Final Access Determination for the Domestic Transmission Capacity Service

Explanatory Statement

June 2012

Contents

List of abbreviations

ACCC	Australian Competition and Consumer Commission
CBD	central business district
CCAs	Call Charge Areas
CACS Act	*Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*
CSP	Carriage Service Provider
DAA	Data Analysis Australia Pty Ltd
DTCS	domestic transmission capacity service (as defined in the current service description)
ESA	exchange service area
FAD	final access determination
IAD	interim access determination
LTIE	Long Term Interests of End-users
Model Terms	*Model Non-Price Terms & Conditions Determination 2008*
NBN	National Broadband Network
PDH	Plesiochronous Digital Hierarchy
POI	Point of Interconnection
RAF	regulatory accounting framework
SAOs	standard access obligations
SDH	Synchronous Digital Hierarchy

Executive Summary

The ACCC has completed its public inquiry into making a final access determination (FAD) for the domestic transmission capacity service (DTCS). This explanatory statement considers the submissions made by industry, discusses the key issues considered by the ACCC in deciding the terms of the DTCS FAD and explains how the FAD will apply in practice.

The DTCS FAD includes both price and non-price terms of access which are intended to guide commercial negotiations about access to the DTCS. The terms and conditions in the FAD will apply where there is no agreed term or condition between an access provider and an access seeker. In the event that commercial agreement cannot be reached, an access seeker may seek to enforce the terms of the DTCS FAD through the Federal Court.

The DTCS FAD sets prices for inter-capital, metropolitan, regional and tail-end services covered by the DTCS Declaration.

The FAD prices are based on a benchmark of prices of DTCS services in competitive areas or routes collected from service providers in 2011. The benchmarked prices are used to predict annual prices for DTCS services in uncompetitive (declared) areas or routes as if they were competitive. The benchmark prices are determined by a linear regression model which takes account of the key drivers of price for DTCS services including route category, distance, data rate, level of protection and quality of service.

The purpose of the benchmarking approach is to set a benchmark based on data collected of *all* prices available to the Commission, and not just the lowest price. Prices used in the model were obtained during the period between January and September 2011. While there will always be a time lag between the collection of data and release of final prices (to enable analysis and consultation) this is somewhat mitigated in the pricing model as the data also contains pricing for forward years where contracts have been negotiated for terms beyond 2011. The pricing methodology does not seek to pick the lowest price in the market at any particular point of time but predicts prices based on the known relationships between price and key variables using a complex regression model.

Staff note that the FAD prices generated by the regression model for shorter distance, low data rate metropolitan and metropolitan tail-end services may be higher than some commercially negotiated prices currently observed in the market. However, the ACCC is of the view that, over all declared DTCS services, the FAD will lower wholesale access charges for transmission services, particularly in regional areas where a lack of access to competitive DTCS services has resulted in higher access costs. This should flow through to lower prices for communications services.

The DTCS FAD will expire on 31 December 2014. In the interests of promoting regulatory certainty, the ACCC has decided the terms of the FAD (including the price terms) will apply for the duration of the FAD. As this is the first time that prices have been set for the DTCS, the ACCC will monitor prices during the term of the FAD. The ACCC notes that if the DTCS FAD leads to any unintended consequences in the DTCS market or the ACCC receives evidence of any market failure, it is able to consider its regulatory options, including a variation inquiry, during the period of the FAD.

The prices provided by the DTCS FAD are end-to-end prices for declared inter-capital, regional and metropolitan services with a bundled tail-end element. Where access seekers wish to purchase a standalone tail-end service (metropolitan or regional), the DTCS FAD also provides a method for deriving this price.

The non-price terms in the FAD have been based on the *ACCC's Model Non-price Terms and Conditions Determination 2008* and are similar to the non-price terms in the fixed line services FADs and the Mobile Terminating Access Service FAD.

1. INTRODUCTION

This Explanatory Statement explains the terms in the *Domestic Transmission Capacity Service Final Access Determination 2012* and the basis on which those terms have been developed. It forms part of the Australian Competition and Consumer Commission's (ACCC) public inquiry, required under section 505 of the *Telecommunications Act 1997,* into making a final access determination (FAD) for the domestic transmission capacity service (DTCS).

The public inquiry into making the DTCS FAD commenced in June 2011. A discussion paper was released at this time, followed by a draft regression model in July 2011, and a public forum in August 2011. A Draft DTCS FAD was issued on 9 December 2011 with a Draft Pricing Calculator, Draft Route Category Workbook and a report from Data Analysis Australia Pty Ltd (DAA) on the linear regression model used to determine the price terms. On 20 January 2012, a sample of 10 per cent of the pricing data used to develop the price terms in the Draft DTCS FAD was published on the ACCC website to provide further transparency about the methodology behind the price terms in the Draft FAD.

The FAD price terms are based on a domestic benchmark of prices of DTCS products in competitive areas and on competitive routes. This approach assumes these prices broadly reflect costs and include a normal rate of return on investment. The domestic benchmark uses a linear regression model of contract prices obtained from DTCS service providers between January and September 2011. This is the same regression model used in the Draft FAD.

This FAD will expire on 31 December 2014. The ACCC must commence an inquiry into making a new FAD at least 6 months prior to this FAD expiring. The ACCC also notes it is required to hold an inquiry into whether to maintain, vary, revoke or let expire the DTCS declaration in the 18 month period prior to the expiry of the declaration on 31 March 2014.

2. REGULATORY OVERVIEW

The *Competition and Consumer Act 2010* (the Act) requires the ACCC to hold a public inquiry into whether to make an FAD for all declared services in operation on 1 January 2011.[1] The DTCS was deemed a declared service in June 1997.[2] The current DTCS declaration is due to expire on 31 March 2014. A copy of the current DTCS services description is at Appendix A.

The Act does not require an access determination to set out *all* the terms and conditions that apply to a declared service. However, an access determination that includes terms and conditions of access to the declared service must include terms and conditions relating to price or a method of ascertaining price.[3] Non-price terms and conditions may be included but are not compulsory.

The terms and conditions of an FAD apply if there is no agreed commercial terms or conditions between an access provider and an access seeker. The Act does not require that *all* the price and non-price terms in an access determination must apply.[4] Parties can include some or all of the terms in an access agreement and are free to agree terms that differ from those in an access determination. If the parties agree terms and conditions of access, the terms of their access agreement will prevail over the FAD terms and conditions to the extent of any inconsistency.[5]

Compliance with an FAD is a carrier licence condition and a service provider rule.[6] Failure to comply may lead to a fine of up to $10 million for each contravention[7] and private action may also be taken in the Federal Court.[8]

Once an FAD is made, any interim access determination (IAD) that applies will be revoked[9] and no access disputes can be notified to the ACCC in relation to that service. The ACCC made a DTCS IAD in April 2011 which was set to expire on 31 December 2011. On 9 November 2011 the ACCC extended the IAD expiry date to the day immediately before the DTCS FAD comes into force.

2.1 Matters to take into account when making an FAD

When making an FAD, the ACCC must take account all of the criteria are specified in subsection 152BCA(1) of the Act which are:

(a) whether the determination will promote the long-term interests of end-users (LTIE) of carriage services or services supplied by means of carriage services

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[1] Subsection 152BCI(2) of the Act.

[2] ACCC, *Deeming of Telecommunications Services: a statement pursuant to section 39 of the Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*, June 1997. The DTCS declaration was varied in November 1998, May 2001, April 2004, April 2009 and September 2010.

[3] Sections 152BC(3) and 152BC(8) of the Act.

[4] Section 152BC(3) of the Act.

[5] Section 152BCC of the Act.

[6] Sections 152BCO and 152BCP of the Act.

[7] Section 570 of the *Telecommunications Act 1997.*

[8] Section 152BCQ of the Act.

[9] Subsection 152BCF(9A) of the Act.

(b) the legitimate business interests of a carrier or CSP who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service

(c) the interests of all persons who have rights to use the declared service

(d) the direct costs of providing access to the declared service

(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

The ACCC may also take into account any other matters that it thinks are relevant when making an FAD.[10]

2.2 Variation inquiry and binding rule of conduct

If an FAD results in unintended consequences, the ACCC may consider undertaking an inquiry into varying the FAD or consider issuing a binding rule of conduct (BROC).

The ACCC may make a BROC for the DTCS if it considers that there is an urgent need to specify terms and conditions for a carrier or carriage service provider (CSP) to comply with the standard access obligations (SAOs) in relation to the DTCS, or to require compliance with the SAOs relating to the DTCS as specified in the BROC. The duration of a BROC is limited to a maximum of 12 months. If the ACCC makes a BROC in relation to the DTCS, it must also commence a public inquiry to vary the existing FAD or make a new FAD to address the issues raised in the BROC on a more permanent basis. Section 152BDE of the Act provides that the BROC would prevail over any provision of the DTCS FAD to the extent of any inconsistency.

Further, the ACCC is required to hold an inquiry into whether to maintain, vary, revoke or let expire the DTCS Declaration within the 18 month period prior to the expiry of the DTCS Declaration in March 2014. The ACCC notes that the declaration inquiry is also an opportunity to consider issues that may relate to the DTCS FAD.

[10] Subsection 152BCA(3) of the Act.

3. KEY ISSUES

This section explains the ACCC's final decision on the key issues raised during the DTCS FAD inquiry.

3.1 Scope of the DTCS Declaration

The DTCS FAD does not review the scope of the DTCS declaration. The ACCC considers the scope of the regulated DTCS service should be determined in a DTCS declaration inquiry due before 31 March 2014 in accordance with subsection 152AL (3) of the Act.

Draft DTCS FAD

The Draft DTCS FAD proposed that the DTCS FAD inquiry was not the appropriate avenue to examine the scope of the current DTCS declaration. The inquiry was intended to consider the form and content of an access determination for the services specified in the current DTCS declaration. The Draft DTCS FAD proposed that any review of the scope of the current DTCS declaration should be determined in the context of a declaration inquiry.

Submission to the Draft DTCS FAD

Telstra submitted that the current inquiry provides an opportunity to canvass stakeholder opinions on the scope of the DTCS declaration and that additional DTCS routes found to be competitive should be removed from regulation.[11]

Telstra argued that deferring the consideration of further removals from the scope of regulation until a later time will result in competitive routes being subject to unnecessary regulation.[12] Telstra stated that the competitive threshold of three or more fibre suppliers should be applied to exclude competitive routes from the scope of the DTCS declaration for the purposes of the FAD.[13]

In relation to the excluded inter-capital transmission routes, Telstra requested that the ACCC clarify that the prices set for inter-capital routes will not apply to the supply of any inter-capital services.[14] Nextgen considered the ACCC's position not to examine the scope of the declaration in the DTCS FAD was reasonable in the current context, as the focus should be on ensuring that the FAD terms promote the relevant statutory criteria.[15] However, Nextgen also noted that it is good regulatory practice to ensure the scope of regulation remains relevant as market conditions evolve in the transition to an NBN environment.[16]

[11] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.33.
[12] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.33.
[13] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.33.
[14] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.3.
[15] Nextgen, Submission to the Draft DTCS FAD, Public version, March 2012 p.5.
[16] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012 p.5.

ACCC's view

The ACCC recognises that an FAD may deal with the application of standard access obligations to specific carriers or to carriers generally, which is one way to refine the scope of regulation. While Telstra submitted in favour of reviewing the scope of DTCS regulation in the FAD inquiry, this did not receive any broader support.

The ACCC also notes that the 2009 DTCS declaration review renewed the DTCS declaration for a period of five years to provide sufficient regulatory certainty about the scope and duration of the regulated service.

The ACCC remains of the view that all currently regulated transmission routes should be subject to the FAD. This reflects the view that parties have not provided enough information during the course of this inquiry that indicates that it would be appropriate to remove particular DTCS from the scope of regulation at this time.

Further, the ACCC will be reviewing the DTCS declaration within the 18 month period preceding the expiry of the current DTCS declaration in March 2014. Given that questions of coverage are already dealt with extensively in the service description of the DTCS, that inquiry would appear, in this case, to provide the more appropriate vehicle to test any further information that parties may wish to provide around the geographic scope of DTCS regulation.

The ACCC confirms that the inter-capital prices included in the Draft DTCS FAD assisted with the domestic benchmarking exercise and were included in the dataset from which the regulated metropolitan and regional prices were developed.

Inter-capital services between Sydney, Melbourne, Brisbane, Adelaide, Perth and Canberra continue to be excluded from the scope of regulation and remain excluded from the application of the FAD. Chapter 4 explains how to use the price terms to determine prices for services from one capital city boundary to another capital city boundary.

3.2 Approach to pricing the DTCS

The DTCS FAD sets regulated prices based on a benchmark of competitive DTCS prices using a linear regression model.

Draft DTCS FAD

The ACCC stated in the Draft DTCS FAD that it would determine regulated DTCS prices using a domestic benchmarking approach, following the conclusion of a public consultation process in 2010.[17] The public consultation considered a number of different approaches to pricing the DTCS. These included the bottom-up long-run incremental cost, top-down long-run incremental cost, fully allocated cost, international and/or domestic benchmarking and a combined approach. Submissions to the public consultation indicated that there was a general level of support for a domestic benchmarking approach.

The ACCC considered that the price of transmission services in competitive areas could provide a reasonable indication of prices that should prevail in areas with less competition (the declared areas) for domestic benchmarking purposes. The ACCC engaged Data Analysis Australia Pty Ltd (DAA) to develop a regression model (the Final Regression Model) using information from DTCS service providers about the prices for DTCS products in competitive areas and on competitive routes. The Final Regression Model takes account of the complex relationships between price and the different variables that impact on price.

Submissions to the Draft DTCS FAD

Stakeholders were broadly supportive of a domestic benchmarking approach, at least in the short term.[18] However, AAPT, Macquarie Telecom (Macquarie) and VHA[19] submitted that the ACCC should move to a cost-based model in the longer term. AAPT considered that the domestic benchmarking approach adopted by the ACCC suffers from some irregularities and the ACCC should consider adopting a more robust cost-based building block approach to setting DTCS price terms in the longer term.[20] Macquarie also suggested that the Draft DTCS FAD prices should be compared with data provided in the Telstra Economic Model (TEM) supplied under the Structural Separation Undertaking (SSU).

Telstra submitted that the pricing approach in the Draft DTCS FAD represents a substantial improvement on the initial analysis, particularly through the introduction of a 'Quality of Service' term.[21] Telstra also submitted that regression analysis is the appropriate

[17] ACCC, An ACCC *Position Paper* on pricing the DTCS, November 2010, p. 6.

[18] Primus, Primus Comments on ACCC's Draft Final Access Determination for the DTCS, Public version, 16 March 2012, p.1. Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.8. VHA, Domestic Transmission Capacity Services Submission to the ACCC, February 2012, p.3.

[19] AAPT, Submission by AAPT Limited to ACCC Draft final access determination for the domestic transmission capacity service dated December 2011, Public Version, 9 March 2012, p. 7. Macquarie Telecom, Draft Final Access Determination for the Domestic Transmission Capacity Service, 29 February 2012, p.4. VHA, Domestic Transmission Capacity Service Submission to the ACCC, February 2012, p.6.

[20] AAPT, Submission by AAPT Limited to ACCC Draft final access determination for the domestic transmission capacity service dated December 2011, Public Version, 9 March 2012, p. 7.

[21] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p. 8.

methodology to inform regulated prices for the DTCS.[22] However, Telstra expressed concern that the approach of predicting prices as the mean value in a range of potential prices creates a risk of under-pricing the highest quality service. Telstra suggested that this risk could be minimised by adopting a 75th percentile approach[23] when setting regulated prices, rather than the mean value. In support of this, Telstra cited that this approach has previously been adopted by the New Zealand Commerce Commission.[24] Professor Trevor Breusch, in his submission on behalf of Telstra, argued that there is no rationale in using the mean value to determine benchmark prices.[25]

ACCC views

The ACCC considers that the domestic benchmarking approach is the most appropriate method of determining prices for the DTCS FAD. The ACCC considers that prices on competitive routes are broadly reflective of costs (inclusive of a normal return on investment) and provide an appropriate estimate of efficient prices that would prevail in competitive markets. The ACCC has therefore used pricing information from competitive routes as a basis for determining prices and price structures on non-competitive routes, through a domestic benchmarking approach. This is also discussed in the assessment of price terms against the long term interests of end-users in chapter 7.

Other cost based approaches (such as bottom up cost modelling) to pricing the DTCS have previously been considered by the ACCC, but were found to be problematic due to the inherent complexities of the service. The ACCC notes that transmission is made of many network elements, one of which is the DTCS, and the difficulties in isolating what network elements are used in any particular transmission network. Further, it was challenging to identify and allocate costs directly attributable to the DTCS and not any other service. Where costs would be attributable across services, the proportion allocated to each service would also be difficult to isolate. The ACCC therefore maintains the domestic benchmarking approach in the DTCS FAD is the appropriate approach.

The ACCC considers it appropriate to use the mean distribution in determining benchmark DTCS prices. In the DTCS benchmarking exercise, mean values reflect the price that would be charged, on average, if the charges were determined by a market with effective competition. Further, the ACCC considers that its approach to base prices on the highest quality of service adequately reflects the maximum/upper bound of regulated prices that could be charged by a service provider.

In terms of the use of information on wholesale services in the TEM model it is unlikely that this will provide direct or appropriate comparisons with market prices available to the ACCC as used in the regression model.

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[22] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.8.

[23] The 75th percentile approach sets a price near the top of the range of expected or predicted prices where there is a probability that 75 per cent of predicted price observations lie under this point. The 75th percentile is obtained by calculating the upper bound of a 50% prediction confidence interval.

[24] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p. 8.

[25] Professor Trevor Breusch, ACCC's Draft FAD of the DTCS and the associated econometric modelling by DAA (November 2011), February 2012, p.10.

3.3 The Final Regression Model

The price terms of the DTCS FAD are based on the predicted mean distribution of prices. The DTCS FAD does not include a term updating the prices prior to the FAD expiry. The ACCC will continue to monitor DTCS prices during the term of the FAD.

Draft DTCS FAD

In developing the price terms for the DTCS FAD the ACCC engaged Data Analysis Australia Pty Ltd (DAA) to provide the statistical modelling. DAA undertook an exploratory analysis of the data obtained from providers which was the basis for the development of a draft regression model. Further refinement of this model with the aim of better reflecting the various relationships between the determinants of price led to the Final Regression Model.

The Draft DTCS FAD noted that the price terms derived by the Final Regression Model were determined using the pricing information collected from service providers between January – September 2011. The ACCC also proposed that the price terms of the DTCS FAD, as generated by the Final Regression Model, would be applied until the expiry of the FAD (being 31 December 2014).

Submissions to the Draft DTCS FAD

Optus, AAPT, Macquarie Telecom, Primus and VHA claimed the Draft DTCS FAD prices for 2Mbps, 0-30 km distances in metropolitan areas were significantly higher (depending on individual service and access seeker) than current market rates. This is claimed to be because the Final Regression Model uses historic data that does not reflect current commercially negotiated rates. AAPT also claims prices are falling by around 20 per cent each year.[26]

Telstra and another party in a confidential submission have argued against updating the pricing data or price terms before the FAD expires. They contend that a pricing update would create uncertainty about the prices that apply and discourage longer term contracts as access seekers seek to exploit the latest regulatory prices. They also argued that collecting the new data would be a burden on industry and any changes in the market reflected in the new data would likely lead to changes in the pricing model which would require further consultation. Telstra also noted that the dataset already includes some current prices because its data includes prices in multi-year contracts that still apply.

Telstra, via its independent expert Professor Trevor Breusch, recommended setting prices using the 75th percentile approach rather than the mean of regression prices as used in the Draft DTCS FAD. Telstra claimed this was necessary to avoid systematically under-pricing the highest quality services. Breusch argued that the New Zealand Commerce Commission (NZCC) had used the 75th percentile approach in its Mobile Terminating Access Service (MTAS) and sub-loop backhaul determinations after weighing up the risks of setting the maximum price too low or too high.

Telstra also questioned the way certain variables were included in the Final Regression Model, the robustness of the Final Regression Model and, as a consequence, its predictive

[26] AAPT, Submission by AAPT Limited to ACCC Draft final access determination for the domestic transmission capacity service dated December 2011, Public version, March 2012, p.7

ability. In addition, Telstra suggested that an appended section of the DAA report on the Final Regression Model was described incorrectly and therefore misleading.

ACCC views

Having considered the submissions to the Draft DTCS FAD, the ACCC has decided that it will maintain the price terms of the DTCS FAD for the duration of the FAD. The ACCC notes the FAD is due to operate for approximately two and half years and expire on 31 December 2014. The ACCC considers that including a provision to update FAD prices before the FAD expires creates unnecessary uncertainty and a risk that market participants will try to game the regulatory environment and/or move away from long term contracts in the hope of securing lower regulated prices.

With regard to evidence in submissions of price decreases since the time data underpinning the FAD pricing model was collected, the ACCC recognises that a domestic benchmarking exercise will nearly always involve a delay between data collection and setting prices and that market prices may shift (both up and down) during that intervening period. This is a not unexpected. As previously indicated, however, the ACCC is able to monitor prices through market observation, market inquiries and through access agreements lodged with the ACCC and will consider an FAD variation inquiry if necessary or issue a BROC if there is an urgent need for regulatory intervention.

The ACCC notes the NZCC determinations referred to in submissions. The NZCC adopted a 75th percentile approach in the *June 2009 Sub-loop Backhaul Standard Terms Determination* after taking account of the risks to the incumbent access provider in setting a price.[27] In the 2011 MTAS decision, the NZCC adopted a 25th percentile approach after taking account of the risks of setting a price that is too high or too low.[28] While informative, the ACCC does not consider the NZCC decisions provide a persuasive case for adopting a 75th percentile approach for the DTCS FAD.

In responding to some of the more technical issues raised in relation to the Final Regression Model the ACCC was provided with further clarification from DAA which is available at Appendix B.[29] Concerning the use of the 75th percentile approach DAA noted that the decision to use the mean, median or some other percentile value when setting benchmark prices should consider a range of factors which may not relate to any particular percentile of predicted prices. DAA also notes that the regulatory uncertainty associated with setting benchmark prices too high or too low cannot be analysed using the data alone and ultimately is a matter for the ACCC to decide.

The ACCC considers there is a balance between the risk of under and over recovery of costs by the access provider. As indicated earlier, the pricing model already incorporates a factor to account for the highest quality of service. Furthermore, Telstra's approach would arbitrarily increase all FAD prices by a significant proportion. The ACCC has decided that an increase of this size for all DTCS products is likely to over-recover the costs of providing the highest quality services. The FAD therefore does not set prices based on the 75th percentile of the benchmark prices.

[27] *NZCC Standard Terms Determination for Telecom's Unbundled Copper Local Loop Network Backhaul Service (Sub-Loop Backhaul) June 2009.*
[28] *NZCC Standard Terms Determination for MTAS May 2011*
[29] *DAA, DTCS Price Benchmarking and Pricing Model Development - Consolidated Report June 2012.*

3.4 Transmission categories

The DTCS FAD adopts the transmission categories proposed in the Draft DTCS FAD.

Draft DTCS FAD

The ACCC categorised transmission services into the following geographic classifications to reflect the way transmission services are currently sold in the market:

- an *inter-capital route* is a route from an ESA within the boundary of a capital city to an ESA within the boundary of another capital city
- a *regional route* is a route where either or both the A-end and B-end are outside the boundary of a capital city
- a *metropolitan route* is a route where both the A-end and B-end are within the boundary of a capital city
- a *tail-end service* is:
    - a regional tail-end route is a route wholly within a single ESA outside the boundary of a capital city
    - a metropolitan tail-end route is a route wholly within a single ESA inside the boundary of a capital city.

Submissions to the Draft DTCS FAD

Nextgen generally supports the transmission categories determined by the ACCC, but notes that these definitions should align with the DTCS service description for consistency.[30]

Further, Nextgen submits that there may be instances where the transmission categories do not necessarily align with the way services are sold commercially. Given that the ACCC is applying a domestic benchmarking approach, Nextgen considers it appropriate to use definitions which are well understood and accommodate different networks and providers.[31]

ACCC views

The DTCS FAD maintains the transmission categories proposed in the Draft DTCS FAD. While these transmission categories broadly reflect how transmission services are categorised and sold in the market, the ACCC recognises that this may not always reflect how all transmission services are categorised commercially. However, the ACCC notes that the transmission categories are broad in scope, align with the DTCS declaration and are easy to understand and apply to most services available.

The revised transmission categories were developed to better identify competitive services to benchmark from the pricing dataset collected from industry during 2011. The revised transmission categories (used for pricing purposes in this FAD) do not indicate that a transmission service is a declared service simply because it falls within a particular category of transmission service. Whether a service is a declared service will be determined by the relevant service description in the declaration.

[30] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.7.
[31] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.7.

3.5 Capital city boundaries

The DTCS FAD maintains the capital city boundaries proposed in the Draft DTCS FAD.

Draft DTCS FAD

In the Draft DTCS FAD, the ACCC proposed a radial distance from a CBD ESA of each capital city to determine which ESAs were within the capital city boundary of that city.[32] The radial distance for each capital city was determined by examining the level of continuous urban development from a CBD ESA. The capital city boundaries for pricing purposes were defined as ESAs that fell wholly or partially within the distance limits noted below:

- Adelaide – a 25 km radius from the Waymouth ESA
- Brisbane – a 25 km radius from the Edison ESA
- Canberra – a 15 km radius from a CBD ESA
- Darwin – a 10 km radius from the Nightcliff ESA
- Hobart – a 6 km[33] radius from a CBD ESA
- Melbourne – a 45 km radius from the Kooyong ESA
- Perth – a 30 km radius from the Wellington ESA
- Sydney – a 50 km radius from the City South ESA

Submissions to the Draft DTCS FAD

Nextgen welcomed the ACCC's clarification of the geographic scope of these boundaries,[34] while Telstra submitted that the boundary definitions provide greater clarity on how routes should be priced.[35] Optus also supported the ACCC's clarification but argued that the Draft FAD did not have regard to the current market construct of Specified Regional Routes.[36]

Telstra also submitted that the capital city boundaries proposed in the Draft DTCS FAD clarified the inter-state routes between ESAs that will be excluded from regulation.[37]

ACCC views

The Final DTCS FAD adopts the capital city boundaries noted in the Draft DTCS FAD. These are also listed in the *Route Category Workbook* on the ACCC website.

The FAD capital city boundaries determine whether a declared DTCS service is priced by the FAD as an inter-capital, metropolitan or tail-end service.[38] The capital city boundary

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[32] ACCC, Draft capital city boundaries – Indicative maps and ESAs – August 2011, August 2011.

[33] The Explanatory Statement to the Draft DTCS FAD incorrectly referenced the radial boundary distance for Hobart. The radial boundary for Hobart is 6 km, not "10 km" as mistakenly noted in the Draft DTCS FAD.

[34] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.7.

[35] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.3.

[36] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 4.4.

[37] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.20.

definitions do not identify whether a service is declared or excluded from the scope of the DTCS declaration. The scope of the DTCS declaration will be considered in the next DTCS declaration inquiry under section 152AL(3) of the Act.

Sydney-Campbelltown routes

The ACCC notes that a small number[39] of ESAs in the Campbelltown Call Charge Area (CCA) are within the 50km radius for the Sydney capital city boundary and the Sydney-Campbelltown route is an unregulated capital-regional route in the DTCS declaration.

For pricing purposes the ACCC considers Campbelltown more akin to, and has the characteristics of, a metropolitan route/area rather than a capital-regional route, particularly as a number of ESAs in the Campbelltown CCA are within the Sydney capital city boundary as defined in this FAD.

As stated above, the FAD capital city boundaries determine whether the price of a regulated service is set as an inter-capital, metropolitan, regional or tail-end service. For the purpose of this FAD, if a regulated service is to/from ESAs that are 1) within both the Campbelltown CCA and the Sydney capital city boundary and 2) within the Sydney capital city boundary, the FAD would calculate the price of that service as a metropolitan route. Conversely, if a service is from Sydney to an ESA that is in the Campbelltown CCA but outside the Sydney capital city boundary, the FAD would calculate the price for that service as a regional route.

Determination of whether any route from Sydney-Campbelltown is an exempt capital-regional route will be made in reference to the DTCS service description.

[38] This sets the value 't' in Table 1 of Schedule 1 to the DTCS FAD. See Chapter 4 below.

[39] The following ESAs are in both the Campbelltown CCA and the Sydney capital city boundary: Narellan, Elderslie, Campbelltown (proper), St Helens Park and Campbelltown South.

3.6 Regional centre boundaries

The DTCS FAD maintains the regional centre boundaries proposed in the Draft DTCS FAD.

Draft DTCS FAD

As with capital city boundaries, the ACCC determined the boundaries of excluded regional routes in order to identify services to benchmark in industry pricing data. The ACCC considered regional centre boundaries should be defined by the central ESA in that regional centre. Where there was no obvious central ESA or urban development of that regional centre covered more than one ESA, the ACCC used more than one ESA to define the regional centre. The list below shows the ESAs corresponding to each regional centre boundary.

NSW

Albury - Albury, Lavington, Wodonga

Lismore - Lismore, Goonellabah

Newcastle - Mayfield, Hamilton, Wolfe, New Lambton, Wallsend, Cardiff, Charlestown

Grafton - Grafton

Wollongong - Wollongong, Unanderra, Corrimal, Dapto

Taree - Taree

Dubbo - Dubbo

Gosford - Gosford

Coffs Harbour - Coffs Harbour

Goulburn - Goulburn

Victoria

Ballarat - Ballarat

Bendigo – Bendigo

Geelong - Geelong, North Geelong

Shepparton - Shepparton

Queensland

Toowoomba -Toowoomba, Withcott, Middle Ridge, Newtown, Drayton

Gold Coast - Southport, Nerang, Merrimac, Arundel, Bundall, Surfer's Paradise, Robina, Mudgeeraba

Townsville - Townsville, Kirwan, Gulliver

Rockhampton -Rockhampton, Frenchville

Bundaberg - Bundaberg

Maryborough - Maryborough

South Australia

Murray Bridge - Murray Bridge

Port Augusta - Port Augusta

Submission to the Draft DTCS FAD

Submissions from Optus[40] and Nextgen[41] welcomed the ACCC's clarification of geographic boundaries. Optus,[42] Nextgen[43] and Telstra[44] agreed that Hobart and Darwin should be viewed as regional areas. Given that demand was not captured as a separate variable in the regression analysis, Nextgen considered that it was appropriate for both Hobart and Darwin to be classified as 'regional' locations for the purposes of the FAD pricing.[45] Optus stated that there had been no regard afforded to the current market construct and treatment of specified regional routes.[46]

ACCC views

The DTCS FAD adopts the regional area boundaries listed above. These are also listed in the *Route Category Workbook* on the ACCC website.[47]

The DTCS Declaration excludes transmission routes between specific capital cities and regional centres without defining the geographic boundary of these regional centres.[48] The ACCC therefore considered it necessary to define the boundary of these regional centres for pricing purposes, and in order to promote pricing certainty and efficient investment by service providers. In defining regional centre boundaries (for the specified exempt capital-regional routes), the ACCC had regard to the availability of competing fibre infrastructure in those regional centres and the extent to which access seekers may readily interconnect with a transmission service provider.

The ACCC notes that industry may continue to determine individual pricing arrangements, including 'specified regional route pricing'. The intent of the DTCS FAD is to guide and facilitate commercial negotiations and provide a base set of terms and conditions of access to the declared service, should commercial negotiations fail. It is not the intent of the FAD to restrict or change how parities commercially negotiate access to the service.

Further, the ACCC notes that the DTCS pricing information collected from service providers and used by the ACCC to determine the price terms of the Draft DTCS FAD, included

[40] Optus, Optus Submission In Response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 4.4.

[41] Nextgen, Submission Response to ACCC Draft FAD, Public version, March 2012, p.7.

[42] Optus, Optus Submission In Response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 4.7.

[43] Nextgen, Submission Response to ACCC Draft FAD, Public version, March 2012, pp.7-8.

[44] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, March 2012, p.20.

[45] Nextgen, Submission Response to ACCC Draft FAD, Public version, March 2012, p.8.

[46] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, February 2012,, paragraph 4.4.

[47] Campbelltown has not been included as a regional centre for pricing purposes (see section 3.5)

[48] For e.g. the DTCS Declaration only refers to regional centres such as 'Campbelltown' in Sydney or 'Ballarat; in Melbourne and does not provide a boundary definition for these regional centres.

specified regional route pricing. As such, the ACCC considers that the DTCS FAD appropriately reflects current market constructs and broadly reflects current commercial pricing constructs adopted across the industry.

The ACCC notes that if difficulties arise in determining the boundaries of regional areas when determining whether a route is exempt or declared the ACCC may consider conducting an inquiry to vary the DTCS declaration to remove any ambiguity.

3.7 Radial distance

The DTCS FAD accounts for transmission route length by measuring distance as the radial distance between the A-end and B-end of each transmission service.

Draft DTCS FAD

The Draft DTCS FAD set the distance of a transmission route as the radial distance between the A-end and B-end of that service. The ACCC considered that a distance measure based on actual route length was complex and would provide opportunities for gaming by access providers seeking higher prices for actual route length calculations. The ACCC considered that the simplicity and transparency of a radial distance approach would avoid this problem. The ACCC also noted that radial distance is commonly used in the market.

Submission to the Draft DTCS FAD

Optus[49] and Telstra[50] supported the radial distance approach as it is common industry practice for pricing transmission services. Optus was supportive but argued that Telstra's Call Charge Area and Special Regional Route pricing constructs should also be reflected in the FAD.[51] Telstra argued the radial distance approach understates the actual length of a route but considered it appropriate for the FAD.[52] Nextgen also argued that actual distance rather than radial distance would better reflect underlying costs.[53] Similarly, Aurora Energy expressed concern that the radial distance approach does not reflect the way services are delivered through transmission hub gateways, such as in Tasmania where inter-state services generally go via Hobart, and therefore understates costs.[54]

ACCC views

The ACCC notes it is common commercial practice to use radial distance and that there is broad stakeholder support for radial distance in the FAD. The ACCC recognises that radial distance measurements may not reflect actual route length in all cases. For example, if locations A and B are close to each other geographically but due to the provider's network architecture are far away from the transmission gateway or are linked to different gateways.

However, the ACCC notes that radial distance is widely used in industry and that market players have developed prices and pricing models to recover costs that may not be accounted for in radial distance measurements. With regard to actual route length, the ACCC considers this is complex to determine and may encourage gaming by parties seeking to charge higher prices for longer distances measured using actual route length. The DTCS FAD therefore uses a radial distance approach to measure the length of a transmission route in all areas.

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[49] Optus, Optus Submission In Response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 4.13.

[50] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, March 2012, p.20.

[51] Optus, Optus Submission In Response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 4.13.

[52] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, March 2012, pp.19-20.

[53] Nextgen, Submission Response to ACCC Draft FAD, Public version, March 2012, p.10.

[54] Aurora Energy, Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, April 2012, p.2.

3.8 Tasmania

The DTCS FAD determines regulated prices between the mainland and Tasmania using an additive term to reflect a 40 per cent uplift for a nominal 300km undersea cable component.

Draft DTCS FAD

The Draft DTCS FAD proposed that transmission services to Hobart be treated as regional services for pricing purposes. However, to account for the higher maintenance and repair costs of undersea cables, the ACCC proposed that prices for mainland-Tasmania services be set with an uplift of 40 per cent for the notional length of 300km for the subsea component. This uplift was based on a comparison of prices for undersea cable routes with mainland inter-capital (excluded and declared) routes and only applied to the 300km subsea component of a service between the mainland and Tasmania.

Submissions to the Draft DTCS FAD

Telstra agreed that prices of routes to Hobart require an adjustment for capital and maintenance costs associated with deploying the submarine cable. However, the proposed 40 per cent uplift is significantly lower than required to ensure continued investment on routes to Tasmania. According to Telstra, the uplift in the Draft DTCS FAD is adequate to reflect the cost of a non-geographically diverse submarine cable but does not capture the much higher costs associated with supplying undersea cable services using higher quality geographically diverse paths. Telstra claimed that a higher uplift factor should be used.[55]

A confidential submission argued that the ACCC should consider the unique cost characteristics of firms in determining an uplift factor for the Melbourne-Hobart route. The submitter requested that the uplift factor in the DTCS FAD be higher than 40 per cent.

Aurora submitted that classifying routes to Hobart as regional services reflected the fact that Tasmania will not achieve equivalence in pricing with other areas in mainland Australia and impact on the ability of Tasmania to compete with other areas.[56] It also argued against a radial distance approach between Tasmania and the mainland because services are typically delivered through a single Hobart gateway.[57]

ACCC views

The DTCS FAD sets prices for services from mainland Australia to Tasmania and services within Tasmania as regional services. This is because services on these routes are more likely to have cost features more akin to regional services, such as lower utilisation.

The DTCS FAD maintains the 40 per cent uplift on routes to Tasmania to compensate service providers for the cost of delivering services over the submarine link. The ACCC has not been provided with sufficient evidence in support of a higher uplift and notes support for the

[55] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, March 2012, p.21.
[56] Aurora Energy, Draft Final Access Determination for the Domestic Transmission Capacity Service, April 2012, p.1.
[57] Aurora Energy, Draft Final Access Determination for the Domestic Transmission Capacity Service, April 2012, pp.1-2.

40 per cent uplift received from Aurora, the main access seeker for services between the mainland and Tasmania.

In response to Aurora's concerns that radial distance measurements may not reflect actual route length in Tasmania, the ACCC notes that this is not unique to Tasmania and also applies to services on the mainland. The ACCC notes that it is current industry practice to price routes to Tasmania and on the mainland using a radial distance approach and that the industry has developed prices and pricing models to recover costs that may not be accounted for in radial distance measurements. Therefore, the ACCC has maintained a radial distance approach for services in and to Tasmania as well as in the mainland.

Modification to the incorporation of the uplift term

The Draft DTCS FAD proposed a pricing formula for services between any A-end on the mainland and any B-end in Tasmania based on a multiplicative approach to the uplift term. The ACCC recognises this approach led to prices which initially declined with distance from 301km down to a minimum, after which they increased again.[58] This counterintuitive relationship between price and distance was not observed on mainland regional services and was an unintended consequence of the multiplicative calculation of the 40 per cent uplift.[59]

To address this unintended consequence, the DTCS FAD determines prices for routes between the mainland and Tasmania using the following *additive* calculation:

$\text{Total Price}_{A\text{-}B} = \text{Price}_{A\text{-}B} + \text{uplift}_{add}$

where

$\text{Price}_{A\text{-}B}$ = price of a regional service of radial distance(A,B)

$\text{uplift}_{add} = \text{Price}_{300} \times 40\%$

In the revised calculation, the term $uplift_{add}$ allows an absolute uplift on the price for the 300km subsea component of any route between the mainland and Tasmania, and the term $Price_{300}$ denotes the price for a regional service of 300km length.

The ACCC considers the additive approach is more appropriate since the uplift represents the modelled absolute extra cost of the subsea component and ensures that the pricing approach is more consistent and predictable.

[58] For example, the annual charges for an unprotected 2Mbps service to Tasmania for distances of 301 km and 450 km are $16,885 and $16,566 respectively, a decline of $399 or 1.89 %.

[59] The Draft DTCS FAD applied the uplift factor as a multiplicative term which depended on a *proportional weight* of the subsea component in relation to the overall route distance, expressed as $ratio_{subsea}$. With $ratio_{subsea} = 300\ km/\ radial\ distance$ being inversely dependent on distance the entire uplift term became a *decreasing* function of distance. In contrast, the term $Price_{A\text{-}B}$ is an *increasing* function of the factor distance. Therefore, up to a point, the multiplicative uplift term decreases faster with distance than the term $Price_{A\text{-}B}$ increases.

3.9 Metropolitan services

The DTCS FAD maintains the metropolitan prices determined in the Draft DTCS FAD.

Draft DTCS FAD

The Draft DTCS FAD set prices for DTCS services in metropolitan areas. As discussed earlier, a metropolitan service is defined as a service where both the A and B end of the service are within the boundary of a capital city.

Submissions to the Draft DTCS FAD

Telstra argues that setting prices using the mean of predicted values underprices the highest quality services, including in metropolitan areas. Telstra argues that the regression model underprices metropolitan (as well as regional) services and that prices should be set at a higher price than that proposed in the Draft DTCS FAD by using the 75th percentile of predicted prices.[60]

Optus submitted that the Final Regression Model results in higher prices for DTCS services at the lower bandwidth (e.g. 2Mbps) and lower distance increments (e.g. less than 30km).[61] Optus suggested that this may be because the Final Regression Model uses obsolete historic data, the model may suffer from omitted variable bias and because the model fails to take account of the efficiencies that Ethernet interfaces may afford over time.

Macquarie submitted that the Final Regression Model would result in price decreases for 2Mbps services on longer distance regional routes but that such decreases are offset by price increases of 20 to 50 per cent on short distances routes (0-10km) in metropolitan areas.[62]

AAPT noted that it acquires a large volume of 2Mbps services at short distances in metropolitan areas and expressed concern that the Draft DTCS FAD would result in price increases above rates currently charged by Telstra.[63]

ACCC views

The FAD prices are based on a benchmark of prices in competitive areas collected form service providers in 2011. The ACCC recognises that some market participants have negotiated lower prices for some DTCS products since the dataset was compiled. However, the ACCC notes that the dataset includes prices in multi-year contracts which apply beyond 2011. The ACCC welcomes such competitive outcomes in market prices, particularly among the more commonly supplied metropolitan, short distance and lower capacity services.

The ACCC considers that the dataset used in the Final Regression Model remains the appropriate reference point for the FAD. The ACCC does not propose to update the FAD

[60] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.9.
[61] Optus, Optus Submission In Response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 2.13.
[62] Macquarie, Draft Final Access Determination for the Domestic Transmission Capacity Service, February 2012, p.2.
[63] Macquarie, Draft Final Access Determination for the Domestic Transmission Capacity Service, February 2012. p.3.

prices before the FAD expires. The ACCC expects to collect new DTCS prices for the DTCS FAD inquiry due before the FAD expires and has access to pricing information in access agreements lodged with the ACCC. Falls in market prices would be factored into this new information. The ACCC will also continue to monitor DTCS prices and will consider appropriate action, including undertaking an FAD variation inquiry or issuing a BROC if there is a need for urgent intervention.

3.10 Protection

A protected service under the DTCS FAD is defined as geographic path diversity in the inter-exchange component of inter-capital, metropolitan and regional services but does not extend to standalone tail-end metropolitan or tail-end regional services.

Draft DTCS FAD

Protection can be provided in different ways[64] and the DTCS Declaration does not specify a form of protection for the DTCS. The ACCC has previously indicated that the DTCS would be priced efficiently if prices reflect a resilient network structure with redundant paths.[65] Submissions to the DTCS FAD Discussion Paper generally supported geographic path protection as the appropriate form of protection to incorporate in the DTCS FAD. The Draft DTCS FAD defined protection as geographically diverse paths for the entire length of a service.

Submissions to the Draft DTCS FAD

Telstra submitted that protection should be defined as protection in the inter-exchange network and should not extend to the tail-end component in the customer access network.[66] Services with two distinct unprotected fibre paths should be priced as two unprotected services.[67] Telstra also argued that benchmarked prices should use data from Ethernet over SDH services as they offer a similar level of quality and protection to SDH services and excluding them would under-recover the costs of the highest quality services.

Optus noted geographic path protection exists in the inter-exchange network but rarely in tail-end services. It also claimed that the Draft DTCS FAD does not reflect the 30 per cent discount currently observed in the market for unprotected services.[68]

Nextgen argued that the DTCS FAD should price only a 'base service' offered in the market. This would ensure that service providers with less extensive networks or protection options were not disadvantaged. Nextgen also submitted that the definition of protection used in the DTCS FAD should take into account the impact on future investment decisions in transmission markets and the development of competition.[69]

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[64] Protection can be provided in the form of dual customer interfaces or equipment, diverse building entry points, diverse exchanges or facilities, diverse fibre strands (e.g. a 'folded loop' with separate fibre strands in the same bundle of cables in the same pits, pipes, ducts and cabinets), diverse geographic fibre paths (separate routes, pits, pipes, ducts and cabinets, e.g. a 'ring network' structure), diverse transmission media (e.g. fixed plus wireless, fibre plus microwave) and the purchase of add-on unprotected services to provide redundancy.

[65] See *ACCC Discussion Paper on Pricing the DTCS*, April 2010, page 10.

[66] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, March 2012, p.28.

[67] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, March 2012, p.29.

[68] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service February 2012, paragraph 4.39.

[69] Nextgen, Submission Response to ACCC Draft FAD, March 2012, p. 13.

ACCC views

The ACCC maintains the view that the DTCS is priced efficiently if prices reflect a resilient network structure with redundant paths.[70] Submissions to the FAD Discussion Paper generally supported geographic path protection as the appropriate form of protection to incorporate in the DTCS FAD. However the ACCC notes that geographic path protection is commonly provided in the inter-exchange network but rarely in tail-end services in the Customer Access Network.

The DTCS FAD therefore defines protection to be geographic path diversity in the inter-exchange component of a transmission service only; it does not extend to the tail-end component of transmission services.

In relation to the discount for unprotected services, the ACCC notes that the pricing data collected from service providers which underpins the FAD pricing model does not indicate a level of discount for an unprotected service, relative to the price of a protected service, of around 20-30 per cent (as noted in submissions). This may be due to differences in the way different service providers reported whether services were protected. The ACCC notes that the Final Regression Model accounts for protection as an indicator variable. As such, prices for an unprotected service can be obtained from the model.

[70] See *ACCC Discussion Paper on Pricing the DTCS*, April 2010, page 10.

3.11 Tail-end services

The DTCS FAD maintains the tail-end pricing approach used in the Draft DTCS FAD.

Draft DTCS FAD

The Draft DTCS FAD proposed to use the metropolitan and regional prices from the Final Regression Model to determine tail-end prices, assuming a nominal tail distance of 2 km. The ACCC indicated that the tail-end price terms in the Draft DTCS FAD would only apply to tail-end services that are provided as stand-alone services and not to tail-end services that are bundled with other transmission services. This is consistent with the DTCS service description, which defines DTCS as a point to point service and the manner in which the ACCC has considered tail-end services in the past.

Submissions to the Draft DTCS FAD

In its submission to the Draft DTCS FAD, Optus raised concern that the proposed approach to pricing tail-end services would result in prices which are significantly higher than commercially negotiated prices for standalone tail-end transmission.[71] Primus was also concerned with the level of prices and submitted that the ACCC's model delivers prices that resemble Telstra's long established list prices.[72] Nextgen noted that the prices are at the high-end of the range of prices within competitive areas.[73]

Optus argued that the proposed approach to pricing tail-end services is flawed, since all data points that include a tail-component have been removed from the dataset used to derive the Final Regression Model.[74] Optus also pointed out that the ACCC's approach to bundled pricing would inherently price the tail-end component using the same level of protection as the trunk component, when in practice the tail is usually unprotected.[75] Telstra is also of the view that tail-end services should only be priced on an unprotected basis, and that the ACCC's pricing calculator should be amended to reflect this.[76]

Nextgen supported the ACCC's decision to price tail-end services on a standalone basis.[77]

Telstra noted that the Draft DTCS FAD price for a 0-2 km inter-exchange service is lower than the price for a standalone tail-end service, despite some of these short distance inter-exchange services possibly having a tail-end network component. Telstra submitted that this could result in below cost pricing on some routes and suggested the tail-end price be set

[71] Optus, Optus submission in response to ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, p.8.
[72] Primus, Primus comments on ACCC's Draft Final Access Determination for the DTCS, public version, March 2012, p.3.
[73] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.12.
[74] Optus, Optus submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 2.32.
[75] Optus, Optus submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, p.8.
[76] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.23.
[77] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.13.

as the base price for the 0-2 km services, or both tail-end services and 0-2 km inter-exchange services be set and priced as 2 km services.[78]

ACCC views

The ACCC has traditionally regarded tail-end transmission services as transmission services provided *within* an ESA between a customer location and a POI on the access seeker's network. Where Telstra provides a tail-end service, the transmission is between the customer location or POI and the local Telstra exchange.

The ACCC notes that in practice, there are two types of tail-end service offered in the market:

1. between a wholesale customer point of presence (POP) and another wholesale customer POP (a POP-to-POP service), and
2. between a wholesale customer POP and an end-user location (a POP-to-end-user service).

In both cases, the POP may or may not be co-located in a Telstra exchange.

The vast majority of tail-end services are provided by Telstra in a bundle with an inter-capital, metropolitan or regional service and are less than 2km in length. As noted elsewhere, tail-end services are rarely provided with geographic path protection, although it can be purchased at additional cost.

With regard to pricing tail-end services, the ACCC notes that all tail-end services are declared. This means it is not possible to determine prices for tail-end services based on a benchmark of competitive tail-end services. The ACCC confirms that the dataset underpinning the FAD prices did not include prices for services that originate and terminate within the same ESA on the assumption that these services meet the definition of a tail-end service (wholly within a single ESA). However, analysis of the prices of tail-end services indicates that tail-end services share some of the same price drivers as other DTCS services.

The DTCS FAD therefore sets prices for tail-end services in metropolitan areas using the Final Regression Model results for unprotected metropolitan services of 2km, and sets prices for tail-end services in regional areas using the Final Regression Model results for unprotected regional services of 2km.

The FAD prices for tail-end services do not apply to tail-end services bundled in an inter-capital, metropolitan or regional service. The FAD prices for inter-capital, metropolitan and regional service already incorporate a tail price because the dataset underpinning the price terms includes prices for services with bundled tails. The FAD price for a tail-end service must not to be added on to the FAD price for an inter-capital, metropolitan or regional service.

The ACCC notes submissions that the price of tail-end metropolitan services are above current market rates and that the price of a metropolitan route under 2km is lower than the price of a standalone metropolitan tail-end service even though metropolitan routes under 2km may have a tail-end component.

[78] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.23.

As discussed above, the ACCC does not propose to update the FAD prices before the FAD expires but expects to collect new DTCS pricing information for the DTCS FAD inquiry due before the current FAD expires. Any reduction in market prices would be expected to flow through to subsequent regulatory prices. The ACCC will also continue to monitor DTCS prices during the term of the FAD. If there is evidence of unintended consequences, the ACCC will consider appropriate action, including undertaking an FAD variation inquiry or issuing a BROC if there is a need for urgent intervention.

3.12 Differences between firms – the quality of service indicator variable

The DTCS FAD maintains the quality of service variable, used to account for the general difference between firms providing DTCS service, as used in the Draft DTCS FAD. The FAD sets prices based on the provider(s) with transmission networks capable of providing a high quality of service.

Draft DTCS FAD

The Draft DTCS FAD noted that service providers differ in the service quality (as measured quite broadly) their networks may provide. This is primarily due to different levels of network coverage, range of services and levels of service availability and reliability. To reflect the costs associated with providing higher quality services, the ACCC based the prices in the Draft DTCS FAD on the service provider(s) with the most robust transmission network as reflected by Quality of Service 1 (QoS 1) in the Final Regression Model. The draft DTCS FAD defined QoS 1 to mean the quality of service that is available using a transmission service that:

- is a Protected Service (see further under the chapter on protected services);
- is provided using a network that is capable of delivering the service by means of more than two geographically diverse paths, and
- has an overall service reliability of above 99.9 per cent.

Submissions to the Draft DTCS FAD

Submissions to the Draft DTCS FAD sought clarity over the ACCC's definition of quality of service and how this variable was measured.

Optus expressed concern that no information was given on what constituted a QoS 2, QoS 3, or QoS 4 service. [79] It was also concerned that only a small subset of the overall pricing dataset collected from service providers may have been used to derive the Final Regression Model because the model only reflects QoS 1 services. [80] Optus considered this to be an issue because the Final Regression Model will be used to price all declared DTCS routes.[81]

Telstra considered that the model should reflect the various differences between transmission providers which it calls firm specific heterogeneity.[82] Telstra submitted that DAA's regression model generated some counter-intuitive pricing outcomes in relation to quality of service.[83] In particular Telstra expressed concern that prices may be higher for a lower quality of service.

[79] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, 24 February 2012, paragraph.4.15.
[80] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, 24 February 2012, paragraph 4.17 .
[81] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, 24 February 2012, p.20.
[82] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.8.
[83] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.12.

Telstra also argued that service reliability, as stated in Service Level Agreements (SLAs), does not reflect actual performance. [84] Instead it reflects the provider's attitude towards bearing the risk of non-compliance. This means that service reliability as defined in SLAs cannot be considered as an actual indicator of quality of service. However, Telstra acknowledged that actual network performance is not available as a discrete measure of quality of service and suggested the use of the 75th percentile to lessen the risk of underpricing the highest quality service.[85]

ACCC views

The ACCC maintains the view that the Final Regression Model should account for firm specific heterogeneity to reflect differences between transmission networks and services provided in the DTCS market. The FAD sets prices based on the provider with the highest ranking in terms quality of service (i.e. QoS1) to ensure the higher costs of providing a rigorous and robust transmission network are adequately recovered.

Why use quality of service as an indicator variable?

The quality of a transmission network (as used in the Final Regression Model) will depend on a number of factors and may be measured in numerous ways. Submissions have indicated that DTCS products offered vary substantially between service providers. In addition, the dataset is representative of the prices charged for a number of different services at a range of transmission capacities, distances and with differing levels of service quality. Some networks provide extensive geographic coverage while others are limited to metropolitan areas only. Others provide a mixture of both. In an engineering sense, quality of service is usually measured with reference to availability levels, with 'carrier grade' networks requiring at least 99.999 per cent availability. The provision of carrier grade services is not a precondition of a DTCS service as described in the service description and transmission networks do vary significantly in the agreed levels of availability as outlined in contracts between providers.

This variation is due to such features as differences in network coverage, level of protection, the geographic extent and location of individual networks, how they are provided (for example, some DTCS services are provided in conjunction with optic fibre ground wire servicing electricity distribution networks) and service availability and service reliability features.[86] Telstra submitted that the different service qualities among service providers should be reflected in FAD prices because of the higher costs involved in providing networks with these features.

How does the quality of service variable apply in the model?

The quality of service indicator variable used in the Final Regression Model does not directly measure engineering or technical features. It is not an engineering assessment that directly

[84] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, pp.12-13.

[85] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public version, 9 March 2012, p.12.

[86] Service availability is a measure provided for in contracts against which service providers generally face penalties if a service is not available for some period (usually a set percentage of time, for example 99.5 per cent). Service reliability is a measure of the aspects of a service that increase the resilience/capability of the service against failure. This could be in either the active (electronic) or passive (fibre) components of the service. While both are related they are used discretely in determining QoS in the model.

compares individual services or individual sections or components of transmission networks. In fact, any such comparison is difficult to achieve in practice. The ACCC was not able to include all possible engineering and commercial factors that may impact on price in the model. Instead, the approach adopted in the regression modelling was to provide a relatively simple and straightforward method to assess each provider's transmission network and rank each according to common and well recognised service features that differentiate the overall capabilities of different networks.

The QoS indicator variable is not representative of a specific measure of the quality of an individual service but rather a ranking of the aggregate of the many specific service quality characteristics present across all the services a provider supplies. This includes the extent and density of the networks' coverage, individual service levels, the ability to provide guarantees as to the availability of services and the reliability of those services. The assessment relied on both publicly available information, information available to the ACCC in DTCS access agreements and information available in the Infrastructure RKR.

While the ACCC acknowledges stakeholder views that service reliability stated in SLAs may not reflect actual performance, the ACCC takes the view that this information is a reasonable proxy for estimating aspects of service reliability and network performance. The ACCC therefore considers it reasonable and appropriate to take account of this information in determining the various quality of service rankings in the Final Regression Model. The ACCC notes that parties are still free to negotiate different terms in access agreements than are provided for in the FAD.

Telstra, through its submission from Professor Breusch identifies some specific concerns regarding the pricing model's coefficients, including where use of the quality of service variable provides counterintuitive outcomes. This is not unexpected as some transmission providers are solely access providers while others are both access seekers and access providers. For example, Optus not only sells a large number of transmission services but also purchases a large number of DTCS services as inputs (whether directly as an input to provide B-end connectivity in its own wholesale products or for its own transmission purposes). DAA suggests these concerns are misplaced since they ignore the interaction of quality of service with many other variables (for example speed) and that if other such variables were accounted for (for example, centred on their mean) then the model would generate less counter-intuitive outcomes in relation to quality of service.[87] However, while the findings of the analysis do proffer some unexpected outcomes at times the Final Regression Model reflects the data available to the ACCC and is considered to be reliable and reflective of actual prices in the market.

Use of the QoS indicator variable in the Final Regression Model?

The Final Regression Model accounts for differences in each transmission provider's network by incorporating an assessment of each service provider's network or service quality (measured quite broadly) compared to each other provider and then ranked accordingly from highest to lowest. As noted in DAA's report, the results generated by the QoS and provider models were similar. [88] This is not unexpected as there were only seven providers in the

[87] *DAA, DTCS Price Benchmarking and Pricing Model Development - Consolidated Report June 2012 (to be received yet).*

[88] *DAA, DTCS Price Benchmarking and Pricing Model Development - Consolidated Report June 2012 (to be received yet).*

model and these were classified into four levels of quality of service. The DAA modelling showed that there was considerable correlation between many of the explanatory terms and that this would lead to many alternative models with similar predictive power. The DAA analysis shows that the pricing model including quality of service had only a slightly less accurate fit when compared to the output of the pricing model using the provider variable.[89]

The ACCC notes that the design of the Final Regression Model takes account of the complex relationships between the key drivers of prices and that the final pricing is derived from the provider(s) with the overall highest service quality. The complexity of these inter-relationships may, in some cases, produce counter-intuitive results. This could be expected from a service as multifaceted and complex as DTCS. However, overall, the ACCC considers it prudent that the Final Regression Model provides a means to ensure that regulated prices enable the recovery of costs equivalent to those incurred in building and maintaining a transmission network of a high standard.

[89] *DAA, DTCS Price Benchmarking and Pricing Model Development - Consolidated Report June 2012 (to be received yet).*

3.13 Network interfaces

The DTCS FAD Final Regression Model does not include a separate explanatory variable for network interface.

Draft DTCS FAD

The ACCC recognised that SDH technology is more mature than Ethernet and is likely to have different levels of protection and cost characteristics. However, the results of the regression analysis on the DTCS pricing information collected from services providers suggested that network interface was not a statistically significant determinant of price. As both network interfaces covered a similar range of capacities in the dataset, the data analysis found little variation across the range of SDH and Ethernet prices. Therefore, the ACCC considered that separate pricing for Ethernet and SDH services was not warranted.

Submissions to the Draft DTCS FAD

Optus questioned the result of the regression analysis and expressed concern that the Final Regression Model may result in Ethernet services being priced too high and SDH services being priced too low.[90] Conversely, the ACCC received confidential information from another stakeholder that indicated a convergence of SDH and Ethernet pricing.

Telstra submitted that the benchmark prices should be associated with the highest quality of service for a point-to-point Ethernet over SDH service.[91] In addition, Telstra argued that SDH services should be priced on a protected basis, while Ethernet services should be priced on an unprotected basis.[92]

ACCC views

The ACCC has decided not to set separate prices for different network interfaces. Based on the ACCC's existing dataset, the network interface variable was found to be statistically insignificant in determining DTCS prices and therefore did not warrant inclusion as a separate term in the Final Regression Model. [93]

The ACCC recognises that SDH is predominantly used in the core transmission network with protection (geographic path diversity). However, DAA's analysis of the pricing dataset has found that there was no statistically significant relationship between network interface and protection to enable the model to predict separate prices based on these features.

The ACCC anticipates that future growth in transmission services will be Ethernet based, however the ACCC also has evidence to suggest that prices for SDH and Ethernet are converging. Therefore the ACCC considers it appropriate that the current DTCS FAD sets the same level of pricing for both SDH and Ethernet services.

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[90] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public Version, February 2012, paragraph 4.20.

[91] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.29.

[92] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.29.

[93] At the 5% significance level.

3.14 Demand

The DTCS FAD Final Regression Model does not include a separate explanatory variable for demand.

Draft DTCS FAD

The ACCC considered a number of demand metrics when developing the Final Regression Model in the Draft DTCS FAD. A specific demand term was not included in the Final Regression Model because the data analysis of the pricing dataset showed that demand is already factored into the negotiated prices. The statistical analysis of the pricing data also indicated that there is no clear linear dependency between annual charge and the demand factors.[94] Stakeholders had also suggested that demand is likely to be captured through other variables, such as route type.[95] As a result, the ACCC considered it unnecessary to include a separate demand variable in the regression model.

Submissions to the Draft DTCS FAD

In its submission to the Draft DTCS FAD, Nextgen agreed that the variation in demand between different transmission routes is likely to be captured to some extent by other factors in the regression analysis, such as route types. Nextgen also sought clarity as whether the regression analysis used in the Draft DTCS FAD accounted for the differences in demand between competitive and non-competitive routes.[96]

Professor Breusch, in his submission on behalf of Telstra, argued that there is little explanation and no justifying analysis given for the demand factor variables considered in Draft DTCS FAD. Therefore, it was unclear how the variables might affect pricing in the DTCS.[97] Professor Breusch suggested that a provider should be better able to recover costs on a route with high utilisation, so annual charges should be inversely related to utilisation.

ACCC views

The ACCC maintains the view that it is not necessary to include a separate demand variable in the Final Regression Model to the DTCS FAD. The previous data analysis found that demand was already captured by other variables in the model, in particular the transmission route category. This is because higher levels of demand are seen on metropolitan routes than regional routes, due to higher population density in metropolitan areas. Similarly, the data rate variable is likely to capture the economies of scale effects from higher utilisation. The ACCC considers that robust data analysis of the pricing dataset and the Final Regression Model in the DTCS FAD adequately accounts for the differences in demand between competitive and non-competitive routes.

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[94] Data Analysis Australia Pty Ltd, Updated Pricing Model For The Domestic Transmission Capacity Service, November 2011, p.6.

[95] AAPT, Submission by AAPT Limited to the ACCC Draft final access determination for the domestic transmission capacity service, February 2012, p.9. VHA, Domestic Transmission Capacity Service Submission to the ACCC, February 2012, pp.4-5.

[96] Nextgen, Submission Response to ACCC Draft FAD, Public version, 14 March 2012, p. 9.

[97] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.3.

3.15 Data rate

The DTCS FAD sets prices for services with data rates from 2Mbps to 1Gbps, inclusive.

Draft DTCS FAD

The DTCS Declaration specifies a minimum data rate of 2Mbps. The vast majority of services are provided between 2 Mbps and 155 Mbps for SDH and between 2 Mbps and 100 Mbps for Ethernet services. Far fewer transmission services are offered at capacities above 622 Mbps. The Draft DTCS FAD set prices for data rates only up to 622Mbps based on data available at the time.

Submissions to the Draft DTCS FAD

Optus and NBN Co considered the FAD should set prices for 1 Gbps or 10 Gbps in the transition to the NBN.[98] Optus submitted that capacities above 622 Mbps should be considered in the regression model if data points are available, otherwise a price multiplier cap could be used to set prices for higher order capacities.[99]

In contrast, Nextgen and Telstra[100] submitted that the DTCS FAD should price only those capacities that are commonly sold in the market and that 622 Mbps is likely to be a reasonable limit. Nextgen also suggested that different route types (i.e. inter-capital, metro, regional) could be subject to different data rate caps.[101]

ACCC views

The ACCC acknowledges the expectation that demand for and availability of higher capacity services will increase (particularly with the transition to the NBN). The FAD includes prices for data rates up to 1Gbps. The ACCC has explored the robustness of the Final Regression Model to predict prices for higher capacity services using information from the underlying dataset and other sources, such as access agreements. The analysis found that there is sufficient pricing information available to support the regression model's estimates for the price of services with data rates up to and including 1 Gbps but not higher. ACCC analysis indicates that the prices predicted by the Final Regression Model are consistent with prices for higher data rate services observed in the market, as evidenced in recent access agreements lodged with the ACCC.

[98] NBN Co, Submission to the draft Domestic Transmission Capacity Service Final Access Determination, 23 March 2012, p.1.

[99] Optus, Optus submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, p.20.

[100] Telstra, Response to the Commission's Draft Final Access Determination for the DTCS, Public version, 9 March 2012, p.17.

[101] Nextgen, Submission response to ACCC Draft FAD, Public version, 14 March 2012, p.16.

3.16 Connection charges

The DTCS FAD sets connection charges for a range of SDH and Ethernet services.

Draft DTCS FAD

The Draft DTCS FAD included connection charges to allow service providers to recover the initial costs of connecting a customer to a service and to provide some investment certainty. The ACCC set prices for connection charges outside the regression model in the Draft DTCS FAD because analysis indicated that there is no significant relationship between one-off connection charges and recurring annual charges. The Draft DTCS FAD connection charges are based on industry averages of connection charges for metropolitan and regional services. The ACCC considered that it was appropriate to set out various connection charges to account for the costs associated with different network interfaces and capacity. Connection charges were set for a single connection and did not account for discounts that may apply for contracts longer than one year. Discounts are left to commercial negotiation.

Submissions to the Draft DTCS FAD

Optus submitted that the ACCC should consider setting lower connection charges because the prices set out in the Draft DTCS FAD are in excess of current prices in the market.[102] Optus and AAPT also suggested that the FAD prices for connection charges should reflect the current commercial practice of offering discounts for longer contract periods.[103]

Telstra submitted that it is in the LTIE for parties to have commercial flexibility to negotiate appropriate connection charges and discounts.[104] However, as the FAD is to be based on the highest quality service, Telstra suggested that connection charges should be based on the highest quality Ethernet connection (a point-to-point Ethernet over SDH service).[105] Further, Telstra sought clarity on whether or not the ACCC intends to price connection charges for bandwidths in excess of 100Mbps for Ethernet and 155Mbps for SDH technologies.[106]

Telstra also noted that the Draft DTCS FAD distinguishes between Ethernet and SDH for the purposes of setting connection charges, despite proposing recurring charges that do not make such a distinction.[107] Telstra considers that the SDH connection charges are aligned with commercially agreed charges in a 12 month contract, however, Telstra considers that the Ethernet connection charges are significantly underpriced.

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[102] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public Version, February 2012, paragraph 1.5(d).

[103] Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public Version, February 2012, paragraph 2.49. AAPT, Submission by AAPT Ltd to ACCC Draft final access determination for the domestic transmission capacity service dated December 2011, Public version, 9 March 201, p.6.

[104] Telstra, Response to the Commissions price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.31.

[105] Telstra, Response to the Commissions price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.32.

[106] Telstra, Response to the Commissions price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.32.

[107] Telstra, Response to the Commissions price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p.29.

ACCC views

The DTCS FAD maintains the connection charges in the Draft FAD and IAD. This is an appropriate approach to pricing connection charges based on the data available to the ACCC.

As explained in the Draft DTCS FAD, connection charges were not included as a variable in the Final Regression Model because the initial data analysis showed that there is no significant relationship between connection charge and annual price. Therefore, the ACCC decided to maintain the connection charges specified in the IAD – which were determined outside of the Final Regression Model and which determined separate connection charges for SDH and Ethernet services. The available evidence to the ACCC indicated that there is a variation in connection prices between SDH and Ethernet network interfaces. Therefore the ACCC has decided to set separate connection charges for these network interfaces.

The DTCS FAD now includes connection charges for 622Mbps and 1Gbps, given that that FAD now sets recurring annual charges for these higher capacity services. The ACCC has determined these additional connection charges based on the information available to the ACCC and considers it appropriate to be included in the DTCS FAD.

The ACCC recognises that there is a wide variety of non-recurring charges related to the provision of the DTCS, such as connection charges and special linkage charges. The amount of these charges is influenced by a number of factors, including discounts offered by service providers. Discounts will be captured to some extent in the data provided by access providers because this data reflects actual commercial charges, rather than price list charges. The ACCC also notes that the connection charges set out in the DTCS FAD apply to contracts of one year in length. The ACCC expects that parties will negotiate waived or discounted connection charges for contracts of longer duration, as is usual commercial practice.

In addition to connection charges, the ACCC understands that there are other forms of non-recurring charge levied on access seekers to access to the DTCS, including feasibility studies, special linkage charges and early cancellation charges. The nature of these charges varies considerably with circumstances and cannot be predicted in advance. The ACCC considers it is therefore not practical to set FAD prices for the range of services that may arise at this time. If the ACCC considers that particular ancillary charges are unjustifiable and deter or deny access to the DTCS, the ACCC has regulatory options available to it including issuing a BROC or varying the FAD.

3.17 Discounts and bundling

The DTCS FAD does not separately account for the effects of discounts and bundling.

Draft DTCS FAD

The Draft DTCS FAD did not separately account for the effects of bundling and discounting. The commercial prices collected from service providers used to derive the Final Regression Model generally only included billing data or 'contract prices'. Contract prices reflected the commercially negotiated prices, including any discounts. As discussed earlier, the pricing dataset included bundled services but did not record how the discounts were calculated in such bundles. Therefore, the ACCC considered that it was unnecessary and impossible to separately account for the effects of discounts and bundling in the FAD.

Submissions to the Draft DTCS FAD

Access seekers broadly agreed that the FAD should incorporate the effect of discounts. VHA argued that the DTCS FAD should reflect the effects of bundling offered in the market. For example, access seekers' decisions to purchase a bundle is based on the aggregate value of the bundle rather than the price of a service on any individual route in that bundle.[108] Nextgen argued that the ACCC should consider the effects of bundling with other services (including wholesale ADSL services) in the next review of the DTCS Declaration.[109] Optus and AAPT also argued that the regression analysis should take into account the range of discounts offered in the transmission market.[110]

Telstra argued it would be inappropriate to incorporate the various commercial discounts offered in the market in the DTCS FAD.[111] This is because commercial arrangements vary between parties and the discounts reflect the reduced risks relevant to those parties' circumstances.

There is also access seeker concern that Telstra bundles metropolitan services at below-FAD prices with regional services at above-FAD prices. These arrangements can lock access seekers into prices which are above regulated rates and prevent them from taking advantage of competitive service offerings. Given that Telstra is the only provider of the DTCS in many regional areas, access seekers are limited in their ability to unbundle their services and purchase metropolitan and regional services separately.

ACCC views

The ACCC notes that the pricing dataset underpinning the FAD prices consists of agreed contract prices and monthly billing data collected from service providers. If discounts are reflected in the contracted prices and the billing data, the FAD prices incorporate their effects. Discounts that are not reflected in contract prices of monthly billing data, such as

[108] VHA, Domestic Transmission Capacity Services Submission to the ACCC, February 2012, p.4.

[109] VHA, Domestic Transmission Capacity Service submission to ACCC, February 2012, p.4. Nextgen, Submission Response to ACCC Draft FAD, March 2012, p.6.

[110] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 4.39.

[111] Telstra, Response to the Commission's price terms in the draft final access determination for the DTCS, March 2012, p.31.

volume discounts or rebates that are applied after certain milestones are reached, are unlikely to be included in the dataset.

The purpose of the benchmarking approach is to set a benchmark based on data collected of *all* prices available to the Commission, and not just the lowest price or specifically discounted prices. Prices used in the model were obtained during the period between January and September 2011. The ACCC notes that a broad range of discounts are normally available when purchasing transmission services (but not as easily identified).

The ACCC considers it is not practical to set regulated prices for every possible discount or rebate that could be offered in the market. The pricing methodology does not seek to pick the lowest price in the market at any particular point of time but predicts prices based on the known relationships between price and key variables using a complex regression model and based on an established and consistent dataset.

The FAD is intended to set the minimum terms and conditions (including price) appropriate for access to the declared service. The FAD therefore sets prices for a standalone DTCS product supplied for a one year period to provide a reference point for commercial negotiations. Parties are free to agree prices, including discounts that may apply, for DTCS products sold in a bundle of services or for periods other than one year. As indicated elsewhere, if the ACCC has evidence of unintended consequences resulting from the FAD it may consider taking appropriate regulatory action.

The ACCC is aware of claims that Telstra charges lower metropolitan prices and higher regional prices when DTCS products are sold in a bundle with lower metropolitan prices. This does not appear to be widespread at this stage. However, the ACCC will monitor transmission prices in access agreements and consider appropriate regulatory action if there is sufficient evidence of unintended consequences from the FAD.

4. PRICE TERMS

As noted earlier, the Act notes that an FAD must include price terms or a method of ascertaining price. The Act also does not require that all the terms of an FAD (including price and non-price terms) be applied together.

Schedule 1 to the FAD sets out a method for ascertaining the price of DTCS products. It also makes it clear that the FAD sets a price for a standalone DTCS product supplied for a 1 year period. The FAD does not set prices for DTCS products sold in a bundle of services or for periods other than 1 year. Such prices are a matter for commercial negotiation. The FAD prices do not include GST or any other tax.

4.1 Prices for inter-capital, metropolitan and regional routes

Prices for inter-capital, metropolitan and regional routes (as per the transmission categories discussed earlier) are determined using the formula below.

Price = exp[$\log_e$(Annual Charge)] x 1.102

The term *$\log_e$(Annual Charge)* is defined as:

$$\log_e(\text{Annual Charge}) = 7.682 + 0.623 \times \log_e(\text{Speed}) + 0.199 \times \log_e(\text{Distance}) + c + t$$

where:

$$c = \begin{cases} 0.078 & \textit{Protected Service} \\ 0.000 & \textit{Unprotected Service} \end{cases} \quad ; \quad \textit{and}$$

$$t = \begin{cases} 0.000 & \textit{Inter-capital Routes} \\ -0.081 & \textit{Metro Routes} \\ 0.052 & \textit{Regional Routes} \end{cases}$$

The FAD refers to a *DTCS Pricing Calculator* on the ACCC website to help use this formula. The amount generated by the Calculator is an end-to-end price. The formula can also be used with commonly available software such as Excel.

The pricing formula works the following way for declared services:

- Enter the speed (data rate in Mbps) and distance (km) of a service into the formula. Then determine the values for 'c' and 't' as set out below. The values for 't' have been determined based on a network with the highest quality of service (QOS 1).
- *Protected* prices apply to inter-capital, metropolitan and regional routes but not to tail-end routes. This sets the value for 'c'.
- *Inter-capital* prices apply if the A-end and B-end are in different capital city boundaries, excluding Darwin and Hobart. This sets the value for 't'.
- *Metropolitan* prices apply if the A-end and the B-end are both in the same capital city boundary. This sets the value for 't'.
- *Regional prices* apply if the A-end or the B-end, or both, are outside a capital city boundary. This sets the value for 't'.

4.2 Prices for tail-end services

Tail-end transmission refers to transmission services provided wholly *within* an ESA in the customer access network (CAN). This occurs between a customer location and a point of interconnect on the access seekers network. Where Telstra provides the tail-end DTCS the transmission is between the customer location or POI and the local Telstra exchange. Telstra does not usually provide stand-alone tail end service but bundles a tail-end service with an inter-exchange component.

All tail-end services are currently declared. This means it is not possible to benchmark the prices of *competitive* tail-end services as with other DTCS products. There is also insufficient information about the underlying costs of tail-end services to determine a different pricing approach. However, tail-end services share many of the same price drivers as other DTCS products (particularly route category, distance, capacity, quality of service). The price of tail-end DTCS products is therefore based on the Final Regression Model.

The FAD sets prices for standalone tail-end DTCS products[112] using the metropolitan and regional prices calculated by the pricing formula, depending on their location. The price for tail-end services assumes a distance of 2km. This is because industry submissions and ACCC analysis shows that the vast majority of tail-end services average 2km or less.

The FAD sets prices only for standalone tail-end services. The prices for inter-capital, regional and metropolitan services include a tail-end component. The price of a tail-end service is not added on to the FAD price for an inter-capital, regional or metropolitan service.

Protected prices do not apply to tail-end routes. The vast majority of tail-end products are not provided with protection, although tail-end protection may be purchased at extra cost. It is expected that such charges would be negotiated commercially.

Tail-end prices are determined the following way:

- *Metro tail-end* prices apply if the A-end and B-end are in the same ESA in a capital city boundary. The distance is set at 2km.
- *Regional tail-end* prices apply if the A-end or B-end are in the same ESA outside a capital city boundary. The distance is set at 2km.

[112] While in practice stand-alone tail services are rarely purchased (they are always bundled with an inter-exchange service) they are considered in the DTCS Declaration as a DTCS service (along with inter-capital, metropolitan and regional services) and are required to be priced in the FAD.

4.3 Prices for services between the mainland and Tasmania

Services to Tasmania are regarded as regional services because of their location, traffic density, demand and the need for submarine cable connection. The submarine cable route is approximately 300km. Telstra and Basslink are the only providers of DTCS products from the mainland to Tasmania. These services carry traffic through Hobart in the south and, to a lesser extent, Launceston in the north. ACCC analysis found that the average price of submarine routes is 39 per cent higher than mainland inter-capital routes. The FAD therefore provides a 40 per cent increase of the price of a 300km cable for DTCS routes from the mainland to Tasmania.

The DTCS FAD sets prices for services between the mainland and Tasmania as follows:

1. Calculate the radial distance between the A-end and the B-end: dist(A,B).
2. Determine $Price_{A-B}$, the price for a regional service of length dist(A,B) for the required data rate.
3. Determine the uplift term ($uplift_{add}$) as the price for a regional service of 300 km length ($Price_{300}$) for the required data rate multiplied by 40%: $uplift_{add} = Price_{300} \; x \; 40\%$.
4. Add the prices calculated at steps 2 and 3 to determine the total price:

$$\text{Total Price}_{\text{A-B}} = \text{Price}_{\text{A-B}} + \text{uplift}_{\text{add.}}$$

4.4 Connection charges

Schedule 1 to the FAD includes a table that sets the prices of non-recurring connection charges for a range of DTCS products supplied for 1 year. The FAD does not include discounts for connection charges for services longer than 1 year. The market is free to negotiate such discounts in commercial negotiations.

The FAD prices are based on an average[113] of collection charges collected from DTCS service providers. These vary with the data rate and network interface of the service. The table sets prices for the most commonly available DTCS products in the market. Where the table does not include a price, this reflects the data available and allows prices to be set via commercial negotiation.

Table 1 – Non-recurring connection charges for DTCS products supplied for 1 year

Data rate	SDH	Ethernet
2Mbps	$3,100	$2,500
10Mbps	$6,500	$2,500
34/45Mbps	$19,000	-
100Mbps	-	$5,000
155Mbps	$36,000	-
622Mbps	$40,000	-
1Gbps	-	$5,000

Like the Draft DTCS FAD, the DTCS FAD does not set prices for other non-recurring charges, such as non-recurring charges for feasibility studies, special link charges and early cancellation charges. These charges are not predictable for DTCS products and their nature and quantum vary considerably depending on each individual connection. The ACCC considers that any regulatory problems associated with these charges should be addressed on a case-by-case basis, potentially through issuing a BROC.

[113] Connection charges are not set using the linear regression model. Unlike recurring monthly/annual charges, analysis indicates there is no significant statistical relationship between connection charges and recurring charges.

5. NON-PRICE TERMS AND CONDITIONS

The DTCS FAD includes non-price terms and conditions of access for the declared DTCS.

Draft DTCS FAD

The Draft DTCS FAD included non-price terms and conditions based on those in the fixed line services FAD and the mobile terminating access service (MTAS) FAD. The non-price terms and conditions in those FADs are themselves based on the ACCC's *Model Non-Price Terms and Conditions Determination 2008*. The Draft DTCS FAD included non-price terms and conditions for the following issues:

- Billing and notification
- Creditworthiness and security
- General dispute resolution procedures
- Confidentiality provisions
- Suspension and termination
- Liability and termination
- Network upgrade and modernisation, and
- Facilities access.

Submissions to the Draft DTCS FAD

Telstra maintained that it is unnecessary to include non-price terms and conditions in the DTCS FAD, while Optus in general supported the inclusion of the non-price terms and conditions.[114] Optus requested that the DTCS FAD also include terms relating to ordering and provisioning, and relocation of transmission services.[115]

Telstra noted that it doesn't consider it appropriate for the non-price terms and conditions to apply from the date of publication of the DTCS FAD, because it will need time to implement the various non-price terms. It has therefore requested that the DTCS FAD provisions take effect 21 days after the date on which the FAD is published.[116]

Optus and Nextgen sought clarity on the application of the facilities access schedule, particularly in respect of the hierarchy between the DTCS FAD, Telstra's SSU and the *Telecommunications Act 1997*.[117]

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[114] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.3. Optus, Submission in response to the ACCC's Draft DTCS FAD for the DTCS, paragraph 1.5(e).

[115] Optus, Optus Submission in response to the ACCC's Draft DTCS FAD for the DTCS, Public version, February 2012, paragraph 1.5(e).

[116] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.23

[117] Optus, Optus Submission in response to the ACCC"s Draft DTCS FAD for the DTCS, Public version, February 2012, paragraph 1.5(e).. Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.17.

Nextgen also sought clarity on whether the price and non-price terms of the Draft DTCS FAD should be taken together as a 'package' or whether an access seeker can request the non-price terms in their own rights with commercially negotiated prices.[118]

ACCC views

The ACCC considers it appropriate to include a set of non-price terms and conditions in the DTCS FAD as a safety net in the event that a commercial agreement cannot be reached. This provides an appropriate level of certainty about the minimum standards that should apply without being unnecessarily prescriptive. The DTCS FAD includes non-price terms and conditions on the following issues:

- Billing and Notifications
- Creditworthiness and Security
- General Dispute Resolution Procedures
- Confidentiality Provisions
- Suspension and Termination
- Liability and indemnity, and
- Network upgrade and modernisation.

The non-price terms are based on the non-price terms and conditions in the Draft DTCS FAD and the MTAS FAD. Where the DTCS FAD differs from these instruments, this is to clarify language and make the drafting more relevant to the DTCS based on the information available. The ACCC has retained the drafting in the Draft DTCS FAD where there has been insufficient information to justify different drafting. This balances consistency among the various FADs with recognising the differences between the declared services.

The DTCS FAD does not include terms in relation to ordering and provisioning. The ACCC recognises there are some concerns about access providers' processes for ordering and provisioning and relocating transmission services. However, the ACCC does not have sufficient information at this time to determine an appropriate response in the DTCS FAD. If more information becomes available, the ACCC would consider an appropriate regulatory response, including a variation inquiry or issuing a BROC (see below).

The DTCS FAD does not include facilities access provisions, unlike the Draft DTCS FAD. The ACCC understands that the DTCS uses the same exchange facilities, such as TEBA space, as other communications services, such as DSL. Access seekers are therefore likely to have facilities access arrangements in place in order to provide those other services. As the DTCS uses the same facilities, additional facilities access arrangements are unlikely to be required for the DTCS. The ACCC also notes that facilities access remains subject to regulation under the Telecommunications Act and the ACCC Facilities Access Code.

[118] Nextgen, Submission response to the ACCC Draft FAD, public version, March 2012, p.16.

Schedule 2 - Billing and Notification

The DTCS FAD includes provisions for Billing and Notification.

Draft DTC FAD

The ACCC included provisions for billing and notification in the Draft DTCS FAD to specify responsibilities for access providers to provide accurate and timely billing information to access seekers.

Submission to the Draft DTCS FAD

Telstra submitted that 'Charge' be more narrowly defined to a charge set out in the FAD and that 'Billing Disputes' be confined to a dispute about an alleged inaccuracy, omission or error in a 'Charge' in an invoice.[119] Further, Telstra argued that an access provider should not have to wait more than 20 Business Days before taking action to recover outstanding payments from an access seeker.[120] Telstra also submitted that the time period of escalating billing disputes or objecting to an access provider's decision to reject a billing dispute be reduced, to ensure that Billing Disputes are resolved in a timely manner. Telstra further submitted amendments to ensure that the consequences for inaccurate invoicing are proportionate to the behaviour it is intending to discourage and that access seekers are imposed a similar penalty for lodging inappropriate billing disputes.

ACCC views

The ACCC has decided to maintain the definitions for 'Charge' and 'Billing Dispute' included in the Draft DTCS FAD and considers that a narrower definition may unnecessarily restrict the application of these terms.

The ACCC has decided that access seekers should be given at least 20 Business Days before an access provider is allowed to take action to recover unpaid payments. The ACCC considers that this is a reasonable period of time to allow the access seeker sufficient time to identify and rectify the issue. Further, the ACCC maintains that the interest penalty charged on outstanding payments (clause 2.6) may encourage the access seeker to resolve the matter in a timely manner.

Similarly, the ACCC considers that the timeframes for escalating billing dispute (clause 2.18) and responding to an access provider's decision to reject a billing dispute should be maintained. In doing this, access seekers will be given sufficient time to consider the merits of a dispute before deciding whether to pursue further action.

The ACCC has decided it is appropriate to maintain the current drafting to clause 2.30, as it encourages the access provider to provide accurate billing. It also ensures that the remedy (the interest payable) is linked to the amount of money which the payer has been deprived, due to incorrect billing.

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[119] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, pp.4-5.

[120] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.5.

The ACCC is not convinced that an access seeker will wait until clause 2.30 has been triggered (clause 2.30 is only triggered if three out of five consecutive invoices are incorrect by five per cent or more) before notifying the access provider of a Billing Dispute. Further, the ACCC does not consider it appropriate to have a reciprocal provision for access seekers who lodge inappropriate billing disputes [121] as this may be excessive and unreasonably discourage access seekers from lodging legitimate billing disputes.

The ACCC however considers it appropriate to amend clause 2.23 to ensure that Billing Disputes are only escalated following the completion of the procedures set out in clause 2.18. For consistency with 2.18, the ACCC has ensured that access seekers are able to escalate not only 'Revised Proposed Resolutions' but also 'confirmed proposed resolutions'.

[121] Telstra, Annexure A - Proposed amendments to Draft FAD Non-price terms, March 2012, p.15

Schedule 3 - Creditworthiness and security

The DTCS FAD includes provisions for Creditworthiness and Security.

Draft DTCS FAD

The Draft DTCS FAD included provisions for creditworthiness and security to balance the rights of access providers to make enquiries of an access seeker's ability to pay for services and provide security, while also ensuring that the terms don't create barriers to entry.

Submissions to Draft DTCS FAD

Telstra sought a number of amendments to these provisions. Telstra argued that the supply of the DTCS should be conditional upon the provision of security in order to mitigate the access provider's financial exposure and risks.[122] To protect the legitimate interests of the access provider, Telstra considers that access providers should determine the amount and form of security to be provided by the access seeker, so long as that amount and form is reasonable.[123] Telstra also noted that access providers should be allowed to alter the security held by access seekers, as this would be consistent with normal commercial practices.[124] In order to satisfactorily assess the creditworthiness of the access seeker, Telstra sought to amend the definition of 'Ongoing Creditworthiness Information' (OCI) to include additional information.[125] Further, Telstra considered that the requirement for access providers to sign a confidentiality undertaking for OCI is unnecessary and should be removed from the FAD.

ACCC views

The ACCC recognises that access providers have a right to mitigate the commercial risks they face in supplying a service and that the provision of security is an important part of this.

However, the ACCC considers that the amendments proposed by Telstra would effectively make the provision of security a *precondition* of supply of the DTCS. As a matter of principle, the ACCC does not consider it appropriate to determine that supply of a declared service is conditional on the access seeker providing security to the access provider. The provision of security, the level of security and the manner in which it is maintained, are matters of commercial judgement that should be determined in commercial negotiations.

The ACCC does, agrees that clause 3.3(b) should be amended to ensure that security reflects the amounts invoiced in respect of the DTCS service. This would reasonably protect the legitimate business interest of the access provider.

The ACCC considers that it would be inappropriate to include additional triggers for access providers to request altered security as, on current information, they would appear to be

[122] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.7.
[123] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.8.
[124] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.9.
[125] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.10.

unnecessarily restrictive.[126] If additional triggers are necessary due to particular circumstances, these should be resolved through commercial negotiation.

The ACCC does not consider it necessary to amend the definition of OCI in the FAD. Parties are free to commercially negotiate different OCI if the definition provided in the FAD does not suit their individual circumstances. In the interest of maintaining confidentiality, the ACCC also considers it appropriate to ensure that a confidentiality undertaking be given by any persons having access to confidential information in an access seeker's OIC (clause 3.9). Telstra's suggested amendment to this clause would not be in the interests of access seekers.

The ACCC has decided that access seekers should not be limited in how often they seek a reduction in their security.[127] The ACCC does not have evidence that this is currently an issue for access providers and is therefore unconvinced that the DTCS FAD should restrict how often they seek a change to their security. Further, Telstra's suggested amendment "where circumstances reasonably require" does not make clear in whose opinion it is "reasonable" to make the request or how disputes about this would be resolved.

The ACCC agrees that a failure to provide a warranty as set out in clause 3.7 should also lead to the same consequences as a failure to provide OCI, as otherwise the access provider cannot reasonably rely on that information. However, the ACCC considers that Telstra's proposed amendments to clause 3.10 to respond to situations where this information is not provided are excessive. The ACCC is of the view that the ACCC's amended clause 3.10 is appropriate to deal with these situations. The amended clause 3.10 allows the service provider to either alter the amount, form or terms of the security (including entitlement to additional security) or to pursue a suspension notice under Schedule 6.

Similarly, the ACCC does not consider it appropriate to accept Telstra's proposed clause 3.10(b) as this would effectively make security a precondition to supply. Further, a failure to maintain or alter security is already dealt with under Schedule 4(dispute resolution procedures).

[126] Telstra, Annexure A - Proposed amendments to Draft FAD Non-price terms, March 2012,, p.19.
[127] Telstra, Annexure A - Proposed amendments to Draft FAD Non-price terms, March 2012, p.20.

Schedule 4 – General dispute resolution procedures

The DTCS FAD includes provisions for dispute resolution.

Draft DTCS FAD

The ACCC included general dispute resolution procedures in the Draft DTCS FAD to facilitate timely resolution of disputes between parties without resorting to legal proceedings.

Submissions to the Draft DTCS FAD

Telstra agrees to the majority of provisions in Schedule 4 (General dispute resolution procedures) of the Draft DTCS FAD.[128] However, Telstra sought amendments to ensure that the general dispute resolution procedures are confined to the terms and conditions of the FAD. Telstra sought an amendment to clause 4.1 to ensure that parties cannot initiate both a Non-billing Dispute and a Billing Dispute in relation to the same subject matter.[129] Further, Telstra submitted an amendment to clause 4.3, to allow the access provider, not an independent third party, to determine whether a billing dispute is in fact a non-billing dispute.

Nextgen submitted that disputes are generally both billing and non-billing in nature and are not necessarily mutually exclusive.[130] Therefore, Nextgen argued that the Draft DTCS FAD could risk separate and parallel dispute resolution processes being pursued, with potentially contrary findings. Further, Nextgen noted that clause 4.2 does not provide a process for identifying an independent third party to determine whether a dispute is a Billing Dispute or Non-Billing Dispute.[131]

ACCC views

The ACCC agrees that the general dispute resolution procedures should be confined to the terms and conditions of the FAD. The ACCC recognises that disputes may include elements which are both billing and non-billing in nature. However, the ACCC considers that the current drafting to clause 4.2 makes clear that to the extent that a Non-Billing Dispute is raised or arises in connection with a Billing Dispute, then that dispute will be resolved in connection with the Billing Dispute procedures. Therefore, the ACCC is not convinced that the current drafting may cause confusion or result in two separate processes being invoked.[132]

The ACCC does not consider it appropriate to amend clause 4.2 to allow the access provider (instead of an independent third party) to determine whether a billing dispute is in fact a non-billing dispute. This would give the access provider too much influence in dispute resolution procedures which could be exploited. For example, it may encourage the access provider to classify disputes as non-billing dispute in order to demand immediate payment. The ACCC has amended clause 4.2 to specify that the 'independent third party' referred to, may include an arbiter from the Australian Commercial Dispute Centre.

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[128] Telstra Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.12.

[129] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.12.

[130] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.16.

[131] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.16.

[132] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 p.12.

Schedule 5 - Confidentiality provisions

The DTCS FAD includes provisions relating to confidentiality.

Draft DTCS FAD

The ACCC included confidentiality provisions in the Draft DTCS FAD to ensure that confidential information used or obtained in the course of providing access is not used to the other party's detriment.

Submissions to the Draft DTCS FAD

Telstra sought an amendment to the definition of 'Confidential Information' to ensure that information which is not strictly confidential in nature is not subject to unnecessary restrictions.[133] Telstra also sought amendments to broaden the permitted uses and disclosure of confidential information in order to better reflect how information is legitimately used and managed on a day to day basis in relation to the supply of the service.[134] Further, Telstra also submitted that clause 7 of the confidentiality undertaking at Annexure 1 to Schedule 5 be removed, because it does not reflect how most businesses store their information.[135]

ACCC views

The ACCC broadly accepts Telstra's requested amendments to the Confidentiality provisions of the DTCS FAD to better reflect how this information is used by parties to manage the day to day operations of their businesses.

The ACCC accepts Telstra's recommendation that information which has been aggregated should not be classified as confidential information. However, the ACCC does not consider it appropriate to limit the definition of confidential information to information concerning the supply of the DTCS to the access seeker. This may unnecessarily narrow the definition of confidential information and expose information which may be commercially sensitive, whether or not it is directly connected to the supply of the DTCS to the access seeker.

The ACCC does not consider it appropriate to accept Telstra's proposed new clauses 5.5(j) and 5.5(k) as disclosure in response to requests from regulatory authorities or government bodies are adequately covered by 5.5(g).

The ACCC accepts that clause 5.10 be amended to include notification rights in response to events specified in clause 6.7 as this is reasonable and in the legitimate business interests of the access provider.

The ACCC notes that the confidentiality undertaking at Annexure 1 to Schedule 5 of the DTCS FAD is an example only. The ACCC therefore does not consider it necessary to remove clause 7 of the confidentiality undertaking. Parties are free to agree a confidentiality undertaking which better reflects their circumstances.

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[133] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 p.13.

[134] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 pp.13-14.

[135] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 pp.14.

Schedule 6 - Suspension and termination

The DTCS FAD includes provision relating to suspension and termination.

Draft DTCS FAD

The ACCC included suspension and termination provisions in the Draft DTCS FAD to allow service providers to suspend or cease service in reasonable circumstances, while also ensuring that the businesses of access seekers are not disrupted for trivial matters.

Submissions to the Draft DTCS FAD

Telstra sought amendments to allow the access provider the right to immediately suspend supply in circumstances that are legitimate and necessary to do so.[136]

Telstra also submitted that clause 6.1(a) be amended to include that a 'Payment Breach'(being a failure to pay any amount owing under the FAD by the due date) by an access seeker to also constitute a suspension event under the FAD.[137]

Telstra reiterated that access seekers should *complete* remedial action under the remedy period in subclauses 6.1(e), 6.1(f) and 6.4(f)(iii), rather than *commence* remedial action within those timeframes. Telstra argued that the current drafting allows access seeker a grace period within which they need not act.

In respect of subclauses 6.1(g) and 6.1(h), Telstra sought amendments to reflect that where a suspension event subsists; the right of suspension should apply to *any* supply of service to the access seeker, and not to any requests for supply made after the date of breach.

Telstra also sought the inclusion of a new subclause 6.4(e) which would allow an access provider to immediately cease supply where an access seeker commits a material breach that is incapable of being remedied.

In a confidential submission to the ACCC, a party requested that this schedule include a provision requiring the access seeker to payout the service for the remaining contract period in a lump sum if a service is terminated as a result of a breach by the access seeker. In addition, while a service is in suspension resulting from a breach by the access seeker, the party requests that the FAD specify that the monthly charges continue to accrue and be paid by the access seeker.

ACCC views

The ACCC agrees that it is appropriate to include immediate rights of suspension during an emergency, to maintain safety to networks and persons and to respond to the events specified in clause 6.7. The ACCC does not consider it appropriate to accept Telstra's proposed clauses 6.X(d) and 6.X(f), as this would effectively make security a precondition to supply and may cause delays in access to the service.

[136] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012p.16.

[137] Telstra, Annexure A - Proposed amendments to Draft FAD Non-price terms, March 2012, clause 6.1(a).

The ACCC is not persuaded that there is a need to vary the meaning of a Suspension Event under the FAD. The ACCC considers that the original drafting to this clause is reasonable, as it first allows the access provider to lodge a billing dispute under Schedule 4 (General dispute resolution procedures), before pursing further action.

The ACCC maintains that it would be unreasonable to request access seekers to complete remedial action within the timeframes specified in subclauses 6.1(e), 6.1(f) and 6.4(d)(ii) to Schedule 6 of the DTCS FAD. Access seekers may require time to identify and consider an issue first, before setting up the relevant procedures for compliance. The ACCC will maintain the current drafting to subclauses 6.1(g) and 6.1(h). The suggested amendments by Telstra may be excessive and would allow an access provider to suspended service before the prerequisites of a suspension event has been met and a suspension notice has been issued.

The ACCC considers that Telstra's proposed new subclause 6.4(e) is unnecessary as the same issue is adequately covered by subclause 6.4(d) to Schedule 6.

Based on available information, the ACCC is not convinced that access seekers should continue to provide payment for a service that has been suspended or terminated due to a fault of the access seeker, as this may be excessive and unnecessary to include in an FAD.

Schedule 7 - Liability and indemnity

The DTCS FAD includes provision relating to liability and indemnity.

Draft DTCS FAD

The ACCC included liability and indemnity provisions in the Draft DTCS FAD to facilitate commercial negotiations and reduce associated barriers to entry.

Submissions to the Draft DTCS FAD

Telstra maintained that it is unnecessary to include liability and indemnity provisions in the DTCS FAD[138], while Optus requests that these provisions be strengthened to ensure the terms are fair and reasonable.

Telstra argued that if liability provisions are to be included, a minimum liability cap of $1 million be included, to ensure that the access provider can recover any losses caused by small acquirers.[139] Additionally, Telstra requests that a separate $20 million liability cap apply to losses or damages arising from access to the access provider's facilities.[140]

Telstra also proposed the inclusion of new clauses 7.5 and 7.6 to address liability for third party negligence claims, losses arising from the broadcasting, use, transmission, communication or making available of any material, and to allow limitations of liability.[141]

Optus argued that clause 7.3 should not be limited in scope and should include indemnity for acts or omissions which lead to the death or personal injury to "any person".[142]

Optus submitted that clauses 7.7 and 7.9 to the Draft DTCS FAD address the same issue. It therefore requested that clause 7.7 be deleted, as it is unnecessarily broader in scope and the removal of this clause would remove potential confusion or inconsistency.[143] In its supplementary submission to the Draft DTCS FAD, Telstra rejected Optus's argument and asserted that clauses 7.7 and 7.9 do not address the same issue.[144] Clause 7.7 specifies the circumstances in which the indemnifying party is not liable to the innocent party, while clause 7.9 sets out the circumstances in which the indemnifying party's liability is reduced. Telstra therefore argued that the ACCC retain clauses 7.7 and 7.9 to the Draft DTCS FAD.

Telstra requested amendments to clause 7.10 to the Draft DTCS FAD, to reflect that an indemnifying party may (but is not required to) conduct the defence of a third party claim

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[138] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 p.18

[139] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 p.18

[140] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 p.19

[141] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012 p.19

[142] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 3.23

[143] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 3.30

[144] Telstra, Response to submissions in relation to the Commission's Draft FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p. 15.

against an innocent party, upon receiving notice of that claim. Further, Telstra also sought the inclusion of a new clause to ensure that if an indemnifying party is given the conduct of the defence against a third party claim, the innocent party must cooperate with the indemnifying party and assists in the conduct of negotiations.

ACCC views

The ACCC considers that liability provisions in the DTCS FAD are necessary to provide regulatory guidance about the balance that should be achieved in allocating commercial risk. Parties should be free to allocate commercial risk in a reasonable manner. However, it would be inappropriate for the DTCS FAD to set liability provisions which create an unreasonable barrier to entry or require access seekers to carry the risk of losses that are not under its control.

Given the lack of information currently available to the ACCC, the ACCC does not consider it appropriate to specify liability caps into the DTCS FAD.

The ACCC consider it would be inappropriate to extend liability to "any person", as requested by Optus. The proposed definition for 'Representative' as currently defined in the FAD intentionally excludes the end-users of a party, as the ACCC considers it would be unreasonable to extend liability to the end-users of a party.

The ACCC has adopted Telstra's proposed new clause 7.5, as it is reasonable and would be in the interests of all parties. Clause 7.5 ensures that each party indemnifies the other party against all loss arising from a claim by a third party against the innocent party to the extent that the claim relates to a negligent act or omission by the first party/representative of the first party. However, the ACCC does not consider it appropriate to accept Telstra's proposed clause 7.6 as it would extend to end-users and appears to be unnecessarily broad in its application.

The ACCC does not consider it appropriate to accept Telstra's proposed amendments to clause 7.10 or Telstra's proposed new clause 7.14, as these terms are unnecessary for inclusion in an FAD.

Schedule 8 - Network upgrade and modernisation

The DTCS FAD includes provisions for network upgrades and modernisation.

Draft DTCS FAD

The ACCC included network upgrade and modernisation provisions in the Draft DTCS FAD, to help parties manage service disruptions and any adverse implications of network disruptions.

Submission to the Draft DTCS FAD

Telstra maintained that the DTCS is unlikely to be affected by network upgrades and modernisations, given the nature of the service and the way in which 'Major Network Modernisation and Upgrade' has been defined in the Draft DTCS FAD. Telstra sought clarification as to whether the ACCC intended to include Schedule 8 in the DTCS FAD, as footnote 97 of the Explanatory Statement to the Draft DTCS FAD noted that the DTCS FAD will not deal with network modernisation and upgrade.

Both Nextgen and Telstra argued that the obligations imposed by Schedule 8 are onerous and would not be in the legitimate business interests of carrier and carriage service providers.[145]

Nextgen argued that the timeframes imposed by clauses 8.1 and 8.3 are onerous and not necessary and that it would be more reasonable to provide for "reasonable notice given the circumstances of the particular transmission network modernisation or upgrade".[146]

Telstra and Nextgen both argued against the obligation for access providers to lodge coordinated capital works program forecasts. Nextgen argued that the ACCC should justify why this provision is necessary.[147] Telstra noted that it had already lodged a coordinate capital works program forecast under the DTCS IAD, which confirmed that Telstra has no works for the next three years. Therefore, Telstra argued that it would be unnecessary to request Telstra to again lodge this information to the ACCC under the DTCS FAD.

ACCC views

The ACCC considers that is necessary to include network upgrade and modernisation provisions in the DTCS FAD, as access seekers should be allowed sufficient notice to plan and respond to upgrade and modernisation work undertaken by access providers. For example, if an access provider chooses to upgrade or change their network interface, this information needs to be communicated with access seekers so that they can make appropriate plans to continue acquiring the service.

Accordingly, the ACCC has amended the definition of 'Major Network Upgrade and Modernisation' to the DTCS FAD to ensure it is appropriate to the DTCS. The amended definition reflects that changes or upgrades to network interface protocols used to provide the declared DTCS also constitute a 'Major Network Upgrade and Modernisation'.

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[145] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.20. Nexgen, Public Submission to the Draft DTCS FAD, p.16.

[146] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.17.

[147] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p. 17.

The ACCC agrees that the timeframe proposed clause 8.3 to the Draft DTCS FAD may be onerous on access providers. As such, the ACCC has decided to relax the timeframe to allow "reasonable notice to be provided, given the circumstances of the particular transmission network modernisation or upgrade".

The ACCC accepts that the coordinated capital works program forecast sought under clause 8.10 may be onerous and may have unintended consequences for DTCS service providers. The ACCC also understands the parties commercially negotiate 'service level agreements' into their contracts to ensure continuity of services, in the event that an access provider decides to make a network upgrade or modernisation. The ACCC has therefore removed this clause (and associated provisions) from Schedule 8.

Schedule 9 - Facilities access

The DTCS FAD does not include Facilities Access provisions.

Draft DTCS FAD

The ACCC included facilities access provisions in the Draft DTCS FAD to ensure that access seekers receive timely access to an access provider's facilities required for the DTCS.

Submissions to the Draft DTCS FAD

Telstra maintained that Facilities Access provisions are unnecessary and inappropriate to include in the DTCS FAD.[148] Telstra emphasised that any access to the access provider's facilities would have to occur prior to the access seeker's acquisition of the DTCS.[149] As such, the facilities access provisions in the Draft DTCS FAD would not relate to access to the DTCS. Given that the ACCC can only specify FAD provisions which relate to access to a declared service, Telstra argued that it is beyond powers of the ACCC to include facilities access provisions in the DTCS FAD.

Optus and Nextgen requested clarification on how the facilities access provisions would operate in conjunction with the facilities access provisions of Telstra's SSU and the relevant schedules in the *Telecommunications Act 1997*.[150] In order to provide certainty to industry, Optus requested that the DTCS FAD instead adopt the facilities access terms specified in the SSU.[151]

Nextgen also sought clarity as to whether the facilities access terms are only available if they are directly connected to the supply of the DTCS by the same service provider, how confidentiality will be respected, and how the definition of 'exchange' should be interpreted.[152]

ACCC views

The DTCS FAD does not include facilities access provisions. The ACCC understands that the DTCS uses the same exchange facilities, such as TEBA space, as other communications services, such as DSL. Access seekers are therefore likely to have facilities access arrangements in place in order to provide those other services. As the DTCS uses the same facilities, additional facilities access arrangements are unlikely to be required for the DTCS.

For example, to provide a digital subscriber line (DSL) service, the access seeker would first acquire facilities access to an access provider's facilities, e.g. TEBA space to locate the DSLAM equipment. In order to provide connectivity to its end-users, the access seeker would

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[148] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.24.

[149] Telstra, Response to the Commission's Draft DTCS FAD for the DTCS – Non-price terms and conditions, Public version, March 2012, p.24.

[150] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 1.5(e). Nextgen Submission response to ACCC Draft FAD, Public version, March 2012, p.17

[151] Optus, Optus submission in response to the ACCC's Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, February 2012, paragraph 1.5(e).

[152] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.16.

then seek a backhaul connection from its existing location (e.g. inside a telephone exchange) to a backhaul service provider (collocated at the exchange), typically via a fibre optic cable. Therefore, in order to acquire the DTCS, the access seeker is likely to have already acquired most or all of the facilities access (in this case, TEBA) they need. If so, they are unlikely to need to acquire facilities access again or acquire additional access to facilities for the DTCS.

With regard to the Telstra's SSU, the ACCC accepted Telstra's SSU in February 2012 after the Draft DTCS FAD was published. Under the Act, the ACCC must not make a FAD that would prevent Telstra from complying with the SSU.[153] The ACCC considers that including facilities access provisions in the DTCS FAD would, in this context, create unnecessary uncertainty about the arrangements that apply.

The ACCC recognises that access to exchange space is important in the lead up to the NBN. However, the ACCC does not consider that the removal of the facilities access schedule from the DTCS FAD will hinder an access seeker's ability to acquire the DTCS for an NBN access service. As mentioned earlier, before an access seeker acquires a DTCS service to supply an NBN service, it is likely that they will already have acquired most or all of the facilities access at the service provider's facility, many of which will be Telstra exchanges. Therefore, an access seeker is not expected to need additional facilities access to acquire the DTCS.

However, if the ACCC receives evidence of unintended consequences as a result of the FAD, the ACCC will consider an appropriate regulatory response, which may include undertaking a variation inquiry or issuing a BROC.

The ACCC also notes that access to facilities is also subject to regulation under Schedule 1 to the Telecommunications Act 1997.

[153] Section 152ER(3) of the Act.

6. COMMENCEMENT AND EXPIRY

Draft DTCS FAD

The Draft DTCS FAD proposed that the DTCS FAD commence on publication[154] and expire on 31 December 2014, nine months after the DTCS Declaration is due to expire. This expiry date was considered necessary because the scope of DTCS Declaration needs to be determined in a declaration inquiry before the prices in exempt areas can be benchmarked using regression analysis. Therefore, the declaration inquiry needs to be completed before prices can be set in a new FAD.

Submissions to the Draft DTCS FAD

Nextgen and Telstra both consider that it is reasonable for the DTCS FAD to expire after the DTCS Declaration expires.[155] A number of other stakeholders, including Macquarie Telecom, Optus, Primus and VHA raised some concern with the proposed expiry date for the DTCS FAD, submitting that prices should be set for no longer than 12-18 months.[156] Macquarie Telecom specified that it is inappropriate to lock-in prices for three years when the pricing data is essentially 12-18 months old, particularly given that prices are generally expected to fall.[157]

VHA responded to stakeholder claims that that a short duration for the FAD may distort commercial negotiations from longer term agreements by arguing that it is more important to ensure that the prices set in those agreements reflect efficient prices.[158] In its argument, VHA emphasised that the only cost based pricing can produce efficient prices and requested that the ACCC set for the FAD 12 months and pursue cost based pricing for the longer term.[159]

Telstra submitted that the non-price terms and conditions should commence 21 days after the date on which the DTCS FAD is published to allow time to implement the new terms.[160]

ACCC views

The DTCS FAD commences on the day of publication and will expire on 31 December 2014. The ACCC considers the price terms and non-price terms should commence together to provide certainty about the arrangements that apply. The ACCC notes that the majority of

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[154] This will automatically revoke the DTCS IAD which is due to expire the day immediately before the day on which the DTCS FAD commences.

[155] Nextgen, Submission response to ACCC Draft FAD, Public version, March 2012, p.6.

[156] Macquarie Telecom, Draft Final Access Determination for the Domestic Transmission Capacity Service, Public Version, 29 February 2012, p.3. Optus, Optus Submission in response to ACCC's draft Final Access Determination for the Domestic Transmission Capacity Service, Public Version, February 2012, Paragraph 3.10. Primus, Primus Comments on ACCC's Draft Final Access Determination for the DTCS, Public version, March 2012, p.1. VHA, Domestic Transmission Capacity Services Submission to the ACCC, February 2012, p.6.

[157] Macquarie Telecom, Draft Final Access Determination for the Domestic Transmission Capacity Service, Public version, 29 February 2012, p. 3.

[158] VHA, The Domestic Transmission Capacity Service Final Access Determination, 22 May 2012, p.2.

[159] VHA, The Domestic Transmission Capacity Service Final Access Determination, 22 May 2012, p.1.

[160] Telstra, Response to the Commission's price terms in the draft final access determination for the Domestic Transmission Capacity Service, Public Version, 9 March 2012, p. 23.

non-price terms are already in force under the DTCS IAD and that the DTCS FAD non-price terms are broadly consistent with the IAD terms. The ACCC also notes that parties may agree commercial terms that differ from those in the DTCS FAD. The ACCC therefore does not consider a need to delay the commencement of the non-price terms in the DTCS FAD. The ACCC may consider a variation inquiry or BROC if there is a need for regulatory intervention.

7. Assessment of price terms against subsection 152CBA(1)

7.1 Long-term interests of end-users

Subsection 152BCA(1)(a) of the Act requires that the ACCC consider the long-term interests of end-users of carriage services or services supplied by means of carriage services in making an access determination. Section 152AB(2) of the Act notes that the following objectives be met in determining whether a thing promotes the LTIE:

- promoting competition in markets for carriage services and for services supplied by means of carriage services
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users, and
- encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure by which telecommunications services are supplied.

Promoting competition

In assessing the price terms of the FAD against this criterion, the ACCC has considered the relevant markets for this service and services supplied by means of this service, and had regard to whether the price terms remove obstacles for end-users gaining access to telecommunication services.[161]

The ACCC has previously stated that the relevant market for the DTCS includes wholesale transmission and the range of retail services (that uses transmission services) delivered over optical fibre. This includes the national long distance, international call, data and IP-related markets.[162] The ACCC consider these markets continue to be the relevant markets for the supply of the DTCS.

The DTCS FAD provides a method for ascertaining a maximum annual price for a DTCS service with the highest quality of service in inter-capital, metropolitan, regional and tail-end locations. The FAD prices are set as the mean values of benchmarked prices of unregulated transmission services collected from industry in the January – September 2011 period.

The ACCC notes that services with the highest quality of service, and the corresponding higher price, may not be required by access seekers in all cases. The FAD price terms do not prevent different quality services being negotiated in the market at lower prices. Such services could be offered by existing service providers or new entrants.

The FAD prices for metropolitan services, including metropolitan tail-end services, are based on market prices in the 2010-2011 period. The FAD prices are lower than the metropolitan prices in the DTCS IAD released in April 2011. In some cases, the FAD prices are higher than market prices in 2012. The ACCC notes that in 2012, some access seekers have negotiated prices with some access providers that are lower than FAD prices. The ACCC

[161] See subsection 152AB(4) of the Act.

[162] See ACCC 2008 DTCS Exemption Decision and the ACCC 2010 DTCS Declaration Variation Inquiry, September 2010, p.21

considers this is not unexpected because the higher level of competition in metropolitan areas would be expected to create downward pressure on prices.

The ACCC notes that the price of transmission services in regional areas is widely regarded as an obstacle to service providers being able to offer lower prices to retail and end-user customers, especially service providers in regional areas. The FAD prices for regional services are significantly lower than the DTCS IAD prices and prevailing 2010-2011 prices.

The ACCC expects the FAD prices for regional services will provide downward pressure on prices and help remove obstacles for access to cheaper wholesale transmission services and downstream retail communications services. The ACCC also expects lower transmission prices in regional areas would be passed on to end-users. Furthermore, lower transmission prices reduce a significant wholesale cost for RSPs, especially for RSPs providing services in and across regional areas, and could thereby reduce a barrier to entry for potential new RSPs.

The ACCC recognises that lower wholesale transmission prices may reduce the prospect of increased competition in the transmission market itself because of potentially lower anticipated returns. However the ACCC also recognises there is a balance between more competition upstream, which may be limited due to the inherent high fixed and sunk costs of investing in transmission networks, and downstream, which may be more extensive due to the lower investment costs. As alluded to earlier, the ACCC considers the relevant downstream services include the range of retail services that use transmission services, such as national long distance, international call, data and IP-related services.

Any-to-any connectivity

The ACCC considers this criterion is relevant to ensuring that the DTCS FAD does not create obstacles for the achievement of any-to-any connectivity, as defined by subsection 152AB(8) of the Act. Any-to-any connectivity is achieved only if each end-user is able to communicate with each other end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunication network.[163]

The ACCC considers that price terms that reflect the efficient cost of supplying the service and provide more transparency about the factors that affect the costs of supply will not create obstacles to achieving any-to-any connectivity for voice and data services that use underlying transmission networks. Prices that broadly reflect costs with a normal rate of return are expected to put downward pressure on wholesale list prices offered by access providers to access seekers which can then be passed on to end-users. Lower prices are also expected to encourage take-up of services and facilitate more interconnection between networks by removing a cost barrier to entry for alternative providers. The ACCC also expects that transparency about the drivers of costs, such as geographic path protection, can help access seekers negotiate service configurations that suit their circumstances.

The ACCC is of the view that the price terms specified in the DTCS FAD are based on a model of prices that broadly reflect the costs of supply and include a normal rate of return. The ACCC also considers that the price terms in the DTCS FAD provide transparency about the main factors that affect costs. As such, the ACCC considers the DTCS FAD price terms

[163] Subsection 152AB(8) of the Act.

remove obstacles for achieving any-to-any connectivity and will help to ensure that end-users are able to communicate with other end-users who are supplied with the service.

Economically efficient use of and investment in infrastructure

In considering whether the DTCS FAD encourages the efficient use of, and investment in, infrastructure the ACCC has had regard to the requirements set out in subsections 152AB(6) and (7A) of the Act. The ACCC considers this criterion refers to the concept of economic efficiency, with its three components: productive, allocative and dynamic efficiency.

Economically efficient use of infrastructure

The ACCC considers that the price terms set by the DTCS FAD encourage the economically efficient use of existing infrastructure. This is because the price terms of the DTCS FAD are based on the prices observed on exempt transmission routes. Exempt transmission routes are considered relatively mature and competitive with a number of service providers and prices that reflect competitive pressure from alternative service providers and services.

As such, the ACCC considers that the prices of services on exempt routes are a proxy for the prices of services provided in a competitive environment. They are also considered a proxy for prices that recover costs and provide a normal return on investment. Further, the prices of exempt services are considered a proxy for the lowest underlying costs, and thereby reflect an acceptable level of productive and allocative efficiency. Similarly, the prices of services in competitive areas are taken to represent competitive responses to technological improvements and changing access seeker requirements, such as growing demand for high data rates and Ethernet services, and therefore reflect an acceptable level of dynamic efficiency.

In addition, the FAD price terms for recurring charges account for the complex inter-relationships between the key factors which affect price on competitive routes – distance, data rate, protection, quality of service and route type. The ACCC considers that setting prices based on the most important cost drivers means that regulated prices are priced efficiently and not based on irrelevant factors. This reduces the risk that regulated prices over- or under- recover the efficient costs of providing the declared service.

The FAD makes it possible to determine prices for standalone tail-end services, unbundled from metropolitan, regional and inter-capital services. The ACCC considers this transparency could encourage more efficient use of tail-end infrastructure and new entrant competition in the supply of tail-end services.

The FAD price terms may also encourage new entry and competition in downstream markets. This is because the FAD is expected to create downward pressure on wholesale prices and thereby reducing price obstacles to retail service providers. Costs savings can be used to innovate, improve productivity, reduce production costs and increase the range and quality of services for downstream customers.

The FAD does not include a mechanism to review prices before the FAD expires. The ACCC considers that price terms fixed for the duration of the FAD provides appropriate certainty to the market. It also promotes efficient use of infrastructure, as access seekers and access providers know up front how the declared service will be regulated for the duration of the FAD, subject to unforseen events or unintended consequences arising. Regulatory certainty

may also encourage efficient market entry, encourage parties to commercially negotiate longer term contracts and promote more economically efficient use of infrastructure.

Economically efficient investment in infrastructure

The ACCC considers that the DTCS FAD price terms encourage efficient investment in infrastructure. As explained in the previous section, the FAD price terms are based on the key cost drivers affecting prices in competitive areas and reflect costs which include a normal return on investment. Furthermore, the ACCC considers the FAD price terms are based on prices that reflect a level of productive, allocative and dynamic efficiency. This provides sufficient and appropriate incentives for efficient investment in infrastructure.

While the ACCC recognises the high fixed and sunk costs of investing in transmission networks, the ACCC considers these risks are mitigated by regulated prices which enable a return on the efficient costs of investment.

The ACCC notes that access providers employ different pricing structures, such as different distance bands, to recoup the costs of their investments and achieve a commercial return. The ACCC notes that the Final Regression Model underpinning the price terms in the FAD is based on information from DTCS service providers providing services across the country. The ACCC therefore considers the FAD takes account of the different cost structures used by access providers to achieve a normal return on investment.

The ACCC also recognises that higher quality transmission services involve higher costs. The ACCC has therefore based the regulated price on the highest quality of service available in the market. The ACCC considers this provides guidance about appropriate prices to recover the costs of investing in infrastructure to provide services of sufficient quality, such as geographically diverse transmission routes that maintain a robust transmission network.

The ACCC notes that services with the highest quality of service, and the corresponding higher price, may not be required by access seekers in all cases. The FAD price terms do not prevent different quality services being negotiated in the market at lower prices. Such services could be offered by existing service providers or new entrants. If access providers with lower quality services adopt the FAD prices, the ACCC expects access seekers will seek to negotiate prices down or seek another provider.

Including a factor to account for the highest quality of service also helps ensure that regulated prices are not so low as to discourage pro-competitive investment that might otherwise occur. Furthermore, by selecting regulated prices based on the mean value of prices predicted by the pricing model, the FAD balances the risk of setting prices too high or too low.

In relation to geographic diversity, the ACCC maintains that transmission services are priced efficiently if the prices reflect a resilient network structure with redundant paths. The FAD price terms take account of the higher cost of providing protection in the form of geographic path diversity. This is limited to the inter-exchange component of metropolitan, regional and inter-capital routes but does not extend to tail-end routes as geographic path protection is rarely applied to tail-end services. This encourages efficient investment by setting prices to recover the costs of providing services with this level of resilience without over-recovering for geographic protection where it is not provided.

7.2 Legitimate business interests

The ACCC considers that the legitimate business interests relating to the DTCS FAD prices are an access provider's interest in earning a normal commercial return on its investments having regard to the relevant risks of investment.[164] In considering the legitimate business interests of the access provider, the ACCC has had regard to what it sees as necessary to maintain those interests.

The DTCS FAD sets prices based on competitive DTCS services. The ACCC considers prices of DTCS services on exempt routes are competitive market prices[165] and reflect access providers' interests in earning a normal commercial return while allowing for the costs of investment to be recovered. In contrast, the prices of DTCS services in regulated areas are more akin to monopoly or duopoly prices. Hence, the ACCC has not set FAD prices based on prices associated with declared DTCS routes.

In addition, the FAD sets prices at a level that corresponds to the highest quality of service. This is based on a qualitative assessment of access providers' networks' capabilities in terms of each provider's network coverage, the level of protection that can be provided, and the availability and reliability of those services. The quality of service factor is intended to ensure the costs of providing higher service qualities can be recovered by the FAD prices. The FAD sets prices at the highest quality of service (QoS1).

The FAD price terms also take account of the costs of providing geographic path protection, which is a superior and more costly form of protection. The ACCC remains of the view that transmission services are priced efficiently if they reflect a resilient network structure with redundant paths and that a pricing mechanism which encourages investments in networks with ring structures is desirable.[166] Capturing the effects of protection on pricing ensures service providers are compensated for investing in geographically diverse infrastructure.

The FAD price terms also account for the higher costs of providing services between the mainland and Tasmania. The ACCC recognises the higher cost of investment and the risks of operating a route that contains a significant subsea component. The FAD therefore provides for an uplift of 40 per cent on routes to Tasmania to compensate service providers for the higher cost of delivering services over the submarine link.

The ACCC considers that by setting price terms based on the prices of competitive services and by taking account of the costs of providing the highest quality of services and geographic path protection, the FAD price terms consider the legitimate business interests of access providers.

[164] ACCC, *Resolution of telecommunication access disputes – a guide*, March 2004 (Revised), p.56.
[165] ACCC, *Final report on reviewing the declaration of the DTCS*, March 2009, Appendix 1.
[166] *ACCC Discussion Paper on Pricing the DTCS*, April 2010, page 10.

7.3 Interests of persons with a right to use the service

The ACCC considers that this criterion requires the ACCC to have regard to the interests of access seekers. Transmission networks form a key input for downstream services including voice and broadband internet services, available over both fixed and wireless platforms. The recent growth in broadband and mobile data uptake has focussed attention on the availability and cost of transmission services. Access seekers have indicated that the lack of access to competitively priced transmission has inhibited the rollout of competitive high-data rate retail services, particularly in regional areas.

The DTCS FAD price terms are based on the prices of DTCS services in competitive areas. The ACCC considers these prices are closer to efficient costs that include a normal rate of return and lower than the prices of DTCS services in uncompetitive areas, particularly in regional areas. To the extent that FAD prices create downward pressure on commercially negotiated prices, the FAD price terms therefore benefits access seekers.

The FAD allows prices to be set for services on a particular geographic route and with a particular data rate, distance, level of protection at the highest quality of service. This means the FAD price terms can be used to determine prices that are tailored to the needs of access seekers' individual circumstances which can then be used to inform commercial negotiations and investment decisions.

The FAD allows prices to be set for data rates up to 1,000Mbps (1Gbps). The ACCC does not, at this time, have sufficient data available to set prices for higher data rates.

The FAD sets prices for metropolitan, inter-capital and regional services which include a tail-end component. It also provides a method for ascertaining the price of tail-end services that are not bundled with other services, ie standalone tail-end services.

The FAD prices for inter-capital, metropolitan and regional services include the price of a tail-end component. As a result, when determining the price of a regulated inter-capital, metropolitan or regional service, the FAD does not require the price of a tail-end service to be added to the price of the other service. The ACCC considers this ensures regulated prices do not over-recover the the costs of tail-end services.

The ACCC notes that tail-end services are usually bundled with inter-capital, metropolitan and regional services and are rarely provided as standalone services. The price of tail-end services is therefore usually incorporated in the total price of another service. By providing a method to ascertain the price of standalone tail-end services, the FAD provides access seekers with greater transparency about the costs of regulated services. The ACCC expects this transparency will inform investment decisions and could stimulate demand for standalone tail-end services, which are not widely available at this time.

7.4 Direct costs of providing access

The direct costs of providing access to a declared service encompass those costs that are necessarily incurred (or caused) by the provision of access. In this context the phrase 'direct costs' is interpreted to mean that an access price should cover the direct incremental costs incurred in providing access including contribution for indirect costs, but not compensation for loss of any 'monopoly profits' that occur as a result of increased competition.

The ACCC DTCS pricing inquiry in 2010 found a number of issues with identifying and allocating costs that can be attributed only to the DTCS and not to any other service. In particular, regulatory and statutory reporting requirements do not provide the level of detail to assess the underlying cost of transmission services. In addition, historical costs mostly relate to the copper network and their application to transmission services carried over other infrastructure may be limited.

However, the ACCC considers the prices of competitive services are a reasonable proxy of the costs of supplying services in a competitive environment with a normal rate of return. The ACCC considers that the prices in a competitive market allow access providers to recoup the direct costs incurred in providing services, even though direct costs may be allocated across a number services provided by the access provider. Therefore in using the market based prices on competitive exempt routes, the ACCC considers that in general, the access provider will be able to recoup the direct costs of providing access to the declared DTCS service.

7.5 Value of extensions and enhancements

The ACCC stated in the 1997 Access Pricing Principles that if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover any costs related to this enhancement for themselves. Equally, if an access provider must enhance a facility to provide the service, it is legitimate for the access provider to incorporate to the access price some proportion of the cost of doing so.[167]

The ACCC considers that significant capability enhancements are not required for the provision of DTCS services. Therefore this criterion is not considered to be relevant in the context of the FAD price terms.

7.6 Safety and reliability requirements

The ACCC considers that this criterion requires that terms of access should not compromise the safety or reliability of carriage services and associated networks or facilities. The ACCC has previously stated that terms and conditions should reflect safe and reliable operations and should not require work practices that would be likely to compromise safety or reliability.

The ACCC is of the view that the regulated price for the DTCS will not compromise the safe and reliable operations of this service. The regulated price is based on market prices that are expected to already take into account the costs of ensuring appropriate safety and reliability standards are met. In setting the price at a level that reflects these costs, access providers are able to undertake the required operational and technical expenditure to ensure safe and reliable operations.

[167] 1997 Access Pricing Principles, p. 11.

The Final Regression Model to the DTCS FAD takes into account differences in protection on certain routes. By capturing the effects of protection on pricing, the service provider is adequately compensated for investing in network enhancements to ensure protection is available and is provided with the incentives for efficient investment in protection. This enhanced protection is expected to contribute to the reliable operation of the network.

Therefore, the ACCC considers that in determining the DTCS FAD it has had appropriate regard to the operational and technical requirements necessary for the safe and reliable operation of carriage services, telecommunications networks or facilities. The price terms of the DTCS FAD are not considered to lead to work practices that would be likely to compromise safety or reliability.

7.7 Economically efficient operation of a carriage service, a telecommunications network or a facility

The ACCC's *Access Dispute Guidelines* notes that the phrase 'economically efficient operation' embodies the concept of economic efficiency. This calls for a consideration of productive, allocative and dynamic efficiency. It would not appear to be limited to the operation of carriage services, networks and facilities used by the access provider supplying the declared service but would seem to include those operated by others (for example, service providers using the declared service).

A consideration of the productive, allocative and dynamic efficiencies in relation to the DTCS market is set out in the section that relates to the LTIE.

The methodology employed by the ACCC to determine prices for the DTCS FAD is underpinned by the assumption that regulated prices based on prices observed in competitive markets reflect a higher level of economic efficiency than those found in declared markets with monopoly (or duopoly) pricing characteristics. Accordingly, the ACCC considers that the price terms set in the DTCS FAD promote the economically efficient operation of carriage services provided by access providers as well as those operated by access seekers using the DTCS to supply downstream services.

In addition, the way the DTCS FAD sets prices accounts for the levels of investment required to ensure that the DTCS operates at an economically efficient level. For instance, the prices the ACCC have used are based on competitive market prices that reflect levels that encourage efficient investment in and the operation of the DTCS. Further, the regulated prices are not set too high so as to encourage unnecessary duplication of DTCS infrastructure. The ACCC therefore considers that the prices set in the DTCS FAD are likely to promote the economically efficient operation of carriage services and telecommunications facilities.

8. Assessment of the non-price terms of the DTCS FAD against subsection 152BCA(1)

The ACCC has included non-price terms and conditions in the DTCS FAD covering the following issues:

- Billing and notifications
- Creditworthiness and security
- General dispute resolution procedures
- Confidentiality provisions
- Suspension and termination
- Liability and indemnity, and
- Network upgrade and modernisation.[168]

The ACCC has assessed the inclusion of these non-price terms and conditions against the statutory criteria in subsection 152BCA(1) of the Act and provide its views below.

8.1 Billing and notification

The terms regarding billing and notifications are set out in Schedule 2 of the DTCS FAD. These provisions specify the way in which an access provider may bill for services and set out procedures for resolving billing disputes. The ACCC's views in response to stakeholder submissions are detailed in section 5.4 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC has considered whether the billing and notification terms set out in Schedule 2 of the DTCS FAD will promote the LTIE. The ACCC believes these provisions will promote competition in DTCS markets and encourage efficient investment in infrastructure. The ACCC does not consider that the billing and notification terms directly concern the connectivity of telecommunications networks.

The billing and notification terms promote competition in DTCS markets by preventing unnecessary disruptions to business activities as a result of errors or ongoing disputes. The terms also help to ensure accurate and timely billing, which allows access seekers to then bill end-users in a timely manner.

By specifying the timeframes for providing invoices and making payments, the billing and notification terms help to promote certainty for access providers. The terms also reduce capital risks by providing assurance of how investment costs will be recovered. As a result, the provisions promote the economically efficient investment in infrastructure by which listed services are supplied, and any other infrastructure by which listed services are capable of being supplied.

[168] The Draft DTCS FAD also included a schedule for facilities access provisions. However, the ACCC decided to remove this schedule after considering submissions received from stakeholders. The reasons for this are discussed further in section 5.11 of this explanatory statement.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC has balanced the legitimate business interests of the access provider with other competing considerations under subsection 152BCA(1) of the Act. The ACCC is of the view that the terms and conditions in Schedule 2 allow access providers to earn a normal return on their investment with respect to the risks involved, such as not being paid amount owing. This promotes certainty and encourages efficient investment in the declared service. The ACCC also considers that an access provider's legitimate business interests will benefit from the certainty of clear and timely billing dispute resolution processes.

The ACCC has amended clause 2.23, to ensure that billing disputes are only escalated following the completion of the procedures set out in clause 2.18. This supports the legitimate business interests of access providers by ensuring that billing disputes are only escalated after a revised proposed resolution has been provided.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

The ACCC believes that this criterion requires consideration of the interests of access seekers. The terms and conditions in Schedule 2 of the DTCS FAD create obligations regarding payment of invoices and billing dispute notification. However, the ACCC does not consider that these obligations are excessive to the point of deterring potential access seeker entry into the market.

The billing and notification provisions allow access seekers at least 20 business days before an access provider can take action to recover unpaid payments. This is considered to be a reasonable length of time for access seekers to identify and rectify any issues. The ACCC also considers that the timeframes for escalating billing disputes will allow access seekers sufficient time to consider the merits of any dispute before undertaking any further action.

The rules and responsibilities around billing and dispute resolution set by the DTCS FAD can reduce the duration of disputes and lead to more efficient and economical dispute resolution outcomes. Clause 2.30 also provides an incentive for access providers to produce accurate billing information and to rectify errors in a timely manner. This will help to prevent unnecessary disruptions to the business activities of access seekers and other users of the declared service.

The ACCC considers that the terms in Schedule 2 of the DTCS FAD are important to access seekers because they require accurate and timely billing data in order to bill end-users. Access seekers may be adversely affected if bills are materially inaccurate or unduly delayed, or if workable processes do not exist to resolve billing disputes in an appropriate and timely manner.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

The ACCC considers that the terms and conditions in Schedule 2 of the DTCS FAD do not directly impact on the direct costs of providing access to the declared services. Rather, these terms stipulate the invoicing processes by which costs are recovered.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that the terms and conditions in Schedule 2 of the DTCS FAD will not affect the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else. This is because this schedule refers to billing and notifications and not the value of network enhancements.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that the terms and conditions in Schedule 2 of the DTCS FAD will not affect operational and technical requirements necessary for the safe and reliable operation of a carriage service. The billing and notification terms do not address operational and technical requirements.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The ACCC considers that the terms and conditions in Schedule 2 of the DTCS FAD help to promote the economically efficient operation of a carriage service. Clear billing and dispute resolution procedures help to make operations more efficient by improving payment certainty and the timeliness of dispute resolution.

8.2 Creditworthiness and security

The terms regarding creditworthiness and security are set out in Schedule 3 of the DTCS FAD. These provisions cover the access provider's rights to make enquiries of the access seeker's ability to pay, and to require that security may be provided in certain circumstances. The ACCC's views in response to stakeholder submissions are detailed in section 5.5 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC has considered whether the creditworthiness and security terms and conditions in Schedule 3 of the DTCS FAD will promote the LTIE. The ACCC is of the view that practical and functional creditworthiness and security terms will satisfy the objective of promoting competition by removing unnecessary barriers for access seekers, while providing protection against capital risks for the access provider. The assurance provided to access providers will also lead to economically efficient investment in infrastructure. The terms and conditions in Schedule 3 of the DTCS FAD do not directly concern the connectivity of telecommunications networks.

The terms and conditions in Schedule 3 of the DTCS FAD seek to effectively balance the interests of access seekers and access providers. The ACCC understands that unnecessary or excessive creditworthiness information or security requirements could potentially delay or frustrate an access seeker's ability to acquire services. This may create an obstacle to their ability to compete in the telecommunications markets. The ACCC has developed the terms and conditions to ensure that they are not unnecessary or excessive to the extent that they would deter entry or hinder an access seeker's ability to compete in telecommunications markets.

The ACCC considers that the terms and conditions in Schedule 3 of the DTCS FAD help to minimise the financial risk for the access provider. This will provide assurance to the access provider that it will recover the costs of investment. By providing protection for the access provider, this will help to promote competition and encourage economically efficient investment in infrastructure.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC has considered the impacts of Schedule 3 of the DTCS FAD on the legitimate business interests of access providers. This involves consideration of an access provider to achieve a normal return on investment, having regard to the relevant risks involved.

The creditworthiness and security terms will benefit the access provider by providing security and reducing financial risk. The provisions seek to balance the rights of access providers to make enquiries of an access seeker's ability to pay for services and to provide security, while also ensuring that terms don't create barriers to entry.

The provision of security protects the access provider's interests of being paid for a debt due. Allowing the access provider to request security before all credit checks are completed benefits the access provider by not exposing it to the risk of default in the intervening period of supply.

The access provider's ability to request creditworthiness information from the access seeker, to receive it within a certain timeframe and then require security to be altered, further supports the legitimate business interests of the access provider to ensure cost recovery.

To better serve the legitimate business interests of the access provider, the ACCC has also amended clause 3.3(b) in the DTCS FAD to ensure that security reflects the amount invoiced in respect of the DTCS.

The ACCC considers that the terms and conditions in Schedule 3 of the DTCS FAD benefit the legitimate business interests of a carrier or CSP by facilitating the management of financial risk and protecting its commercial return on investments.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

The ACCC is of the view that the terms and conditions in Schedule 3 of the DTCS FAD achieve an appropriate balance between the interests of access seekers who have the right to use the declared service and access providers.

The ACCC has decided that access should not be conditional upon the completion of credit checks or the provision of security. Security preconditions have the potential to create unnecessary delays in accessing the service and may deter entry into telecommunications markets. The terms in Schedule 3 have been drafted such that conditional access is to be requested only in certain circumstances. This may be when an access seeker is first acquiring the service and where it does not have a credit history, or when a subsequent event occurs that would give rise to genuine concerns around the access seeker's ability to pay its debts.

The ACCC has also concluded that it is not appropriate for an access provider to determine the amount and form of security or to determine the terms and conditions on which that security is to be maintained by an access seeker. This may unnecessarily result in access providers determining restrictive terms of access.

The Schedule 3 terms and conditions also provide for the access seeker to reduce its security where the access seeker can demonstrate an improvement in its creditworthiness or a material change in circumstances. Such credit reviews have the potential to free up working capital for the access seeker. This counterbalances the lack of incentive for the access provider to reduce security requirements for its downstream competitors.

The ACCC considers that the terms and conditions in Schedule 3 of the DTCS FAD accommodate the interests of all persons who have the right to use the declared service.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

The creditworthiness and security terms and conditions in Schedule 3 of the DTCS FAD will not impact on the direct costs of providing access to the declared service, as they do not contribute to those costs. Indirectly, the protection afforded to the access provider means that any direct costs incurred are likely to be recovered.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that the terms and conditions in Schedule 3 of the DTCS FAD will not affect the value to a person of extensions, or enhancements of capability, whose cost is borne by someone else because this schedule does not relate to changes to the network.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that the terms and conditions in Schedule 3 of the DTCS FAD will not affect operational and technical requirements necessary for the safe and reliable operation of a carriage service, as they do not address operational and technical requirements.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The ACCC considers that the terms and conditions in Schedule 3 of the DTCS FAD will not affect the economically efficient operation of a carriage service, as they do not impact on the ability of the access provider and access seeker to operate their respective services, networks and facilities in an economically efficient manner.

8.3 Dispute resolution procedures

The terms regarding the general dispute resolution procedures are set out in Schedule 4 of the DTCS FAD. These general provisions do not apply to billing disputes, which are covered in Schedule 2 of the DTCS FAD. The ACCC's consideration of stakeholder submissions relating to the general dispute resolution procedures is detailed in section 5.6 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC does not consider that the terms and conditions in Schedule 4 of the DTCS FAD directly impact on the LTIE in terms of the objectives of promoting competition, achieving any-to-any connectivity, and the objective of encouraging the economically efficient use of, and investment in, infrastructure.

However, the existence of defined and balanced dispute resolution procedures indirectly promotes the LTIE. These procedures can reduce the time and expense of dispute resolution for all parties. The dispute resolution procedures promote regulatory certainty and encourage parties to confidently engage in commercial negotiations.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC considers that the general dispute resolution procedures achieve a balance between the legitimate business interests of the access provider and the interests of the access seeker. The procedures, obligations and rights in Schedule 4 of the DTCS FAD apply equally to both access providers and access seekers.

The provisions in Schedule 4 encourage simple, flexible, timely and inexpensive dispute resolution procedures. This prevents undue reliance on legal proceedings or arbitrations. It is in the mutual interest of both access providers and access seekers to have certainty about processes regarding dispute resolution and the ability to resolve non-billing disputes quickly.

The mediation processes outlined in Schedule 4 of the DTCS FAD are in accordance with the objective dispute resolution guidelines from the Australian Commercial Dispute Centre. The processes also provide for equal representation at mediation and in front of the expert committee. Each party is required to bear its own costs of mediation and the expert committee, and share the costs of the mediator or the independent member of the expert committee. In this way, the terms do not place an unreasonable share of the costs on one party.

The ACCC has adopted Telstra's recommendation that the general dispute resolution procedures be confined to the terms and conditions of the FAD. This allows parties to negotiate their own dispute resolution procedures for terms not covered by the FAD and allows greater flexibility over commercial negotiations.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

For the reasons set out above regarding paragraph 152BCA(1)(b) of the Act, the ACCC is of the view that dispute resolution procedures benefit both the legitimate interests of the access provider and the interests of the access seekers who have the right to use the declared service.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

The ACCC considers that the terms and conditions in Schedule 4 of the DTCS FAD do not affect the direct costs of providing access to the declared service because they do not directly contribute to the costs of providing access to the declared service. However, the procedures may indirectly reduce costs for all parties by reducing the time and expense associated with dispute resolution.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that the terms and conditions in Schedule 4 of the DTCS FAD do not relate to extensions, or enhancement of capability, whose cost is borne by someone else because this clause does not refer to the value of network enhancements.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that the terms and conditions in Schedule 4 of the DTCS FAD will not affect operational or technical requirements necessary for the safe and reliable operation of a carriage service.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The ACCC considers that the terms and conditions in Schedule 4 of the DTCS FAD will not affect the economically efficient operation of a carriage service, as they do not impact on the ability of access providers and access seekers to operate their respective services, networks and facilities in an economically efficient manner.

8.4 Confidentiality provisions

The terms regarding the use and protection of confidential information are set out in Schedule 5 of the DTCS FAD. These provisions seek to ensure that confidential information used or obtained in the course of providing access is not used to the other party's detriment. The ACCC's views in response to submissions related to the confidentiality provisions are set out in section 5.7 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC considers that the inclusion of confidentiality provisions is in the LTIE because it protects the confidential information of both access providers and access seekers and prevents this information from being used inappropriately. The ACCC considers that the confidentiality provisions in Schedule 5 of the DTCS FAD are necessary to protect the sensitivity of information that is exchanged during normal business operations.

Appropriate confidentiality provisions are likely to promote competition because access seekers and access providers have assurance that commercially sensitive information cannot be used to gain a competitive advantage to the detriment of the other party. Parties are also more likely to make efficient investments in infrastructure knowing that their confidential information is protected. The ACCC considers that the confidentiality terms and conditions do not have an effect on any-to-any connectivity.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC considers that the terms and conditions in Schedule 5 promote the efficient use of confidential information, minimise costs to parties in disclosing information and promote the legitimate business interests of the access provider. If the confidential information of the access provider is not properly protected, the access provider may suffer losses. The confidentiality terms in Schedule 5 of the DTCS FAD help to prevent that loss.

The ACCC has accepted Telstra's recommendation to amend clause 5.10 to include notification rights in response to termination events specified in clause 6.7. The ACCC considers that this amendment is reasonable and is in the legitimate business interests of the access provider.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

The ACCC considers that the terms and conditions set out in Schedule 5 of the DTCS FAD serve the interests of access seekers. These provisions help to protect the confidential information from misuse by the access provider by outlining procedures for handling confidential information. The ACCC recognises that the confidential information provided by access seekers when provisioning services is potentially very valuable. Protecting that information from misuse is in the access seekers' interests.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

The ACCC understands that confidentiality clauses in Schedule 5 may require an access provider to develop systems to comply with the clauses.[169] The ACCC submits that any costs associated with this development are not unreasonable given the necessity of protecting confidential information. The ACCC is of the view that the terms and conditions in Schedule 5 of the DTCS FAD strike the right balance between imposing additional costs and protecting the interests of access seekers.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that this criterion is not relevant because the terms and conditions in Schedule 5 of the DTCS only include processes for confidentiality, not any network enhancements.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that this criterion is not relevant because the terms and conditions in Schedule 5 of the DTCS FAD do not have implications for the safe and reliable operation of the network.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The ACCC considers that the terms and conditions in Schedule 5 of the DTCS FAD promote the economically efficient operation of a carriage service by outlining procedures for secure information sharing. Without the fear of confidential information being disclosed, parties are able to candidly share information necessary for the provision of services.

[169] ACCC, Final Determination – Model Non-price Terms and Conditions, November 2008, p.25.

8.5 Suspension and termination

The terms and conditions regarding the suspension and termination of DTCS services are set out in Schedule 6 of the DTCS FAD. These terms cover the circumstances in which an access provider may suspend or terminate a service of an access seeker, including timeframes for an access seeker to rectify their conduct. The ACCC's consideration of submissions on this issue is detailed in section 5.8 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC has considered whether the inclusion of the suspension and termination provisions in Schedule 6 of the DTCS FAD is in the LTIE. The ACCC is of the view that the suspension and termination provisions will help to promote competition and encourage efficient investment in infrastructure. The suspension and termination provisions in Schedule 6 of the DTCS FAD are not relevant to the objective of any-to-any connectivity.

Under the DTCS FAD an access provider may only suspend service once it has given notice of its intention to suspend the service to the access seeker. The suspension and termination provisions are likely to encourage efficient investment in infrastructure because access seekers have assurance that their service will not be indiscriminately suspended or terminated for trivial matters. This is also likely to promote competition, because access seekers will be able to operate their businesses in competition with other services without disruption due to inappropriate matters.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC has taken into account the legitimate business interests of the access provider in determining the terms and conditions in Schedule 6 of the DTCS FAD. The suspension and termination provisions are important for the access provider. They are a means by which an access provider can protect its legitimate business interests in achieving a normal return on its investment, having regard to relevant risks.

The ACCC has accepted Telstra's suggestion to include immediate rights of suspension during an emergency, to maintain safety to networks and persons, and to respond to the events specified in clause 6.7. This allows access providers to suspend or cease services in reasonable circumstances, while ensuring that access seeker's business is not disrupted inappropriately.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

The ACCC has also taken into account the interests of other parties when including the terms and conditions in Schedule 6 of the DTCS FAD. The suspension and termination provisions are important for access seekers because the clauses ensure that their businesses are not disrupted inappropriately. In situations where an access seeker is in breach of an access agreement, the terms in Schedule 6 protect the interests of access seekers by providing that the access provider can only suspend or terminate a service after giving sufficient notice of its intention to do so and providing an opportunity for the breach to be remedied. This ensures that a service will not be unreasonably interrupted.

Schedule 6 also provides some protection for access seekers where the service has been terminated. An access provider must refund to an access seeker a fair and equitable proportion of those sums paid under the FAD for a period extending beyond the date on which the supply of the service has been terminated.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

Providing access to a declared service imposes direct costs on the access provider. The ACCC has had regard to these costs in including the terms and conditions in Schedule 6 of the DTCS FAD. Schedule 6 provides a means by which the access provider may suspend or terminate a service of an access seeker in specific circumstances. This allows the access provider to protect itself from commercial risks such as in the event where an access seeker fails to pay its bills.

Overall, the terms and conditions in Schedule 6 of the DTCS FAD balance the interests of all parties in relation to the costs associated with access to the declared service.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that the terms and conditions in Schedule 6 of the DTCS FAD are not relevant to extensions, or enhancements of capability, whose cost is borne by someone else. This is because the clauses relate to the circumstances under which an access provider may suspend or terminate a service, rather than the circumstances under which a party may recover costs relating to network enhancements.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that the terms and conditions in Schedule 6 of the DTCS FAD do not limit arrangements to ensure safe and reliable operation of carriage services.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The clauses in Schedule 6 of the DTCS FAD allow an access provider to suspend the supply of a service when the access seeker has failed to pay money owing or has otherwise breached its obligations under the DTCS FAD. The ACCC considers that these clauses encourage and support the economically efficient operation of carriage services and associated networks of the access provider. It is not economically efficient for an access provider to be required to supply a carriage service where an access seeker is consistently defaulting on payment.

8.6 Liability and indemnity

The terms regarding liability and indemnity are set out in Schedule 7 of the DTCS FAD. These terms determine responsibility for damage to property or personal injury. The ACCC's views in response to submissions on this issue are detailed in section 5.9 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC has considered whether the inclusion of the terms and conditions in Schedule 7 of the DTCS FAD is in the LTIE. The ACCC considers that the liability and indemnity provisions promote the economically efficient use of and investment in infrastructure by managing the allocation of capital risk between parties. This encourages parties to make efficient investment decisions.

The ACCC also considers that the inclusion of liability and indemnity clauses helps to promote competition by reducing barriers to entry because it assists parties in their commercial negotiations regarding the management of liabilities and losses.

The liability and indemnity clauses are not relevant to the objective of achieving any-to-any connectivity.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC has had regard to the legitimate business interests of carriers and CSPs in developing the liability and indemnity clauses of this schedule. Schedule 7 of the DTCS FAD provides that the legitimate business interests of access providers are protected from the commercial risk of ensuring that they are not held liable for the conduct of access seekers.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

The ACCC considers that the inclusion of liability and indemnity clauses is in the interests of all persons who have the right to use the service, because it ensures that risks are appropriately apportioned between parties and allow parties to make repairs and compensate those who have suffered loss. The ACCC is of the view that the inclusion of these clauses enables and encourages commercial negotiation. In the absence of the provisions, these liability and indemnity issues may impose significant barriers to entry and parties could be made to carry the risk of losses that are not under their control.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

The ACCC recognises that liability and indemnity provisions may contribute to the indirect costs of providing access to the declared service. However, the ACCC is of view that these provisions are necessary and should be included in the FAD because they help to mitigate commercial risks between parties and thereby facilitate commercial negotiations.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that the terms and conditions of this schedule are not relevant to extensions or enhancement of capability, whose cost is borne by someone else because this schedule does not refer to the value of network enhancements.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that the terms and conditions of this schedule do not affect the operations and technical requirements necessary for the safe and reliable operation of a carriage service. However, the liability and indemnity clauses of this schedule specifically address safety and reliability issues and therefore help ensure that access provider networks are operated in a safe and reliable manner.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The ACCC considers that the terms and conditions to this schedule help to manage risk between parties and therefore encourages the economically efficient operation of carriage services and telecommunications facilities.

8.7 Network upgrade and modernisation

The terms and conditions regarding network upgrade and modernisation are set out in Schedule 8 of the DTCS FAD. These provisions seek to manage service disruptions resulting from actions to upgrade and improve networks. The ACCC's views in response to submissions on this issue are set out in section 5.10 of this explanatory statement.

Paragraph 152BCA(1)(a) – whether the determination will promote the LTIE

The ACCC has considered whether the inclusion of the terms and conditions in Schedule 8 is in the LTIE. The ACCC considers that the network upgrade and modernisation provisions will promote competition and ensure ongoing any-to-any connectivity. This schedule does not deal directly with issues that would impact on the efficient use of the infrastructure or with incentives for investment in infrastructure.

The network upgrade and modernisation clauses help to manage service disruptions and any associated consequences of disruptions which may impact on the availability or quality of services. The provisions help to ensure that reliable services are available to compete with other services. This helps to promote competition between access seekers and access providers.

The ACCC recognises that network upgrades are important to supply new services and to improve the quality of existing services. Upgrades will also be undertaken to upgrade old or outdated equipment in order to improve the efficiency with which existing services are provided. The ACCC has amended the definition of 'Major Network Upgrade and Modernisation' to include changes or upgrades to network interface protocols. Changes or upgrades to the network or equipment will have a direct and positive impact on the overall efficiency of the network and is in the LTIE.

The ACCC considers that it has achieved a balance between the interests of access providers and access seekers in terms of an appropriate notification time. If the notification time is too long, access seekers face an increased risk of stranded investments and potentially losing customers. Conversely, if the timeframe is unduly limited, the access provider's ability to upgrade and invest in its network will be constrained. The ACCC has decided to relax the timeframe to allow "reasonable notice to be provided, given the circumstances of the particular transmission network modernisation or upgrade". The ACCC considers that this time should be sufficient to allow the migration of customer services. This will ensure ongoing any-to-any connectivity and will thereby promote the LTIE.

Paragraph 152BCA(1)(b) – legitimate business interests of a carrier or CSP

The ACCC has taken into account the access provider's legitimate business interests when including the proposed network upgrade and modernisation terms and conditions at Schedule 8 of the FAD.

The ACCC recognises that it is a legitimate business interest of carriers and CSPs to make network changes that are necessary to supply new or additional services or to improve the quality of existing services. In particular, the ACCC has considered the practical implications of the notification requirements resulting from the network upgrades and the timing of those notifications.

As outlined above, the ACCC has decided to relax the timeframe for notification because the previous timeframe proposed in the Draft DTCS FAD may have been too onerous on access providers. The ACCC is of the view that the revised notification requirements specified in this schedule are appropriate for commercial negotiations and promote the necessary level of certainty to allow efficient infrastructure investment by the access provider.

Paragraph 152BCA(1)(c) – interests of all persons who have the rights to use the declared service

The ACCC considers that the terms of this schedule take into account the interests of all persons who have the right to use the declared service.

The ACCC has given weight to access seekers' legitimate interests of being informed of planned upgrades and consulted on how a network upgrade is to be implemented. The ACCC has also taken these factors into account in determining the appropriate notification obligations on the access provider. The ACCC is of the view that the inclusion of the notification requirements in the DTCS FAD will allow access seekers to have access to relevant information so they can make informed business decisions in access the DTCS.

The ACCC considers that the proposed terms strike an appropriate balance between the access provider's legitimate interests in upgrading its network and ensuring that access seekers are given sufficient time to incorporate knowledge of such upgrade into their planning and investment decisions.

Paragraph 152BCA(1)(d) – direct costs of providing access to the declared service

The ACCC has taken into account the impact of the network modernisation and upgrade clauses on the costs of providing access to the DTCS.

The ACCC is of the view that the additional cost incurred by the access provider in providing the information under the proposed notification requirements will be minimal, and the access provider is likely to have access to the required information under the prescribed notice period. In addition, the ACCC considers that the benefits of providing the information in the required notices outweigh the costs.

Paragraph 152BCA(1)(e) – value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

The ACCC considers that the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else, is not relevant to this schedule because the cost of such upgrades and modernisations are born by the access provider.

Paragraph 152BCA(1)(f) – operational and technical requirements necessary for the safe and reliable operation of carriage services

The ACCC considers that the terms and conditions specified in this schedule specifically relate to and thereby take into account the operational and technical requirements necessary for the safe and reliable operation of a carriage service.

Paragraph 152BCA(1)(g) – economically efficient operation of a carriage service

The ACCC considers that the economically efficient operation of carriage services and associated networks of the access provider and access seekers will be encouraged by parties having greater information available to them in making investment decisions. This is because it will remove information asymmetry which may deter investment.

Appendix A

DTCS Declaration

The domestic transmission capacity service is a service for the carriage of certain communications from one transmission point to another transmission point via symmetric network interfaces on a permanent uncontended basis by means of guided and/or unguided electromagnetic energy, except communications between:

(a) one customer transmission point directly to another customer transmission point

(b) one access seeker network location directly to another access seeker network location

Inter-capital routes

(c) a transmission point in an exempt capital city and a transmission point in another exempt capital city. Exempt capital cities include: Adelaide, Brisbane, Canberra, Melbourne, Perth or Sydney

Capital-regional routes

(d) a transmission point in Sydney and a transmission point in any of the following regional centres: Albury, Lismore, Newcastle, Grafton, Wollongong, Taree, Dubbo, Campbelltown, Gosford, Coffs Harbour and Goulburn

(e) a transmission point in Melbourne and a transmission point in any of the following regional centres: Ballarat, Bendigo, Geelong and Shepparton

(f) a transmission point in Brisbane and a transmission point in any of the following regional centres: Toowoomba, Gold Coast, Townsville, Rockhampton, Bundaberg and Maryborough

(g) a transmission point in Adelaide and a transmission point in Murray Bridge and, Port Augusta

Inter-exchange transmission (metropolitan areas)

(h) inter-exchange transmission for the following metropolitan ESAs:

(1) in Sydney between transmission points located at an exchange in any of the following ESAs: Ashfield, Balgowlah, Bankstown, Blacktown, Burwood, Campsie, Carramar, Castle Hill, Chatswood, Coogee, Cremorne, East, Eastwood, Edgecliff, Epping, Glebe, Granville, Harbord, Homebush, Hornsby, Hurstville, Kensington, Kingsgrove, Kogarah, Lakemba, Lane Cove, Lidcombe, Liverpool, Mascot, Mosman, Newtown, North Parramatta, North Ryde, North Sydney, Parramatta, Pendle Hill, Pennant Hills,

Petersham, Randwick, Redfern, Revesby, Rockdale Rydalmere, Ryde, Seven Hills, Silverwater, St Leonards, Undercliffe, Waverley

(2) in Brisbane between transmission points located at an Exchange in any of the following ESAs: Paddington, South Brisbane, Toowong, Valley, Woolloongabba

(3) in Melbourne between transmission points located at an Exchange in any of the following ESAs: Ascot, Brunswick, Caulfield, Coburg, Elsternwick, Footscray, Heidelberg, Malvern, Moreland, North Melbourne, Port Melbourne, Preston, Richmond, South Melbourne, St Kilda, Toorak

(4) in Perth between transmission points located at an Exchange in any of the following ESAs: South Perth and Subiaco

Inter-exchange transmission (CBD areas)

(i) inter-exchange transmission for the following CBD ESAs:

(1) in Sydney between transmission points located at an Exchange in any of the following ESAs: City South, Dalley, Haymarket, Kent, Pitt and exempted Sydney Metropolitan ESAs as set out in item (h)(1) of this service description

(2) in Brisbane between transmission points located at an Exchange in any of the following ESAs: Charlotte, Edison, Spring Hill and exempted Brisbane Metropolitan ESAs as set out in item (h)(2) of this service description

(3) in Adelaide between transmission points located at an Exchange in any of the following ESAs: Flinders and Waymouth.

(4) in Melbourne between transmission points located at an Exchange in any of the following ESAs: Batman, Exhibition, Lonsdale and exempted Melbourne Metropolitan ESAs as set out in item (h)(3) of this service description

(5) in Perth between transmission points located at an Exchange in any of the following ESAs: Bulwer, Pier, Wellington and exempted Perth Metropolitan ESAs as set out in item (h)(4) of this service description

Definitions

Where words or phrases used in this Annexure are defined in the *Trade Practices Act 1974* or the *Telecommunications Act 1997*, they have the meaning given in that Act.

an **access seeker network location** is a point in a network operated by a service provider that is not a point of interconnection or a customer transmission point

a **customer transmission point** is a point located at customer equipment at a service provider's customer's premises in Australia (for the avoidance of doubt, a customer in this context may be another service provider)

network interfaces include Ethernet, Plesiochronous Digital Hierarchy (PDH) and Synchronous Digital Hierarchy (SDH) network interfaces used to provide a transmission rate of 2.048 Megabits per second or above which an access provider provides to itself or others

exchange means a telecommunications exchange and includes the land, buildings and facilities (within the meaning of section 7 of the *Telecommunications Act 1997* (Cth)) that comprise or form part of the exchange

exchange service area or **ESA** has the meaning given to that phrase by the Australian Communications Industry Forum Limited definition in ACIF C559:2006, Part 1

a **point of interconnection** is a physical point of interconnection in Australia between a network operated by a carrier or a carriage service provider and another network operated by a service provider

a **transmission point** is any of the following:

a) a point of interconnection
b) a customer transmission point
c) an access seeker network location

uncontended means dedicated and not shared

Appendix B

[DAA CONSOLIDATED REPORT]