

## Model Non-price Terms & Conditions Determination 2008

### Submission by Adam Internet, iiNet/Chime, Internode/Agile and AAPT/PowerTel.

#### Introduction

This submission is prepared on behalf of Adam Internet Pty Limited, iiNet Limited, Chime Communications Pty Limited, Internode Pty Limited, Agile Pty Limited, AAPT Limited and PowerTel Limited (*the Access Seekers*) in respect of the ACCC's draft Model Non-price Terms & Conditions Determination 2008. The Access Seekers are very encouraged by the step taken by the ACCC and support the proposed terms and conditions outlined in the draft determination and accompanying discussion paper. The proposed terms and conditions respond to a number of concerns raised during access disputes and once implemented, will encourage efficient access to the core services that will in turn enhance competition and be in the long term interests of end-users of telecommunications services. The Access Seekers welcome the ACCC's initiative and are pleased to have the opportunity to provide feedback and comments to the ACCC.

#### A. Billing and notifications

The Access Seekers submit that clause A.5(b) and A.5(b)(ii) are potentially inconsistent with clause A.6, as clause 6.5.4(d) of Communications Alliance's *Telecommunications Consumer Protections Code (C628:2007)*<sup>1</sup> does not permit service providers to bill for charges older than 190 days from the date the charges were incurred. As such, the Model Non-Price Terms & Conditions potentially place service providers in the unreasonable position where they cannot recover late billed amounts from their end-user customers but are still required to reimburse the access provider. Providing the access provider with the right to invoice access seekers for a period of up to 5 months after the charges were incurred would ensure protection of both the access provider's right to payment and the access seeker's ability to invoice customers is not impeded by the Communications Alliance Code. The Access Seekers also consider that there is no reason to provide the access provider with the right to extend its invoicing period for 8 months simply because a service is being billed for the first time. Again, this places access seekers in the position where they cannot recover late billed charges from their customers as a result of the Communications Alliance Code. The Access Seekers therefore propose the following amendment:

*A.5 The access provider shall be entitled to invoice the access seeker for Charges which have been previously uninvoiced or Charges which were understated in a previous invoice, provided that:*

*(a) the Charges to be retrospectively invoiced can be reasonably substantiated to the access seeker by the access provider; and*

*(b) subject to clause A.6, no more than 5 months have elapsed since the date the relevant amount was incurred by the access seeker's customer, except:*

*(i) where the access seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or*

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<sup>1</sup> Attached at Annexure 1. Available from: [http://www.commsalliance.com.au/\\_\\_data/page/21676/C628\\_2007.pdf](http://www.commsalliance.com.au/__data/page/21676/C628_2007.pdf)

~~(ii) to the extent that the Charges relate to a new Service being billed for the first time, in which case such Charges may be invoiced up to 8 months after the relevant amount was incurred by the access seeker's customer, subject to agreement with the access seeker (such agreement not to be unreasonably withheld); or~~

(iii) to the extent that the Charges relate to services supplied by an overseas carrier and the access provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the access provider shall invoice such amounts as soon as is reasonably practicable.

With regards to whether clause A should also specify time periods within which invoices for core services should be paid, the Access Seekers submit that it is appropriate to do so. The Access Seekers submit that 30 days is a fair and reasonable period to allow for payment of an invoice for each of the core services.

The Access Seekers consider it reasonable that access seekers should be entitled to additional interest of overpaid amounts where this occurs frequently. Further, the Access Seekers agree that payment of disputed amounts should be withheld provided that a billing dispute is notified prior to the due date for payment of the invoice.

## **B. Creditworthiness and security**

The Access Seekers submit that clause B does not expressly reflect certain aspects of the ACCC's in-principle position in relation to when credit checks or security should be given. The terms should make clear that such checks and security be made only when the access seeker first acquires services from the access provider or when events give rise to genuine concerns about the access seeker's ability to pay its debts. The Access Seekers therefore suggest the following amendment:

*B.1 Unless otherwise agreed by the access provider, the access seeker must (at the access seeker's sole cost and expense) provide to the access provider and maintain for the term of this agreement, on terms and conditions reasonably required by the access provider and subject to clause B.2, the Security (as shall be determined having regard to clause B.3 and as may be varied pursuant to clause B.4) in respect of amounts owing by the access seeker to the access provider under this agreement. Notwithstanding the above, the access provider cannot require the Security to be given or deny access before any Ongoing Creditworthiness Information request has been complied with. This clause B is to apply only when the access seeker first acquires services from the access provider, or on the occurrence of a subsequent event that gives rise to genuine concerns around the access seeker's ability to pay its debts.*

## **C. Liability (risk allocation) provisions**

The Access Seekers agree with the ACCC's general position that liability provisions should apply to both parties and should place risk with the party that has the ability to control the risk. Further, the Access Seekers agree with the ACCC's position that a service provider should not be required to compensate for, or indemnify against, losses that it has no control over.

The Access Seekers consider it appropriate that the Model Non-price Terms & Conditions address liability under the CSG Standard. As the ACCC is aware, the CSG Standard provides that a service provider is liable to pay compensation to a customer for failing to meet mandated connection and fault rectification time frames in regards to a standard telephone service. This would apply to telephone services provided via the ULLS. The ability to meet these requirements is largely outside the control of access seekers, who must rely upon the access provider to connect or repair services. If a failure to meet the CSG Standard time frames is caused by the access provider, it is reasonable that the access provider indemnify an access seeker for compensation payments made pursuant to the CSG Standard. Accordingly, we suggest the following additional clause:

*C.24 To the extent that an access seeker's obligation to pay compensation under the CSG Standard is caused by the access provider, the access provider indemnifies the access seeker.*

#### **D. General dispute resolution procedures**

The Access Seekers agree that fair and reasonable terms of access would seek to resolve disputes over access quickly and minimise costs overall. The proposed general dispute resolution procedures achieve the ACCC's aim to facilitate the resolution of disputes in an expeditious manner and to allow the parties to escalate a dispute to a higher level in the dispute resolution procedure where appropriate. However, to avoid the potential for a party to use mediation simply as a delay tactic when it is clear that the parties will not reach agreement, the Access Seekers submit that the parties should agree whether or not to proceed with a particular avenue of dispute resolution (such as mediation) that precedes a party seeking arbitration or commencing legal proceedings.

As a result, when a party submits a dispute to mediation in accordance with clause D.11, the other party should be at liberty to accept or reject the proposal to mediate the dispute on an assessment of the likelihood of the dispute being resolved via mediation. The Access Seekers therefore propose the following amendment:

*D.4 ...*

*(b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then unless the parties agree in writing within a further 5 Business Days to refer the Non-Billing Dispute to an Expert Committee under clause D.12, the parties may by written agreement either party may submit it to mediation in accordance with clause D.11.*

Such an amendment is consistent with the ACCC's aim to facilitate expedited dispute resolution procedures and necessary to avoid a particular party from using delay tactics to prolong the resolution of a dispute.

#### **E. Confidentiality provisions**

The Access Seekers submit that the definition of "confidential information" in clause L is appropriate. The Access Seekers consider that a standard form of confidentiality undertaking to support the model terms and conditions is not necessary as the proposed terms address issues relating to disclosure and liability with regards to confidential information. In the discrete instances where

confidentiality undertakings are required, the parties may agree to the form of the undertakings as relevant to their particular circumstances. Alternatively, the ACCC may consider developing standard form of undertakings to supplement the model terms and conditions that are based on the form of confidentiality undertakings the ACCC provides to the parties in access arbitrations conducted under Part XIC of the *Trade Practices Act 1974*.

## **F. Communications with end users**

The Access Seekers consider that the proposed terms and conditions under clause F appropriately allow access providers to communicate to end-users of an access seeker in a fair and reasonable manner.

## **G. Network modernisation and upgrade provisions**

The Access Seekers agree with the ACCC's rationale for proposing longer notice periods in the event that the access provider intends on upgrading its network. It is reasonable that access seekers should generally receive an equivalent period of a planned network upgrade as an access provider effectively provides itself. However, the Access Seekers consider that the proposed minimum notice period of 6 months is insufficient to allow access seekers to respond to an upgrade by investigating and implementing possible alternative methods of service delivery. The Access Seekers consider that a minimum period of 24 months notice is necessary to ensure suitable arrangements are made to service end-users and submit that the Model Non-price Terms & Conditions be amended to reflect this. A 24 month period is in line with similar provisions in the New Zealand Commerce Commission's "Standard Terms Determination for the designated service: Telecom's unbundled copper local loop network"<sup>2</sup>, which explains in clauses xii to xv of the executive summary as follows:

### ***Cabinetisation***

- xii. The Commission acknowledges that, during the life of this determination, copper local loops from the exchange will be replaced by copper local loops from distribution cabinets in the street. Accordingly, provision has been made for Access Seekers to receive sufficient notice of any planned cabinetisation within an exchange area, for use in their service and investment planning.*
- xiii. Under the UCLL STD, Telecom is required to provide Access Seekers with:*
- an initial notice of cabinetisation for the first 24 months;*
  - a cabinetisation notice at least 24 months before any other cabinetisation takes place (i.e. that was not addressed in the initial notice), and,*
  - a rolling three year forecast of its cabinetisation plans on each six month anniversary of the determination date.*

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<sup>2</sup> New Zealand Commerce Commission, *Standard Terms Determination for the designated service: Telecom's unbundled copper local loop network*, p.7. Attached at Annexure 2. Available from: [http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/ContentFiles/Documents/UCLL%20Dec%20609%20625260\\_3.pdf](http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/ContentFiles/Documents/UCLL%20Dec%20609%20625260_3.pdf)

- xiv. *The notices must set out Telecom's cabinetisation plans on a per exchange basis (including the suburbs affected and the number or percentage of MPFs that will be affected) and explain the effect on any Access Seekers in receipt of the UCLL service.*
- xv. *In some circumstances, such as where there is a material risk to the UCLL service, Telecom may amend these notices or may cabinetise a part of its network by giving less than 24 months notice. In these events and if requested by the Access Seeker, Telecom must pay for the transfer of the Access Seeker's customers to other Telecom services.*

The Access Seekers accept that if Telstra is awarded the NBN, Telstra may be subject to network rollout requirements that would not allow it to adhere to the notice provisions set out in the Model Non-price Terms & Conditions. However, given the broad scope and massive impact that the NBN will have on the provision of the core services, it is unreasonable that access seekers are guaranteed no notice of works that are likely to severely curtail their current ability to acquire declared services and provide services to end-users. At a minimum, it would be helpful if access seekers received early notice of Telstra's proposed roll-out agenda, such that all affected parties have a reasonable indication of when each exchange is likely to go offline. As such, the Access Seekers consider the Model Non-price Terms & Conditions should make it clear that in the event that Telstra rolls out the NBN, it must be required to provide access seekers with the same notice about Major Network Modernisation and Upgrades that it provides itself. The Access Seekers submit that the following amendment is required:

*G.2 The terms and conditions that apply to a Major Network Modernisation and Upgrade done pursuant to the National Broadband Network (if any) are to override this clause G only to the extent of inconsistency between them. To avoid doubt, in the event of an inconsistency that affects Telstra's ability to adhere to the notice periods set out in this clause G, Telstra is required to give the access seeker an equivalent period of notice (in writing) to that which it provides itself of a Major Network Modernisation and Upgrade done pursuant to the National Broadband Network.*

## **H. Suspension and termination**

The Access Seekers agree with the ACCC's position regarding when an access provider should be entitled to suspend or terminate a service. Further, the Access Seekers agree it is appropriate that there should not be a general right to suspend a service or terminate an agreement for persistent breaches.

For consistency and to allow the parties to negotiate a resolution that differs from the remedial action specified in a Suspension Notice, the Access Seekers propose the following amendments to clauses H.2 and H.4:

*H.2 ...*

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

*(g) refuse to provide the access seeker with the Service:*

- (i) of the kind in respect of which the Suspension Event has occurred;*
- and*

(ii) *a request for which is made after the date of the breach, until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and*

...

H.4 ...

(d) ...

(ii) *the other party has given a written notice to the first mentioned party access seeker within 20 Business Days of becoming aware of the breach ("**Breach Notice**")*; and

## I. Changes to operating manuals

The Access Seekers agree that an access provider should require the agreement of the access seeker before making changes to an operating manual where the procedures to be implemented are not to apply to all service providers. However, the Access Seekers further submit that agreement should be sought also where the change is likely to cause a material impact on the access seeker's legitimate interest in being able to acquire a core service and compete for the supply of end-user services. The Access Seekers also consider that it is important that they are made fully aware of amendments to operational documents. This can be easily facilitated by Telstra providing access seekers with a documented list of changes, a mark-up copy of the new manual that underlines all amendments, and a copy of the new manual. Given that Telstra would have these documents in electronic format, this would be an easy exercise. The Access Seekers therefore propose the following amendments:

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

(a) ...

(i) *giving 20 Business Days prior written notice to the access seeker, including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly marks all amendments, and*

(b) *otherwise, or where the change may detrimentally affect the access seeker's ability to acquire a service or supply services to end-user services, by agreement of the parties.*

*I.2. Upon completion of the process described in clause I.1, the access provider must give the access seeker a copy of the new operational document.*

## J. Ordering and provisioning

### **Minimum number of services**

The Access Seekers agree with the proposed terms regarding the minimum number of services to be connected as part of an MNM.

### ***Migration Plan terms (Forecasting timeframes)***

Though the Access Seekers consider 56 calendar days provides more time than necessary to ensure all suitable arrangements can be organised for MNMs, they accept that this time frame represents a reasonable compromise between access seekers' wish for rapid rollout and Telstra's arguments that it needs this time to manage labour resources.

### ***After hours connections***

The Access Seekers agree that it is appropriate for After Hours connections to be specified at the discretion of the access seeker. The Access Seekers accept that additional charges may apply for this work, which failing agreement could be arbitrated by the ACCC in an access dispute. The Access Seekers note that the charges to apply for After Hours work is outside the scope of the model non-price terms, however, they consider that the charges should be standardised rather than rated individually in relation to each piece of After Hours work. For instance, After Hours connections should be stated as a set monetary amount rather than a clause that provides for Telstra to "recover costs", which is unnecessarily arbitrary.

### ***Limits on number of exchanges per State per day***

The Access Seekers agree with the ACCC's reasons for removing Telstra's contractually imposed right to limit MNMs to one exchange per State per day. The Access Seekers are, however, concerned with the proposed Limitation Notice, particularly that the terms provide a means for Telstra to unilaterally impose unreasonable limitations on access seekers' ability to schedule MNMs that could potentially be a backdoor method for Telstra to effectively cap exchanges. As currently worded, terms J9 to J11, have the potential to permit Telstra to refuse to perform MNMs to a greater extent than Telstra's current one exchange per State per day rule, as Telstra could simply give notice that it has insufficient capacity to perform any MNMs. Though the Access Seekers accept that capacity limitations may be required, the current Limitation Notice provisions are so loose that they could be manipulated by Telstra to totally avoid its obligations.

The Access Seekers make the following additional comments:

- It is unclear whether "available capacity" concerns only physical constraints, such as available TEBA space, or also would include human resource constraints such as Telstra and or contractor labour capacity. MNM processes require the access seekers already have Interconnect Cables in place or an approved construction in progress before an MNM is requested, as such TEBA and MDF space should never be an "available capacity" constraint that could be included in a Limitation Notice. Rather, this sort of physical capacity constraint can only be relevant to Telstra's decision to cap an exchange. The Access Seekers submit that clause J.10(c) should be amended to clarify this and to ensure that Telstra is not able to use Limitation Notices as a backdoor method to cap exchanges, and hence avoid the conditions imposed in the WLR, LCS and likely PSTN exemptions.
- To ensure that all interested parties are aware of Limitation Notices, the model terms should specify that Limitation Notices be promptly included on Telstra's website, with prompt update emails of new and expired

Limitation Notices being sent to all interested parties that provide email addresses to Telstra and ask for details about Limitation Notices.

- If Telstra issues a Limitation Notice then there must be a queue for access. It is important that the queuing policy ensure that there is equivalency of access in this queue, such that Telstra joins the queue along with everybody else and cannot “jump” the queue by using available staff or contractors to perform its own required work.

The Access Seekers suggest the following amendment:

*J.9 Telstra may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice (“**Limitation Notice**”) it has published on Telstra’s website. Telstra must provide prompt email notification of all new and expired Limitation Notices to parties who have requested this information and provided Telstra with an appropriate email address for such notice.*

### **LSS to ULLS processes**

The Access Seekers agree that the development of a LSS to ULLS migration process is vital and support the ACCC’s proposed terms. The Access Seekers consider that 6 months is an excessive period in which to develop and implement a migration process.

The proposed PSTN OA exemption and recent WLR and LCS exemptions envisage that the ULLS will be capable of providing competitive infrastructure. The exemptions include a condition that Telstra must implement an LSS to ULLS migration process but fail to provide a lead-in time between implementation of the migration process and the exemptions coming into effect, so it is quite conceivable that access seekers will simply not have time to migrate LSS SIOs to the ULLS prior to the exemptions commencing. The Access Seekers consider it imperative that the gap between the two events is minimised as much as possible to ensure that LSS SIOs are logistically capable of being migrated to the ULLS prior to Telstra being exempt from its obligations to provide the WLR, LCS and (likely) PSTN OA. As the ACCC is aware, Telstra’s WLR and LCS exemptions commence in August 2009. Given the number of LSS SIOs that will be affected by these exemptions and the requisite 56 day lead-in period, migrations to the ULLS will involve a process that at a minimum will stretch out over several months, particularly when the need to market the ULLS to end-users is taken into account. In order to reduce the impact of anticipated delays resulting from the potentially high number of migrations, the Access Seekers submit that Telstra should be required to support a LSS to ULLS migration process within 3 months of the Model Non-price Terms & Conditions being finalised.

The model terms do not provide that the LSS to ULLS migration process must support multi-party LSS to ULLS transfers, that is the process should provide a means to transfer, as both singular connections and MNMs, from an LSS acquirer to a different ULLS acquirer. Again, this will assist competition, gives end-users greater choice, and is very relevant if the WLR, LCS and likely PSTN exemptions result in a large number of LSS SIOs migrating to the ULLS.



***iVULL processes***

The Access Seekers agree that the development of an iVULLs ordering and provisioning process is vital and support the ACCC's proposed terms. For the same reasons outlined above in relation to the LSS to ULLS process, the Access Seekers submit that Telstra should be required to support an iVULL ordering and provisioning process within 3 months of the Model Non-price Terms & Conditions being finalised.

***ULLS transfer process***

The Access Seekers agree with the ACCC's proposed terms.

***DULLS transfer process***

Where an access seeker wishes to obtain an In-use ULLS coupled with the porting of the telephone number associated with the in-use Local Loop, a ULLS Order known as DULLS is submitted. Like an In-use ULLS, a DULLS involves a request for the use of a Local Loop that is "in use" (that is, the relevant Local Loop is being used by Telstra to supply telecommunications services to the end-user at the time of the ULLS Order) so that the access seeker can use the Local Loop to supply telecommunications services to the end-user customer. However, in addition, it includes a request for the diversion of the telephone number associated with the given Local Loop to enable that number to be ported by means of the Category D porting process, as described in *ACIF C540:2005*, the Local Number Portability Code.

Telstra has currently imposed a restriction on DULLS orders so that they can only be placed by access seekers who also acquire WLR and LCS services or who have a voice Interconnect and Local Number Porting agreement with Telstra. This restrains access seekers from using a competitive WLR (or equivalent) service and is directly relevant to the recent WLR and LCS exemptions granted to Telstra. The Access Seekers consider that there is no technical reason why Telstra could not accept DULLS orders from any access seeker and then accept a Local Number Porting request from another carrier. Any gaining service provider should be able to get a DULLS, irrespective of the losing service provider. It appears that the reason for Telstra's restrictions is a commercial decision, which has the effect of limiting competition. The Access Seekers submit that the Model Non-Price Terms & Conditions should mandate a DULLS provisioning process and submit that the following additional terms should be inserted:

***DULLS transfer process***

***J.22 Except where the parties agree otherwise, Telstra will support a DULLS migration process by no later than 3 months from the date of these model terms and conditions.***

***J.23 The DULLS migration process must support any access seekers acquiring the ULLS.***

***J.24 The DULLS migration process must support a Local Number Porting request from any gaining service provider.***

## K. Facilities Access

### ***Decisions affecting access to Facilities***

The Access Seekers consider it is vital that access seekers are provided timely and complete details of any decision that Telstra makes to deny exchange access. The ACCC's proposed terms reflect the considerable amount of frustration experienced by access seekers and, as such, are supported by the Access Seekers.

### ***Notification of capacity limitations***

The Access Seekers consider it would be helpful if the manner in which Telstra must notify service providers about capacity constraints is specified. The Access Seekers suggest that Telstra should be required to promptly lodge a notice on Telstra's website, with timely update emails of any changes being sent to all interested parties that provide e-mail addresses to Telstra and request notice of capacity limitations. The Access Seekers submit that the following amendment is appropriate:

- K.16 The access provider must take reasonable steps to notify service providers who have rights to acquire the ULLS and/or PSTN originating and terminating access services at particular Exchanges, that existing TEBA space or the MDF is at, or is approaching, full capacity at those Exchanges. Reasonable steps include Telstra promptly publishing details of potential or actual capacity constraints on Telstra's website and prompt email notification to parties who have requested this information and provided Telstra with an appropriate e-mail address for such notice. Telstra is required to provide access seekers with an equivalent period of notice that it provides to itself.*

### ***Queuing provisions***

The Access Seekers consider Telstra's current queuing policy significantly and unreasonably delays access to exchanges. The Access Seekers believe it would be helpful if upon receipt of an access request, Telstra must provide the access seeker with a list of all access seekers currently queued in the relevant exchange. This would enable access seekers to negotiate parallel or joint builds in the exchange and speed up the queue. Accordingly, it would also be useful if Telstra was not able to unreasonably withhold consent to a minor variation to a design and construction proposal that would facilitate a proposed parallel or joint build negotiated between access seekers in the queue. Telstra's queuing policy should also be non-discriminatory. Access seekers should also be given ongoing updates about the status of the queue. The Access Seekers suggest the following clauses be inserted:

- K.26 The access provider must ensure that its queuing policy is non-discriminatory and that it does not provide itself access on a basis that places itself ahead of access seekers waiting in the queue.*

- K.27 Upon receipt of a request to access an exchange, the access provider shall provide the access seeker with a list of all access seekers currently queuing to access that exchange.*

- K.28 The access provider must provide ongoing updates regarding details of the queue to all access seekers in the queue.*

K. 29 The access provider must not unreasonably withhold consent to an access seeker making variations to a design and construction proposal, where the variation is to facilitate a parallel or joint build and will not result in other queued access seekers being subject to further delay.

**Adam Internet Pty Limited,  
iiNet Limited and Chime Communications Pty Limited,  
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**9 October 2008**