall jointly develop procedures to enable them to comply with section 118A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) in respect of any Specified CSG Service.

D. GENERAL DISPUTE RESOLUTION PROCEDURES

D.1 If a dispute arises between the parties in connection with or arising from this agreement, the dispute shall be managed as follows:

- (a) in the case of a Billing Dispute, the dispute shall be managed in accordance with the Billing Dispute Procedures; or
- (b) subject to clause D.2, in the case of a Non-Billing Dispute, the dispute shall be managed in accordance with the procedures set out in this clause D.

D.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless the access provider otherwise determines, that Non-Billing Dispute shall be resolved in accordance with the Billing Dispute Procedures.

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- D.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this clause D. A Non-Billing Dispute must be initiated only in good faith.
- D.4 Any Non-Billing Dispute notified under clause D.3 shall be referred:
- (a) initially to the nominated manager (or managers) for each party, who shall endeavour to resolve the dispute within 5 Business Days of the giving of the notice referred to in clause D.3 or such other time agreed by the parties; and
 - (b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then unless the parties agree in writing within a further 5 Business Days to refer the Non-Billing Dispute to an Expert Committee under clause D.12, either party may submit it to mediation in accordance with clause D.11.
- D.5 If:
- (a) under clause D.11(f), the mediation is terminated; and
 - (b) after a period of 5 Business Days after the mediation is terminated as referred to in paragraph (a), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise), either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.
- D.6 A party may not commence legal proceedings in any court or commence any arbitration whether pursuant to Part XIC of the TPA or otherwise (except proceedings seeking urgent interlocutory relief or the making of an interim determination) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this clause D or clause D.2

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(if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause D.5; or

(b) the other party has failed to substantially comply with the dispute resolution procedure set out in this clause D or clause D.2 (if applicable).

D.7 Each party must continue to fulfill its obligations under this agreement during the pendency of a Non-Billing Dispute and any dispute resolution procedure under this clause D.

D.8 There shall be a presumption that all communications between the parties during the course of a Non-Billing Dispute are made on a “without prejudice” and confidential basis.

D.9 Each party shall, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause D.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

D.10 Subject to clauses D.6, D.11(h) and D.12(k), nothing in this agreement precludes or limits the right of a party (if any) to seek arbitration of a dispute by the ACCC under the arbitration provisions set out in Division 8 of Part XIC of the TPA. This clause does not constitute a general agreement to arbitration of a Non-Billing Dispute.

D.11 Where a Non-Billing Dispute is referred to mediation pursuant to clause D.4(b):

(a) any referral shall be made by written notice (and notified to the other party), including a statement of the disputed matters in the Non-Billing Dispute and must take place within 15 Business Days upon the receipt by the mediator of such notice;

(b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (“**ACDC Guidelines**”) and the provisions of this clause D.11. In the event of any inconsistency between them, the provisions of this clause D.11 shall prevail;

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- (c) it is to be conducted in private;
- (d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator should:
 - (i) have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
 - (ii) have an appreciation of the competition law implications of his/her decisions; and
 - (iii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- (e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who shall attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- (f) it shall terminate in accordance with the ACDC Guidelines;
- (g) the parties shall bear their own costs of the mediation including the costs of any representatives and shall each bear half the costs of the mediator;
- (h) any agreement resulting from mediation shall bind the parties on its terms.

D.12 The parties may by written agreement in accordance with clauses D.4(b) or D.5(b), submit a Non-Billing Dispute for resolution by an Expert Committee ("**Initiating Notice**"), in which case the provisions of this clause D.12 shall apply as follows:

- (a) The terms of reference of the Expert Committee shall be as agreed by the parties. If the terms of reference are not agreed within 5 Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee shall be deemed to be terminated.

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- (b) An Expert Committee shall act as an expert and not as an arbitrator.
- (c) The parties shall each be represented on the Expert Committee by one appointee.
- (d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs D.11(d)(i), (ii) and (iii).
- (e) Each party shall be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- (f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- (g) The parties shall ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- (h) If the dispute is not resolved within the timeframe referred to in clause D.12(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- (i) The Expert Committee shall have the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- (j) The Expert Committee must give written reasons for its decision.
- (k) A decision of the Expert Committee is final and binding on the parties in the absence of manifest error or a mistake of law.
- (l) Each party shall bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee

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on the Expert Committee and the parties shall each bear half the costs of the independent member of the Expert Committee.

E. CONFIDENTIALITY PROVISIONS

- E.1 Subject to clause E.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- (a) use or copy such Confidential Information except for the purposes of this agreement; or
 - (b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- E.2 For the avoidance of doubt, information generated within the access provider's Network as a result of or in connection with the supply of the relevant Service to the access seeker or the interconnection of the access provider's Network with the access seeker's Network (other than the aggregate Network information of the access provider and all access seekers to whom the relevant service is supplied) is the Confidential Information of the access seeker.
- E.3 The access provider shall upon request from the access seeker, disclose to the access seeker quarterly aggregate traffic flow information generated within the access provider's Network in respect of a particular Service provided to the access seeker, if the access provider measures and provides this information to itself. The access seeker must pay the reasonable costs of the access provider providing that information.
- E.4 Subject to clause E.5, Confidential Information of the access seeker:
- (a) referred to in clause E.2; or
 - (b) relating to or concerning the access seeker's end-users,

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may be:

- (c) used by the access provider:
 - (i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
 - (ii) for the purposes of this agreement;
 - (iii) for the purpose of billing; or
 - (iv) for another purpose agreed to by the access seeker;
- (d) disclosed only to personnel directly involved in the purposes referred to in paragraph (c) above.

E.5 A party (“**disclosing party**”) may to the extent necessary disclose the Confidential Information of the other party:

- (a) to those of its directors, officers, employees, agents and representatives to whom the Confidential Information is reasonably required to be disclosed for the purposes of this agreement;
- (b) to any professional person acting for the disclosing party to permit that person to protect or advise on the rights of the disclosing party in respect of the obligations of the disclosing party under this agreement;
- (c) to an auditor acting for the disclosing party to the extent necessary to permit that auditor to perform its audit functions;
- (d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this agreement or for the purpose of seeking advice from a professional person in relation thereto;
- (e) as required by law provided that the disclosing party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information;

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- (f) with the written consent of the other party provided that if required by the other party as a condition of giving its consent, the disclosing party must comply with clause E.6;
 - (g) in accordance with a lawful and binding directive issued by a regulatory authority which is duly authorised to do so;
 - (h) if reasonably required to protect the safety of personnel or property; or
 - (i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted.
- E.6 If required by another party as a condition of giving its consent to the disclosure of the Confidential Information of that other party, the disclosing party, before disclosing Confidential Information to a third person, must:
- (a) impose an obligation upon the disclosee:
 - (i) to use the Confidential Information disclosed solely for the purposes for which the disclosure is made and to observe appropriate confidentiality requirements in relation to such information; and
 - (ii) not to disclose the Confidential Information without the prior written consent of the other party;
 - (b) obtain an acknowledgment from such a disclosee that:
 - (i) the Confidential Information is and at all times remains proprietary to the other party; and
 - (ii) that misuse or unauthorised disclosure of the Confidential Information may cause serious harm to the other party.
- E.7 Each party must co-operate in any action taken by the other party to:
- (a) protect the confidentiality of the other party's Confidential Information; or
 - (b) enforce its rights in relation to its Confidential Information.

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- E.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the disclosing party that the Confidential Information is or will be correct.
- E.9 Each party acknowledges that a breach of this clause by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this clause E.
- E.10 If the access seeker believes there is *prima facie* evidence which tends to show that the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4, the access seeker may invoke the audit procedures set out in this clause E.10 as follows:
- (a) The audit procedures in this clause E.10 must be initiated only in good faith;
 - (b) The access seeker shall give the access provider a written notice that it intends to initiate an audit in accordance with this clause E.10;
 - (c) The access seeker shall nominate an Independent Auditor to conduct an audit of the access provider's systems for the purpose of determining whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4;
 - (d) If the access provider objects to the person nominated by the access seeker or the parties have not agreed on an Independent Auditor within 5 Business Days of the notice given under clause E.10(b), then the Independent Auditor shall be a person nominated by the President for the time being of the Institute of Chartered Accountants in the State in which the access provider holds its registered office;

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- (e) The access seeker shall bear all reasonable costs of the access provider relating to the audit, as well as the costs of the Independent Auditor;
- (f) The Independent Auditor shall be required to give a confidentiality undertaking to the access provider in terms reasonably required by the access provider;
- (g) The Independent Auditor's first task shall be to determine whether there is *prima facie* evidence which tends to show that the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4. The Independent Auditor may obtain advice from a barrister or solicitor (who does not act for and has not acted for either of the parties in relation to any matter in question) in determining whether such *prima facie* evidence exists;
- (h) If the Independent Auditor so determines, then he/she shall be required to proceed with the audit;
- (i) If the Independent Auditor is required to proceed with the audit in accordance with clause E.10(h), he/she shall be required to conduct an audit of the access provider's systems (including but not limited to its computer systems, databases, records and processes) for the purpose specified in clause E.10(c);
- (j) The audit shall be conducted expeditiously and in any event for no longer than 20 Business Days (excluding any delays caused by the access provider);
- (k) The access provider must permit the Independent Auditor to audit and inspect its systems (including but not limited to its computer systems, databases, records and processes) and the access provider must provide the Independent Auditor with such assistance as he/she reasonably requires in order to conduct the audit;

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- (l) At the conclusion of the audit, the Independent Auditor shall be required to provide a report to both parties setting out his/her findings and conclusions as to whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4;
- (m) If the Independent Auditor's report contains Confidential Information of the access provider, then he/she will mask such information in the version of the report provided to the access seeker, provided that the access seeker's solicitors are given an unmasked copy of the report (subject to them first giving confidentiality undertakings to the access provider in a form reasonably required by the access provider);
- (n) The parties acknowledge that the Independent Auditor's report shall be *prima facie* evidence of the matters contained in the report and (subject to any obligation of confidence attaching to the report or the information contained therein) may be used in connection with any dispute concerning whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4.

F. COMMUNICATIONS WITH END USERS

- F.1 The access provider may communicate and deal with an access seeker's end-users as expressly provided in clauses F.2 to F.4 and as otherwise permitted by law.
- F.2 Subject to clause F.3, the access provider may communicate and deal with the access seeker's end-users:
 - (a) in relation to goods and services which the access provider currently supplies or previously supplied to the end-user;

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- (b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
- (c) where the access provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
- (d) in a manner or in circumstances agreed by the parties; or
- (e) in an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.

F.3 If:

- (a) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services with the access seeker and must not engage in any form of marketing or discussion of the access provider's goods and/or services;
- (b) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider, the access provider may engage in any form of marketing or discussion of the access provider's goods and/or services; and
- (c) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider and the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services, with the access seeker, but may otherwise engage in any form of marketing or discussion of the access provider's goods and/or services.

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- F.4 Where a party communicates with the end-user of the other party, that first mentioned party must make and maintain records of that communication with the other party's end-user in circumstances where that communication discusses anything concerning the other party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other party (however such a requirement may arise pursuant to any dispute resolution procedure).
- F.5 For the purposes of clauses F.2 to F.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.
- F.6 Neither party may represent that:
- (a) it has any special relationship with or special arrangements with the other party;
 - (b) there are consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
 - (c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
 - (d) the other party participates in the provision of the first mentioned party's services, provided that a party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other party.
- F.7 Where a party communicates with an end-user of either party, the first mentioned party shall ensure that it does not attribute to the other party:
- (a) blame for a Fault or other circumstance; or
 - (b) the need for maintenance of a Network; or
 - (c) the suspension of a Service,

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provided that this requirement does not require a party to engage in unethical, misleading or deceptive conduct.

- F.8 This clause F shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

G. NETWORK MODERNISATION AND UPGRADE PROVISIONS

- G.1 Subject to clause G.2, the access provider may make a Major Network Modernisation and Upgrade:

- (a) by giving the access seeker an equivalent period of notice (in writing) to that which it provides itself (and in any event not less than 6 months written notice or another period as may be agreed in writing between the parties) before any such modernisation and upgrade is scheduled to take effect; and
- (b) provided that the access provider has consulted with the access seeker and negotiated in good faith any reasonable concerns of the access seeker, in relation to the modernisation and upgrade.

- G.2 The terms and conditions that apply to a Major Network Modernisation and Upgrade done pursuant to the National Broadband Network (if any) are to override this clause G to the extent of inconsistency between them.

- G.3 Notwithstanding any continuing negotiations between the access provider and the access seeker in respect of clause G.1(b), a Major Network Modernisation and Upgrade may proceed at the time stated in clause G.1(a), unless the access provider and the access seeker agree otherwise.

- G.4 An access seeker must not unreasonably withhold its consent to a lesser period of notice being provided at the request of the access provider in relation to a Major Network Modernisation and Upgrade.

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- G.5 If the access seeker seeks an amendment to a Major Network Modernisation and Upgrade, or an amendment to the period of notice to be provided, the access provider shall consider in good faith the amendment sought by the access seeker and shall negotiate in good faith with the access seeker in relation to such amendment.
- G.6 In attempting to reach a mutually acceptable resolution in relation to the amendment, the parties must recognise any need that the access provider may have to ensure that the specifications for Services which the access provider supplies to more than one of its customers need to be consistent (including without limitation having regard to the incorporation by the access provider of any relevant international standards).
- G.7 For the avoidance of doubt, nothing in this clause G is intended to give the access provider a right to amend the definition or service description of a Service (as set out in the then current service declaration for that Service).
- G.8 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter shall be resolved in accordance with the dispute resolution procedures set out in clause D of this agreement.
- G.9 For the purposes of this clause G, a **‘Major Network Modernisation and Upgrade’** means, and:
- (a) includes the installation of Telstra customer access modules closer to ULL end-users than a Telstra exchange building;
 - (b) requires the truncation of ULLS provided from Telstra exchange buildings, or the establishment of a new point of interconnection (or relocation of an existing point of interconnection) for a Service, or alteration of deployment classes of equipment used on a Service; or,
 - (c) results in a Service no longer being supplied or adversely affects the quality of a Service (or any Services supplied by access seekers to their end-users using the Service).

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H. SUSPENSION AND TERMINATION

H.1 The access provider may immediately suspend the supply of a Service or access to the access provider's Network, provided it notifies the access seeker where practicable and provides the access seeker with as much notice as is reasonably practicable:

- (a) during an Emergency; or
- (b) where in the reasonable opinion of the access provider, the supply of that Service or access to the access provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network security or is likely to impede the activities of authorised persons responding to an Emergency; or
- (c) where, in the reasonable opinion of the access provider, the access seeker's Network or equipment adversely affects or threatens to affect the normal operation of the access provider's Network or access to the access provider's Network or equipment (including for the avoidance of doubt, where the access seeker has delivered Prohibited Traffic onto the access provider's Network),

and is entitled to continue such suspension until (as the case requires) the relevant Emergency or threat has passed or until the normal operation of the access provider's Network or access to the access provider's Network or equipment is no longer adversely affected or threatened.

H.2 If:

- (a) the access seeker has failed to pay monies owing under this agreement;
- (b) the access seeker's use either of its Facilities or the access provider's Facilities is in contravention of any law;

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- (c) the access seeker breaches a material obligation under this agreement; or
- (d) any of the events described in clause H.7 occurs in respect of the access seeker,

(“**Suspension Event**”) and:

- (e) within 20 Business Days after becoming aware of the Suspension Event, the access provider gives a written notice to the access seeker:
 - (i) citing this clause;
 - (ii) specifying the Suspension Event and the Service in respect of which the event has occurred;
 - (iii) requiring the access seeker to institute remedial action (if any) in respect of that event; and
 - (iv) specifying the action which may follow due to a failure to comply with the notice,

(“**Suspension Notice**”) and:

- (f) the access seeker fails to institute remedial action as specified in the Suspension Notice within 20 Business Days after receiving the Suspension Notice (in this clause H.2, the “**Remedy Period**”),

the access provider may, by written notice given to the access seeker within 20 Business Days after the expiry of the Remedy Period:

- (g) refuse to provide the access seeker with the Service:
 - (i) of the kind in respect of which the Suspension Event has occurred; and
 - (ii) a request for which is made after the date of the breach,until the remedial action specified in the Suspension Notice is completed; and

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- (h) suspend the provision of any Service of the kind in respect of which the Suspension Event has occurred, until the remedial action specified in the Suspension Notice is completed.

H.3 In the case of a suspension pursuant to clause H.2, the access provider shall reconnect the access seeker to the access provider's Network and recommence the supply of any suspended Services as soon as practicable after there no longer exists a reason for suspension and the access provider shall do so subject to payment by the access seeker of the access provider's reasonable costs of suspension and reconnection.

H.4 If:

- (a) a party ceases to be a carrier or carriage service provider; or
- (b) a party ceases to carry on business for a period of more than 10 consecutive Business Days without the prior written consent of the other party (such consent not to be unreasonably withheld); or
- (c) in the case of the access seeker, any of the reasonable grounds specified in subsection 152AR(9) of the TPA apply; or
- (d) a party breaches a material obligation under this agreement and:
 - (i) that breach materially impairs or is likely to materially impair the ability of the other party to deliver Listed Carriage Services to its customers; and
 - (ii) the other party has given a written notice to the access seeker within 20 Business Days of becoming aware of the breach ("**Breach Notice**"); and
 - (iii) the other party fails to institute remedial action as specified in the Breach Notice within 20 Business Days after receiving the Breach Notice (in this clause H.4, the "**Remedy Period**"),

the other party may terminate all or any part of this agreement by written notice given to the first mentioned party within 20 Business Days after becoming

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aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

H.5 A party must not give the other party both a Suspension Notice under clause H.2 and a Breach Notice under clause H.4 in respect of:

- (a) the same breach; or
- (b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events,

except where a Suspension Notice has previously been given to the access seeker by the access provider in accordance with clause H.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the access seeker within the relevant Remedy Period specified in clause H.2.

H.6 For the avoidance of doubt, a party shall not be required to provide a Suspension Notice under clause H.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause H.4.

H.7 Notwithstanding any other provision of this agreement, either party (“**Notifying Party**”) may at any time immediately terminate all or any part of this agreement (including terminating the supply of one or more Services) by giving written notice of termination to the other party if:

- (a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party and the order or resolution remains in effect for a continuous period of 5 Business Days; or
- (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the whole or a substantial part of the undertaking and property of the other party and the appointment remains in effect for a continuous period of 5 Business Days; or

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- (c) a holder of an encumbrance takes possession of the whole or any substantial part of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- (d) the other party is or likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- (e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- (f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of 3 months; or
- (g) the other party breaches any of the terms of any of its loan, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to this agreement; or
- (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- (i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

H.8 Termination or expiry of this agreement for any reason:

- (a) shall not operate as a waiver of any breach by a party of any of its provisions;
- (b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of the termination or expiry, including a right of indemnity; and

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- (c) shall not extinguish or otherwise affect the provisions of this agreement which by their nature survive termination.

H.9 Without prejudice to the parties' rights upon termination or expiry of this agreement, the access provider must refund to the access seeker a fair and equitable proportion of those sums paid under this agreement by the access seeker which are periodic in nature and have been paid for a Service for a period extending beyond the date on which this agreement terminates or expires, subject to any invoices or other amounts outstanding from the access seeker to the access provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance with the dispute resolution procedures set out in clause D of this agreement.

I. CHANGES TO OPERATING MANUALS

I.1 Operational documents concerning the ULLS may be amended:

- (a) by the access provider from time to time to implement or reflect a change to its standard processes, subject to:
 - (i) giving 20 Business Days prior written notice to the access seeker; and
 - (ii) allowing the access seeker to provide comments during the notice period on the proposed amendment, and giving reasonable consideration to any comments which the access seeker has made on the proposed amendment; and
- (b) otherwise, by agreement of the parties.

Note: operational documents concerning the ULLS include (i) *The Telstra Operations and Maintenance Manual Part 16 Fault Management Procedures for Telstra Unconditioned Local Loop Service*; and (ii) *The Telstra Ordering and Provisioning Manual Part 16 Telstra Unconditioned Local Loop Service Operations Manual*

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J. ORDERING AND PROVISIONING

Provisions to apply to Managed Network Migrations (“MNM”) to the ULLS

Minimum number of services

- J.1 Except where the parties agree otherwise, it is at the discretion of the access seeker whether a particular Service is to be connected as part of an MNM, or outside of an MNM.
- J.2 The access seeker will notify Telstra at the time the order is made whether a particular Service is to be connected as part of an MNM or outside of an MNM.
- J.3 Except where the parties agree otherwise, there is not a minimum number of services required as a pre-requisite for requesting an MNM.

Migration Plan terms (Forecasting timeframes)

- J.4 Unless the parties agree otherwise, the period of notice that an access seeker must give for an MNM is 56 calendar days.
- J.5 Telstra must not cancel an MNM where the number of Services to be cutover as specified in the 20 Business Day forecast differs to the number of Services specified in the 56 calendar day forecast.
- J.6 If the cutover of Services cannot occur within the 56 calendar day forecast period, Telstra must to take all reasonable steps to ensure that cutover occurs as soon as practicable following the conclusion of that period.

Note: For instance the cutover may not occur because of a significant variation between the 56 calendar day forecast and the 20 Business Day forecasts

After Hours connections

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J.7 Except where the parties agree otherwise, it is at the discretion of the access seeker whether a particular Service is to be connected within Business Hours or After Hours.

Note: additional charges may be payable for After Hours work.

Limits on number of exchanges per State per day at which MNM cutovers can be scheduled

J.8 Except where the parties otherwise agree, and subject to clause J.9, Telstra must not refuse to schedule a cutover for an MNM at an Exchange because the access seeker has requested an MNM cutover at other Exchanges in that State on the same day.

J.9 Telstra may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice (“**Limitation Notice**”) it has published.

J.10 The Limitation Notice must specify:

- (a) the limit that is to apply;
- (b) the period and the exchange service areas to which it applies; and
- (c) the reasons for the limit being necessary by reference to forecast demand and available capacity.

J.11 The Limitation Notice lapses 60 calendar days it is published, unless earlier withdrawn.

Note: Another Limitation Notice may be issued to replace a lapsed notice.

J.12 Telstra must not unreasonably refuse to vary or withdraw the Limitation Notice on the request of an access seeker.

J.13 Where an access seeker disagrees with a decision made by Telstra not to vary or withdraw the Limitation Notice, the access seeker may seek dispute resolution in

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accordance with the dispute resolution procedures set out in clause D of this agreement.

New ULLS Ordering and Provisioning processes

LSS to ULLS processes

- J.14. Except where the parties agree otherwise, Telstra will support a LSS to ULLS migration process, including an MNM process, by no later than six months from the date of these model terms and conditions.
- J.15 The LSS to ULLS migration process must provide for the migration of end-users from LSS to ULLS in a manner that ensures:
- (a) any period of time in which an end-user is unable to receive a broadband service by means of the copper pair servicing their Standard Telephone Service will be no longer than three (3) hours; and
 - (b) end-user involvement in that migration (including without limitation the making of a telephone call or sending of correspondence by the end-user to Telstra) is not required.

iVULL processes

- J.16 Except where the parties agree otherwise, Telstra will support an iVULL ordering and provisioning process by no later than six months from the date of these model terms and conditions.
- J.17 It is at the discretion of the access seeker whether the ULLS is to be provisioned using the iVULL process.
- J.18 The access seeker must notify Telstra at the time the order is made whether the ULLS is to be provisioned using the iVULL process.

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- J.19 If an access seeker requests the ULLS to be provisioned using the iVULL process, the access seeker must accept any risk to the quality of, connectivity of and suitability for providing voice and/or data services on the existing copper path.
- J.20 The iVULL process is set out in Annexure 1 to this agreement.

ULLS transfer processes

- J.21 The parties shall jointly develop procedures to support the transfer of a ULLS between a losing ULLS access seeker and gaining ULLS access seeker.

K. FACILITIES ACCESS

Decisions affecting access to Facilities

- K.1 Where an access provider receives a request from an access seeker for access to an Exchange, the access provider must give its decision to the access seeker as soon as practicable but in any event not more than 10 business days from when the request is received.
- K.2 Before giving its decision to an access seeker in relation to a request for access, an access provider must make all reasonable enquiries before deciding whether:
- (a) a request for access to an Exchange by an access seeker should be denied on the basis that the Facilities at the Exchange do not have available capacity;
 - (b) an Exchange should be listed as a Capped Exchange; or

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- (c) permission should be withheld from an access seeker wishing to gain access to a Facility on the basis that works arising from an earlier received request for access have not yet been completed and inspected.

Note: This does not prevent an access provider from using recently compiled or verified floor plans or inventories etc where it is reasonable to do so.

K.3 Before making any decision to deny access to an Exchange, an access provider must consider:

- (a) the potential for the use of Facilities at an Exchange to be optimised;
and

- (b) the capability of those Facilities to be extended or enhanced;

including the potential for:

- (c) existing TEBA space to be increased or a second TEBA space to be constructed;
- (d) use of the existing TEBA space to be optimised, including by removing redundant equipment;
- (e) an external cabinet to be built adjacent to the Exchange building;
- (f) use of the MDF to be optimised, including by reassigning MDF blocks, removing redundant junction and CAN cables;
- (g) the capability of the MDF to be extended or enhanced, including by:
 - (i) adding modules; or
 - (ii) replacing current modules with modules that support a larger number of terminal blocks ('MDF compression'); and
- (h) an additional distribution frame to be constructed.

K.4 An access provider must not deny an access seeker access to an Exchange on the basis of its own reasonably anticipated requirements unless:

- (a) the access provider has communicated to the access seeker:

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- (i) how it makes these assessments;
 - (ii) the time frame over which it makes these assessments; and
 - (iii) the criteria by which it assesses whether requirements are reasonably anticipated;
- (b) the access provider has measured its reasonably anticipated requirements for the relevant Exchange at the time, or an earlier time reasonably proximate to when, the access seeker's request for access was made; and
- (c) details of its reasonably anticipated requirements for the relevant Exchange have been recorded in writing.

K.5 Subject to clause K.6, the access provider must not:

- (a) refuse a request made by an access seeker for access to Facilities to an Exchange;
- (b) withhold permission to the access seeker accessing TEBA space for the purpose of installing its equipment causing the access seeker to queue;

on the basis that the access provider has already approved another access seeker's request for access to Facilities at the Exchange and any works associated with that earlier approved request have not yet been completed and inspected.

K.6 An access provider may withhold permission to TEBA space being accessed where there are reasonable grounds to believe that access to that TEBA space would, at the time of the request for access, compromise the safe and reliable operation of a Network or Facility.

K.7 Where an access provider withholds permission to TEBA space being accessed pursuant to clause K.6, the access provider must grant permission as soon as practicable after the circumstances which gave rise to the potential compromise of the safe and reliable operation of a network or facility no longer apply.

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K.8 An access provider must not deny:

- (a) a request by an access seeker for access to an Exchange; or
- (b) a design and construction order;

on the basis that the scope of works extends beyond that necessary to meet the requirements of the access seeker, unless there are reasonable grounds to believe that the scope of works also extends beyond what is reasonably necessary to meet forecasted demand across all service providers that would use the relevant Facilities.

K.9 If an access provider:

- (a) denies a request made by an access seeker for access to Facilities at an Exchange;
- (b) places an Exchange on a list of Capped Exchanges; or
- (c) withholds permission for the access seeker to access TEBA space;

the access seeker may make a written request to the access provider:

- (d) to make available Specified Information; or
- (e) that the access seeker or an independent person (as agreed between the parties) be permitted to inspect the Exchange.

K.10 For the purposes of clauses K.9(a),(b) and (c) and clause K.14(c), an access seeker may specify any or all of the following types of information to be made available (“**Specified Information**”):

- (a) a written explanation of the decision;
- (b) the floor plans of the particular Exchange;
- (c) an inventory of active, inactive, and underutilised equipment used to supply Services and/or permit interconnection of equipment for the purpose of supplying Services to end-users;

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Note: Examples of such equipment are distribution frames, racks, power and air conditioning equipment. Equipment at the Exchange that is not used to supply Services and/or permit interconnection of equipment, including the access provider's switching or data equipment, does not need to be included on this inventory.

- (d) details of any approved plan to expand the capacity of the particular Exchange or Facilities, including the anticipated timeframe for completion;
 - (e) details of any other potential means by which capacity of Facilities could be increased that have been identified; and
 - (f) any other matters on which the decision was based, such as the reasonably anticipated requirements of the access provider and existing access seekers present at the Exchange.
- K.11 If a request is made by an access seeker pursuant to clauses K.9 or K.14, an access provider must:
- (a) take all reasonable steps to make the Specified Information available to an access seeker; or
 - (b) permit an exchange inspection
- within 10 Business Days of the request being received.
- K.12 If an access provider does not comply with a request made by an access seeker pursuant to clauses K.9 or K.14 within 10 Business Days, the access seeker may seek dispute resolution in accordance with the dispute resolution procedures set out in Clause D of this agreement.
- K.13 The terms and conditions on which information is to be made available, or an Exchange is to be inspected, including the persons who can receive information or inspect the Exchange, are to be agreed between the access provider and the access seeker as soon as practicable and in any event within 10 Business Days of a request made pursuant to clauses K.9 or K.14 being received by the access provider.

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K.14 Where an access seeker is considering in good faith increasing the capacity of existing Facilities at an Exchange that could be used by itself and other service providers (“**Common Infrastructure Works**”), the access seeker may make a written request to the access provider to supply details of the likely scope of Common Infrastructure Works for the Exchange including:

- (a) the current capability of Facilities at the particular Exchange;
- (b) the forecasted demand for access to those Facilities for all service providers based upon:
 - (i) access seeker forecasts;
 - (ii) documented reasonably anticipated requirements forecasts of the access provider; and
 - (iii) applications for access to those Facilities that have been received by the access provider for the particular Exchange;
- (c) any Specified Information relevant to the likely scope of Common Infrastructure Works for the particular Exchange.

K.15 An access provider must take reasonable steps to assist an access seeker commencing and completing works, including Common Infrastructure Works, as soon as practicable, including:

- (a) making available its own staff so that any necessary approvals can be provided within agreed timeframes;
- (b) negotiating with its approved contractors, and where necessary approving additional contractors, so that works can be completed within agreed timeframes.

Notification of capacity limitations

K.16 The access provider must take reasonable steps to notify service providers who have rights to acquire the ULLS and/or PSTN originating and terminating

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access services at particular Exchanges, that existing TEBA space or the MDF is at, or is approaching, full capacity at those Exchanges.

Queuing provisions

- K.17 Where an access provider requires an access seeker to queue, the access provider must advise the access seeker of its place in the queue and an estimate of the likely date on which it will be able to access the Exchange.
- K.18 An access seeker must take reasonable steps to complete its works within an agreed design and construction proposal validity period.
- K.19 Where an access seeker becomes aware that it will not be able to complete works within an agreed validity period, it must promptly notify the access provider by submitting a written request for an extension of time.
- K.20 Any written request for an extension of time made under clause K.19 must include:
- (a) the name of the Exchange;
 - (ii) contact details for the responsible employee of the access seeker;
 - (iii) an outline of the works being undertaken;
 - (iv) a brief outline of the reasons for delay;
 - (v) the anticipated period within which the works should be completed;
and
 - (vi) the potential for queued access seekers to be given access to the particular Exchange during any downtime.
- K.21 On receiving an extension of time request, the access provider is to forward the request and its decision regarding the extension to all queued access seekers.

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- K.22 The access provider must consider any requests it may receive from queued access seekers for access to the Exchange during any downtime that is identified in the request for an extension of time.
- K.23 The access provider must provide written notice to access seekers prior to implementing changes in technical specifications for design and construction proposals for an Exchange.
- K.24 The access provider must not reject a design and construction proposal or proposed variation of a design and construction proposal for an Exchange on the basis of a technical specification that had not been notified to access seekers prior to the design and construction proposal being submitted.
- K.25 The access provider must not unreasonably withhold consent to an access seeker making minor variations to a design and construction proposal for an Exchange.

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L. INTERPRETATION & DEFINITIONS

In this agreement, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa; and
- (b) the words “including” and “include” mean “including, but not limited to”.

“**ACDC**” means the Australian Commercial Disputes Centre Limited;

“**ACMA**” means the Australian Communications and Media Authority;

“**After Hours**” means outside Business Hours;

“**Applicable Percentage**” means:

- (a) during the first and second months of the Fee Waiver Period, 50%;
- (b) during the third and fourth month of the Fee Waiver Period, 75%; and
- (c) in the fifth and subsequent months of the Fee Waiver Period, 100%;

“**Billing Dispute**” means a dispute relating to a Charge or an invoice issued by the access provider;

“**Billing Dispute Notice**” means a notice given pursuant to clause A.11;

“**Billing Dispute Procedures**” means the procedures set out in clauses A.11 to A.29;

“**Business Hours**” means 8.00 am to 5.00 pm Monday to Friday, excluding a day which is a gazetted public holiday in the place where the relevant transaction or work is to be performed.

“**Business Day**” means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned;

“**Calendar Day**” means a day reckoned from midnight to midnight;

“**Calendar Month**” means a period commencing at the beginning of any day of a named month and ending:

- (a) at the end of the day before the corresponding day of the next named month; or

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(b) if there is no such corresponding day – at the end of the next named month;

“**CAN**” means a customer access network;

“**Capped Exchange**” means an exchange that is included on a published list of exchanges that are subject to capacity constraints;

“**Carriage Service**” has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

“**Charge**” means a charge for the supply of a Core Service;

“**Confidential Information**” means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this agreement) relating to or developed in connection with or in support of the business of a party (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this agreement);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or
- (c) information which has been independently developed or obtained by the other party;

“**Core Service**” means a “core service” for the purposes of section 152AQB of the TPA;

“**Correspondent**” means an international telecommunications operator to whom a party’s international network is connected and from whom traffic is sourced and/or to whom international traffic is provided;

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“**CSG Standard**” means the *Telecommunications (Customer Service Guarantee) Standard 2000 (No. 2)* and the *Telecommunications (Customer Service Guarantee) Amendment Standard 2001 (No. 1)*, as amended from time to time (including without limitation the *Telecommunications (Performance Standards) Determination 2002*);

“**design and construction proposal validity period**” means the period of time a design and construction proposal (lodged by an access seeker and approved by Telstra) remains valid;

“**Emergency**” means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage property,

being an emergency which requires a significant and co-ordinated response;

“**Event**” means an act, omission or event relating to or arising out of this agreement or part of this agreement;

“**Exchange**” means telephone switching equipment of the access provider or access seeker;

“**Expert Committee**” means a committee established under clause D.12;

“**Facility**” has the same meaning given to that term in section 7 of the *Telecommunications Act 1997 (Cth)*;

“**Fault**” means:

- (a) a failure in the normal operation of a Network or in the delivery of a Service; or
- (b) any issue as to the availability or quality of a Service supplied to an end-user via the access seeker, notified by the end-user to the access seeker’s help desk,

that has been reasonably assessed by the access provider as being the access provider’s responsibility to repair;

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“**Fee Waiver Period**” means a period which is equal to the period of delay in supplying a Service or establishing a POI;

“**Indemnifying Party**” means the party giving an indemnity under this agreement;

“**Independent Auditor**” means a person appointed as an independent auditor in accordance with clause E.10;

“**Innocent Party**” means the party receiving the benefit of an indemnity under this agreement;

“**Interconnect Gateway Exchange**” means an Exchange nominated by the access provider for provision of interconnection of the access provider’s Network with that of the access seeker;

“**International POI**” means an agreed location which:

- (a) is a physical point of demarcation between the access provider’s international Network and the access seeker’s domestic Network, or, if agreed as an alternative, is between the access provider’s international Network and the access seeker’s international Network; and
- (b) is associated (but not necessarily co-located) with one or more of the access provider’s international gateway exchanges,

but does not include a POI;

“**iVULL process**” means an Intact Vacant ULLS as described at Annexure 1.

“**Liability**” (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this agreement, or part of this agreement or in relation to any Event or series of related Events;

“**Listed Carriage Service**” has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

“**Loss**” includes liability, costs or expenses (including legal costs);

“**LSS**” means Line Sharing Service;

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“**MDF**” means a main distribution frame;

“**Month**” means a calendar month;

“**Network**” of a party, means that party’s system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic or optical energy;

“**Non-Billing Dispute**” means a dispute other than a Billing Dispute;

“**OPM**” means Telstra’s Ordering and Provisioning Manual as amended from time to time;

“**Outage Period**” in relation to a Service means the Repair Time for that Service as specified in any applicable Service schedule;

“**People**” of a party, means each of that party’s directors, officers, employees, agents, contractors, advisers and representatives but does not include that party’s end-users or the other party;

“**POI**” means an agreed location which:

- (a) is a physical point of demarcation between the Networks nominated by the access seeker and the access provider; and
- (b) is associated (but not necessarily co-located) with one or more of the access provider’s Interconnect Gateway Exchanges,

but does not include an International POI;

“**Prohibited Traffic**” means traffic offered across a point of interconnection for which there is no agreement between the access provider and the access seeker that the access provider will carry such traffic or provide a related service to the access seeker;

“**Recurring Charges**” means Charges of a recurring nature payable periodically for the supply or usage of a Service as listed in an applicable price list and includes annual service charges to cover operating costs;

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“**Repair Time**” means the period of time between the access provider determining that a reported failure in the normal operation of a Service or service provided to an end-user is a Fault and repair of the Fault by the access provider, as set out in any relevant Service schedule;

“**Security**” means the amount and type of security provided, or required to be provided, to the access provider in respect of the provision by the access provider of Services, as set out at *[insert a reference to the location in the agreement where the amount of the security is specified]*;

“**Service**” means a Core Service;

“**Specified CSG Service**” means a “specified service” within the meaning of the CSG Standard;

“**TEBA space**” Telstra Exchange Building Access space;

“**TPA**” means the *Trade Practices Act 1974* (Cth);

“**ULL**” means unconditioned local loop;

“**ULLS**” means unconditioned local loop service.

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Annexure 1

(ULLS only)

iVULL process

The ACCC considers that where there is an existing and vacant cable path that is intact all the way from a Telstra exchange to an end-user premises, and a soft dial tone is present on the line interface or an equipment number exists for the inactive service number that was previously connected to the end-user premises, an access seeker may request Telstra to provide the following Intact Vacant ULLS (iVULL) service.

The iVULL process requires the access seeker to supply the inactive service number (i.e., the full national number) that was previously active at the relevant end-user's premise. This service number can be obtained by the end-user dialling 1800 801 920 from the end-user premises.

On receipt of a completed iVULL request, Telstra will:

- (a) validate the relationship between the inactive service number and the address of the end-user premises;
- (b) confirm the presence of the soft dial tone on the line interface or an equipment number for the inactive service number; and
- (c) undertake any other relevant validations

Note: Relevant validations could include those identified in Telstra's OPM, the ACIF C569:2005 *Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer* and ACIF G587 *Unconditioned Local Loop Service IT Specification – Transaction Analysis* and are for other ULLS ordering and provisioning processes

If these validations are successful, Telstra will:

- (a) perform service qualification in accordance with paragraph 7 of Telstra's OPM on the cable path associated with the inactive service number;
- (b) reserve the cable path associated with the inactive service number in accordance with paragraph 8.1 of Telstra's OPM; and

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- (c) cutover the ULLS in accordance with the process for IULLs described in paragraphs 8.2 and 9.2 of Telstra's OPM.

If an access seeker submits a request for an iVULL service to Telstra that meets the requirements set out above, the access seeker must accept any risk to the quality of, connectivity of and suitability for providing voice and/or data services on the existing cable path between the Telstra exchange and the end-user premises.