**TELSTRA CORPORATION LIMITED**

# Telstra Submission on ACCC Draft Determination on Model Non-price Terms and Conditions

**PUBLIC VERSION**

9 October 2008

# Contents


Overview ..... 1

1 Introduction ..... 3

2 Background and proposed approach ..... 4

3 Responses to the Commission's specific questions ..... 6

4 Proposed approach to particular terms of access ..... 9

4.2 Billing and Notification ..... 9

4.3 Creditworthiness and Security ..... 9

4.4 Liability (Risk Allocation) Provisions ..... 10

4.5 General Dispute Resolution Procedures ..... 10

4.6 Confidentiality provisions ..... 11

4.7 Communication with End users ..... 12

4.8 Network modernisation and upgrade provisions ..... 12

4.9 Suspension and Termination ..... 13

4.10 Changes to Operating Manuals ..... 14

4.11 ULLS Ordering and Provisioning ..... 14

4.12 Facilities Access ..... 18

Annexure A Proposed amendments to draft Model Non-Price Terms and Conditions

Annexure B Communications Alliance Ltd, ULLS Migration Processes Progress Report June 2008

## Overview

Telstra welcomes the opportunity to comment on the Australian Competition and Consumer Commission's *Draft Determination – Model Non-price Terms and Conditions* released on 18 September 2008.

The key observation that Telstra would make about the Commission's Draft Determination is that much of what the Commission is proposing is unnecessary or otherwise inappropriate. The Commission has noted itself that any determination of model terms and conditions need not be exhaustive, and yet the Commission has sought to provide very specific guidance on a broad and enlarged range of matters for no apparent reason. If the Commission decides to proceed with making a final determination that puts in place model non-price terms and conditions, then it needs to undertake a substantial rationalisation of the scope of the determination.

Telstra submits that:

- In relation to sections A to F and section H, which are largely unchanged from the 2003 final determination, there has been very little disputation in relation to the matters addressed by those sections and there is no benefit from providing continuing guidance. These sections should therefore be deleted from the model terms and conditions;

- If the Commission nonetheless decides to maintain those sections in the model terms and conditions, then the Commission should amend the drafting so as to align the clauses with the relevant provisions in Telstra's standard contracts, which represent the prevailing terms that have been accepted in the industry (and Telstra notes that, in any event, much of the 2003 final determination simply adopted Telstra standard contract terms either outright or with only minor amendments);

- In relation to section G (concerning network modernisation and upgrade), Telstra welcomes the Commission's recognition that the proposed National Broadband Network rollout will be addressed through a separate process. However, most of the other draft clauses in section G require substantial amendment, in particular, to address, the need to accommodate emergency upgrades and also to provide for a workable notice period (15 weeks rather than the Commission's proposed 6 months);

- In relation to section I (concerning changes to operational manuals), Telstra welcomes the Commission's position in acknowledging that a ULL Access Provider requires the ability to unilaterally make changes to its standard processes;

- In relation to section J (ULL ordering and provisioning) and section K (facilities access), these new sections are unnecessary (variously seeking to provide guidance on matters that are unlikely to be contentious moving forward and/or are well handled already by other means) and should be deleted. Furthermore, the ACCC has no statutory power to make model terms relating to facilities access, and any such terms would therefore be invalid; and

- Finally, to the extent that implementation of the proposed model terms and conditions require changes to existing processes and systems, the model terms

should state that the costs incurred in implementing the changes will be borne by Access Seekers. This would achieve an appropriate balance between the interests of Access Seekers and Access Providers, and would mean a fairer outcome is achieved if costs are required to be incurred as a result of the Commission's determination.

The long term interests of end-users will not be promoted by the Commission determining a set of model terms and conditions that are wider in scope and more prescriptive than is necessary. Telstra would urge the Commission to carefully reconsider its approach from this perspective.

# 1 Introduction

1 Telstra welcomes the opportunity to comment on the Commission's *Draft Determination – Model Non-price Terms and Condition* ("Draft Determination") released on 18 September 2008.

2 This submission is structured around the framework provided by the Commission's Report on the Draft Determination:

- Background and proposed approach – section 2;
- Specific questions posed by the Commission – section 3; and
- Proposed approach to particular terms of access - section 4.

# 2 Background and proposed approach

3 Telstra notes that the Commission is intending to determine a revised and enlarged set of model *non-price* terms and conditions, but will not determine model *price* terms and conditions. To give guidance on price matters, the Commission states that it will instead continue to make use of its power to issue indicative prices.

4 Telstra supports the Commission taking a prudent approach to determining model terms and conditions, and would urge the Commission to resist providing guidance, even non-exhaustive guidance, where there is no clear need to do so. This would appropriately preserve the primacy of commercial negotiation under the Part XIC access regime.

5 To this end, in relation to those parts of the 2003 Determination that have never been the subject of any dispute, Telstra questions the utility of making a new determination in relation to those terms and conditions. Telstra notes that in many cases the 2003 Determination simply adopted (outright or with only minor changes) the standard provisions in Telstra's contracts. Although it is not surprising that there was no disputation in relation these clauses, it is also notable that even where the Commission decided to vary from Telstra's standard provisions there has been likewise very little disputation (that is, Access Seekers did not seek to raise disputes in order to substitute the model terms for those in Telstra's standard contracts). In view of this, it is surprising that the Commission sees the need to make a determination in relation to matters that are well settled between the relevant parties, and which do not reflect the changes the Commission made to contractual terms that have prevailed across the industry. For this reason, Telstra believes that the terms would ideally be removed from the scope of the Commission's determination.

6 However, if the Commission wishes to retain the existing coverage of the model non-price terms and conditions, then Telstra believes that the Commission should amend the Draft Determination so as to align it with current market conditions, consistent with the Commission's stated intention (Report on the Draft Determination, p.11). These current market conditions are that, with few exceptions, almost all of the provisions in Telstra's standard contracts are well established and accepted in the industry.

7 In relation to those areas that have been contentious, and bearing in mind that the Model Terms and Conditions are non-binding, Telstra would urge the Commission to consider carefully whether a particular issue is transitory in nature and past its period of major industry relevance (for example, because the industry has now moved into a different phase of development) and, if it is found to be non-transitory, whether the issue would be better handled through some separate process (for example, an industry self-regulatory process). As the Commission has noted, "the model terms and conditions need not address all possible terms and conditions of access."[1]

8 Where the Commission decides to address an issue through the model non-price terms and conditions then, to the extent that the proposed clause(s) would require Access Providers to make changes in their processes or systems, then the model terms and conditions should make it clear that Access Seekers using those changed processes or systems will bear the costs of those changes. This is necessary in terms of ensuring that:

[1] Report, p.5.

- the model terms and conditions are "fair" – because it would strike a balance between the interests of Access Seekers and those of the Access Provider, which reflects the intention of the Parliament (as noted by the Commission on p.10 of the Report on the Draft Determination); and

- Access Seekers are put on notice that they are to bear those costs, if and when such Access Seekers request an Access Provider to implement particular clauses in the model terms and conditions.

# 3 Responses to the Commission's specific questions

| Commission question | Telstra response |
|---|---|
| (a) Should model terms and conditions be specified for other aspects of access to core services in addition to those already identified in Part 1? If so, provide a detailed description of the access term or condition that they propose for inclusion, and to explain how adopting that approach would facilitate a service provider's access to core services and their supply of services to end-users, and how this would represent fair and reasonable terms and conditions of access. Where possible, include a copy of agreements or other documents that record the current term and condition of access (if any) on a confidential basis. | No – the scope of the Draft Determination is already too broad and should be narrowed rather than widened. |
| (b) Should the proposed model terms and conditions relating to billing and notifications (Clause A) also specify time periods within which invoices for core services should be paid? If so, what would be a fair and reasonable period to allow for payment of an invoice for each of the core services? | No – the appropriate billing timeframes may vary between particular services, and should be assessed on a case-by-case basis having regard to matters including a particular Access Seeker's creditworthiness. They may also be the result of a broader agreement concerning the billing terms agreed between the parties more generally, in which case specifying different timeframes for the core declared services would be commercially disruptive and cause significant operational issues (and increased costs) for little benefit. This is a matter that should be left for commercial negotiation between the parties. |
| (c) Should the proposed model terms and conditions relating to Liability (Risk Allocation) Provisions (Clause C) be further developed insofar as they address liabilities under the Customer Service Guarantee (CSG) Standard? If so, what additional terms and conditions should be included in the model terms and conditions? | No. The payment of CSGs is covered in other legislation, and the industry has already adopted processes to address liability. CSG liability attaches to the notion of a "standard telephone service". It is therefore not appropriate for the Commission to attempt to re-regulate an area that is covered by other legislation, and which does not directly correlate with the core declared services. |
| (d) Is the definition of 'confidential information' (Clause L) appropriate? Should a standard form of confidentiality undertaking be included to support the model terms and conditions relating Confidentiality Provisions (Clause E)? If so, what form should this confidentiality undertaking take? | The exception in subparagraph (b) for information received from third parties "except where the other party has knowledge" that the information is confidential should be broadened to include circumstances where the other party should *reasonably have known* the information was confidential. |

| Commission question | Telstra response |
|---|---|
| | It is otherwise not appropriate (being beyond the current scope of model terms and conditions) and not necessary to include a standard form of confidentiality undertaking. Issues of confidentiality are well settled between the parties, and have rarely been the subject of dispute and, even where they were, the Commission declined to make any determination that overrode parties' contractual terms[2] |
| (e) What event, such as a decision made by a particular committee or executive in respect of a major network modernisation or upgrade, should trigger the Access Provider's obligation to notify Access Seekers under the Network Modernisation and Upgrade Provisions (Clause G)? | Telstra has in place procedures that ensure that where a firm decision has been made internally to proceed with a particular network upgrade (according to internal policies and procedures), the requirement to notify Telstra's Access Seekers and its affected retail business units is triggered. To trigger the notification prior to a firm decision being made by Telstra (with the risk that Telstra's plans change) would likely subject Telstra unnecessarily to claims.<br><br>Telstra believes that it would be overly prescriptive for the model terms and conditions to specify the trigger (by reference to a particular committee or executive) of the obligation to notify, not least because the particular decision-makers and processes will likely change from time to time with reorganisation. It would be completely inappropriate for the model terms and conditions to disable the flexibility Telstra would otherwise have to conduct its business affairs.<br><br>Telstra also notes that notification to an Access Seeker should only be required where the particular Access Seeker's service is impacted by the relevant network modernisation or upgrade. |
| (f) Would Access Seekers use the additional ULLS ordering and provisioning processes under Clause J? Should the model terms and conditions provide for a six month period to develop the additional ULLS ordering and provisioning processes under Clause J? If not, what other period (if any) should be allowed? | There is no need for any model terms and conditions in relation to ULLS ordering and provisioning. See Telstra's response in section 4.10 below. |

[2] Unconditioned Local Loop Access Dispute Between Telstra Corporation Limited (Access Provider) and Optus Networks Pty Limited (Access Seeker) Statement of Reasons for Final Determination, March 2008, at 1862.

| Commission question | Telstra response |
|---|---|
| Should the model terms and conditions provide more detailed requirements concerning each supporting the existing Transfer ULLS (T-ULLS) ordering and provisioning process? If so, what terms and conditions should be specified? | |
| (g) Should the model terms and conditions regarding facilities access (clause K) include as a means to overcome capacity limits on the MDF the allocation of terminal blocks on the customer side of the MDF? Would published listings of exchanges approaching full capacity benefit service providers? Should the model terms and conditions allow services providers to access other service providers' requirements on an 'as needs basis'? Should such access be restricted to certain personnel or an independent third party? Would confidentiality undertakings be necessary? | There is no need for any model terms and conditions in relation to facilities access. See Telstra's response in section 4.11 below.<br><br>Specifically, with regard to the use of the customer side of the MDF, Telstra already allows access seekers to interconnect to the customer (line) side of the MDF. However, Telstra follows clear, best practice engineering guidelines to ensure the efficient use of limited MDF and exchange space whilst maintaining service integrity for all users. As such, Telstra requires interconnection first to the exchange (or equipment) side of the MDF; followed by MDF enhancement (for example, MDF extension) where possible; with interconnection to the customer side only in circumstances where these other solutions are not possible. Interconnecting to the customer side of the frame in circumstances where other solutions are possible adds unnecessary complexity (and cost) to the management of all services on the MDF.<br><br>As Telstra has informed the Commission on numerous previous occasions, Telstra does not have any means to know that a particular exchange is "approaching full capacity" as available space is only checked on an as-and-when-required basis. Telstra could not fulfil any obligation to monitor the level of capacity at its 5000+ exchanges, or even the 500+ TEBA-enabled exchanges, to warn Access Seekers that space is becoming limited. |

# 4 Proposed approach to particular terms of access

9 In addition to the submissions in this section, Telstra also refers to Annexure A which sets out Telstra's proposed amendments to sections A to H of the draft Model Terms and Conditions and includes relevant submissions from Telstra's submission on the draft 2003 Model Terms and Conditions ("2003 Submission") [3] These proposed amendments are relevant only to the extent that the Commission determines to retain particular sections in spite of Telstra's primary submission that the scope of the model terms and conditions should be rationalised (as discussed in section 2). Annexure A highlights many instances where the draft Model Terms and Conditions differ from industry practice; however, it should be noted that Annexure A is not exhaustive in so doing.

## 4.2 Billing and Notification

10 Telstra notes that the billing and notification provisions are substantially unchanged from the Commission's 2003 Model Terms and Conditions. A number of the comments made by Telstra in the 2003 Submission are still relevant as they were not adopted by the Commission in the final 2003 Model Terms and Conditions, but Telstra's suggested terms have prevailed across the industry in the five years since. These comments have been reproduced at Annexure A. For example, at A.5(b)(ii), the Commission has specified an 8 month period for billing uninvoiced charges for new Services. As set out in the 2003 Submission, such a restriction is inappropriate for new Services.

11 A further example is at A.30 which provides that where certain conditions are met, overpayments as a result of incorrect invoicing should attract interest at the rate set out in clause A.7 , plus 2%. Whilst this reflects a modified version of the Commission's position in the draft 2003 Model Terms and Conditions, Telstra maintains that this clause is inappropriate and should be removed. If, notwithstanding Telstra's objections, the Commission does decide to retain this provision then, as set out in the 2003 Submission, substantial changes should be made.

12 In addition, Telstra notes that the 6 month period for lodging a Billing Dispute Notice (at A.15) is inappropriate for rebill services. The appropriate time frame is 65 days.

## 4.3 Creditworthiness and Security

13 Telstra notes that the creditworthiness and security provisions are substantially unchanged from the Commission's 2003 Model Terms and Conditions.

14 A number of the comments made by Telstra in the 2003 Submission are still relevant, as they were not adopted by the Commission in the final 2003 Model Terms and Conditions. These comments have been reproduced at Annexure A. For example, Telstra maintains its position that the drafting in clause B.5 should reflect that a request from an Access Seeker to reduce its security will be "considered". If the Commission retains these clauses, then it should alter them to reflect current industry practice as set out in Telstra's amendments.

[3] Telstra, *Draft Determination Model Non-price Terms and Conditions*, 21 July 2003.

15 Telstra also notes that, under clause B.8 of the Model Price Terms and Conditions, an Access Seeker "may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information". In Telstra's submission, this clause is unnecessary and should be deleted. Any such confidential information would fall within the definition of "Confidential Information" and thus attracts the protection of clause E. In particular, Access Seekers have the ability, under clause E.6, to impose conditions on the Access Provider disclosing Confidential Information to third parties.

## 4.4 Liability (Risk Allocation) Provisions

16 Telstra notes that the liability (risks allocation) provisions are substantially unchanged from the Commission's 2003 Model Terms and Conditions and largely reflect Telstra's current contractual provisions.

17 In relation to clause C.23, Telstra submits that this clause is unnecessary and should be deleted for the following reasons:

- CSG liability attaches to the notion of a standard telephone service, and not a core declared service;
- CSG liability is dealt with specifically in other legislation. It is neither appropriate nor necessary for the Commission to therefore attempt to replicate or interpret that legislation in the model terms and conditions; and
- In any event, Telstra notes that the industry has already established processes to address CSG Liability for resale services.

## 4.5 General Dispute Resolution Procedures

18 Telstra notes that the provisions relating to the general dispute resolution procedures are substantially unchanged from the Commission's 2003 Model Terms and Conditions. A number of the comments made by Telstra in the 2003 Submission are still relevant, as they were not adopted by the Commission in the final 2003 Model Terms and Conditions, and the industry has not adopted the provisions suggested by the Commission. The clauses should therefore be amended to reflect current industry practice. Telstra's comments have been reproduced at Annexure A for ease of reference. For example, the requirement in clause D.9 equates with an obligation to make discovery, and is too burdensome. Telstra maintains its position that this clause should be redrafted to reflect that information will be exchanged between the parties as required.

19 Telstra also notes the Commission has added an exception, in clause D.6, to allow parties to commence proceedings seeking "the making of an interim determination" at any time. In Telstra's submission, this:

- is internally inconsistent with the general prohibition on commencing "any arbitration whether pursuant to Part XIC of the TPA or otherwise" in that clause. The Commission does not have power to make an interim determination until a party commences an access arbitration under Part XIC of the TPA and it is requested by a party to the dispute; and
- undermines the general contractual dispute resolution process set out in clause D. Armed with the ability to seek an interim determination in any circumstances, parties would arguably have no incentive to follow the general contractual dispute resolution procedures. This is contrary to the

underlying objectives of Part XIC of the TPA, which is to uphold commercial negotiations and agreement, and for regulatory intervention to be only used where commercial agreement is not reached.

20 In Telstra's submission, parties should not be permitted to commence an arbitration (for any purpose) until they have made efforts to resolve the dispute under those contractual procedures. Access Seekers would be adequately protected without the proposed exception (particularly in light of the Commission's backdating power under section 152DNA of the TPA).

21 Additionally, Telstra notes that it has obligations under the operational separation regime in relation to dispute resolution. Telstra's customer contracts will reflect those obligations, and not the Commission's model terms and conditions.

## 4.6 Confidentiality provisions

22 Telstra notes that the confidentiality provisions are substantially unchanged from the Commission's 2003 Model Terms and Conditions. To the extent that the draft Model Terms and Conditions do not reflect Telstra's proposed terms in the 2003 Submission, the Commission should amend the model terms to reflect the position Telstra put forward in 2003, which reflected industry practice then (and which practice still prevails today). Telstra has reproduced the relevant matters in its 2003 Submission in Annexure A. For example, as argued by Telstra in 2003, the audit provisions contained in clause E.10 are unjustified, unworkable, inefficient and should be deleted.

**Warranties as to correctness of information (E.8)**

23 This term is inappropriate and should be deleted. Telstra relies on the accuracy of information provided to it. For example, Confidential Information includes forecasting information provided by Access Seekers. There are specific provisions which address forecasting information and Access Seekers should not be able to rely on E.8 to avoid their obligations under the forecasting provisions.

**Network information (E.2)**

24 This clause should also provide that aggregated information about Services or particular types of Services supplied by the Access Provider to the Access Seeker, such as the total volume of a particular Service supplied to the Access Seeker, is information of both the Access Provider and the Access Seeker and may be used by either of them.

**End user details**

25 Telstra also believes that additional terms should be included in any determination of model terms and conditions to allow for the use of end user details by the Access Provider in the following circumstances: where the Access Provider had information about the end user before the end user became a customer of the Access Seeker; where the Access Provider obtains the detail from the end user or another source who warrant it is entitled to disclose the information; where the end user acquires telecommunications services from a carrier or carriage service provider other than the Access Seeker (eg by dialling an override code or carriage service provider specific access code). A further term should be included which provides that in all of these circumstances the end user's details will cease to be Confidential Information of the Access Seeker.

## 4.7 Communication with End users

26 Telstra notes that the provisions relating to communication with end users remain substantially unchanged from the Commission's 2003 Model Terms and Conditions.

27 A number of the comments made by Telstra in the 2003 Submission are still relevant, as they were not adopted by the Commission in the final 2003 Model Terms and Conditions. As the Commission's altered provisions have not been adopted by the industry in the five years of their operation, Telstra believes it is appropriate for the Commission (if it is to retain the clauses in its determination) to now adopt the comments Telstra originally suggested so that the model terms reflect industry practice. These comments have been reproduced at Annexure A. For example, the obligation to maintain records of a communication with another party's end users under clause F.4 is unreasonable, unworkable and imposes a significant administrative burden on Telstra, and should be deleted.

28 Additionally, Telstra submits that Access Providers should have an explicit right to communicate with Access Seekers' end-users upon suspension or termination of the Access Seeker's services.

## 4.8 Network modernisation and upgrade provisions

29 Telstra welcomes the Commission's recognition that the proposed National Broadband Network rollout will be addressed through a separate process. This is consistent with Telstra's previous submissions (in access disputes and in the undertakings process) on the issue.

30 However, Telstra is concerned about the way in which the Commission has attempted to address this issue, as it creates uncertainty about how the provisions will interact with any process to apply for any National Broadband Network rollout. Rather than suggesting that the provisions will only be overridden "to the extent of any inconsistency", Telstra submits that any process adopted as part of the National Broadband Network should completely override clause G providing any National Broadband Network provider with the certainty required for a network rollout of such an enormous scale. The term "National Broadband Network" should also be defined for clarity.

31 In terms of the network modernisation or network upgrade provisions to apply outside of any National Broadband Network rollout, the Commission will be well aware of Telstra's concerns with the drafting of the model terms and conditions. In particular, Telstra refers the Commission to Telstra's submissions in respect of its 2005 ULLS undertaking and, in relation to the proposed terms and conditions, Telstra submits that:

- the requirement under clause G.1 to provide "equivalent notice" is unnecessary in the context of Telstra's obligations under the TPA and operational separation obligations;
- a notification period of a minimum of 15 weeks should apply to any network modernisation and upgrade works, and would balance:
    - Access Providers' ability to deploy, use, repair and improve their networks in an efficient manner; and

- Access Seekers' aim to protect their investments, those investments generally undertaken in full awareness that Access Providers' networks do need to be efficiently used, deployed, remediated and upgraded;

- a requirement for Telstra to consult and negotiate in good faith any reasonable concerns of the Access Seeker is inappropriate, given:

  - the uncertainty such a requirement would promote. Such a requirement would be difficult for Access Seekers to enforce (something previously acknowledged by the Commission). Similarly, it would be difficult for Telstra to know, with any certainty, whether it had complied or breached such obligations; and

  - the fact that this would only serve to delay network upgrades, particularly routine network upgrades that involve relatively simple (though important and possibly critical) network remediation and repairs); and

- the obligation to notify Access Seekers in clause G should exclude Major Network Modernisation and Upgrade works that are required in the event of an emergency - ie to protect the security or integrity of Telstra's network or the health or safety of any person. It is entirely appropriate for there to be exemptions from the required notice periods in circumstances such as these. The Commission acknowledged as much in its final decision on Telstra's 2005 ULLS undertaking and, after explicitly noting the exclusion in Telstra's contracts for emergency network upgrades, did not raise any issue in its March 2008 statements of reasons on Chime's and Optus' ULLS access disputes.

## 4.9 Suspension and Termination

32 Telstra notes that the provisions relating to suspension and termination are substantially unchanged from the Commission's 2003 Model Terms and Conditions. To the extent that those provisions are unchanged and the Commission seeks to retain the clauses in its determination, Telstra has reproduced its comments from the 2003 Submission in Annexure A. Telstra again requests that the Commission now make the amendments Telstra suggested in 2003, as these reflect current industry practice, with the industry not having sought the provisions determined by the Commission in the intervening five year period.

33 In addition to the triggers for immediate suspension of services set out in clause H.1, Telstra submits that the Access Provider should be entitled to immediately suspend the provision of services to an Access Seeker if:

- its access to the Access Provider's network, or use of the Access Provider's services, contravenes any law;

- it is insolvent; or

- it fails to provide or maintain any security required by the Access Provider.

34 These exceptions reflect Telstra's standard contracts, are largely accepted by industry, and are appropriate for the circumstances they address.

35 Telstra also notes that, under clause H.9, the Access Provider is obliged to refund sums paid for services extending beyond termination or expiry. In some circumstances, Access Seekers may agree to pay cancellation or termination charges upon termination of an agreement. Accordingly, clause H.9 should be made subject to any early cancellation or termination charges that the Access Seeker has agreed to pay.

## 4.10 Changes to Operating Manuals

36 Telstra welcomes the Commission's position in acknowledging that a ULL Access Provider requires the ability to unilaterally make changes to its standard processes.

## 4.11 ULLS Ordering and Provisioning

**MNM**

37 As an overall comment, Telstra believes that there is no need for model terms and conditions in relation to ULLS MNMs. This is because demand for such MNMs is now minimal and Telstra believes that future demand will not give rise to any of the issues raised by the Commission.

*Minimum number of services*

38 In its Final Determination (published Statement of Reasons) in a number of recent ULLS disputes[4], the Commission expressed the view that 20 services is an appropriate scale for MNMs to be requested. This was contrary to Telstra's submission that it is neither practical nor reasonable to offer MNMs for migrations of less than 30 services. The Commission went on to determine, that no minimum number of services should be required to request an MNM, but that the charge for an MNM should be structured as a fixed cost component and a variable cost component. The absence of a minimum number of services for an MNM is mirrored in clauses J.1 to J.3 of the Draft Determination.

39 Telstra believes that the draft clauses J.1 to J.3 are unnecessary, and would highlight two points in addition to those that it has argued previously. First, Telstra already enables unmanaged volumes of up to 15 services per day per exchange, so project management of small batches is not required. Second, Telstra introduced the MNM process to project manage the migration of a large number of services to ULL, beyond the unmanaged 15 services per day per exchange.

*Notice of MNM*

40 The Commission's draft clause J.4 follows the conclusions reached in the Final Determination (published Statement of Reasons) in a number of recent ULLS disputes[5], which was that 84 day notice requirement should be reduced to 56 days.

41 Telstra believes that this reduction is unnecessary because, in practice, the 84 day timeframe fits within the overall lead times for Access Seekers in planning

[4] For example, Unconditioned Local Loop Service Access Dispute Between Telstra Corporation Limited (Access Provider) and Optus Networks Pty Limited (Access Seeker) - Statement of Reasons for Final Determination March 2008 – at 1507
[5] For example, Unconditioned Local Loop Service Access Dispute Between Telstra Corporation Limited (Access Provider) and Optus Networks Pty Limited (Access Seeker) - Statement of Reasons for Final Determination March 2008 – at 1474

an MNM. That is, the 84 day notice requirement is not acting as a constraint on Access Seekers in seeking to effectively manage the migration of their customers to ULL. As it also provides Telstra with an appropriate amount of time in which to plan for and resource the MNM, the 84 day timeframe strikes an appropriate balance between the interests of the parties, and is therefore appropriate.

*Change in the number of services*

42 The Commission's draft clause J.5 proposes that Telstra cannot cancel a MNM because the number of services in the 20 business day notice differs from that in the 56 calendar day notice. Telstra considers that this draft clause is unnecessary because in practice the number of services in an MNM always differs between the 56 calendar day and the 20 business day notice, and it is always less (never more). In view of this, Telstra never cancels an MNM where the number of services in the 20 business day notice differs from that in the 56 calendar day notice.

*After hours connections*

43 The Commission's draft clause J.7 proposes that an Access Seeker have discretion over whether an individual service is connected within business hours or after hours. Telstra believes that this draft clause is unnecessary because Access Seekers using ULL MNM are also reliant on LNP, and the LNP standard hours are 8am to 5pm AEST Monday to Friday. Access Seekers deliberately schedule both the cutover and the LNP for standard hours on the same day (and this is achieved in most cases). An after hours ULL cutover would provide no benefit because the LNP request would not be likely to be completed until the following day as extended hours for LNP end at 7.00pm AEST and a standard MNM cutover and subsequent porting activity takes several hours.

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

44 The Commission's draft clauses J.8 to J.13 propose that Telstra must not refuse to schedule a cutover for an MNM at an exchange because the Access Seeker has requested an MNM cutover at other exchanges in that State on the same day, unless the cutover date requested is inconsistent with a Limitation Notice published by Telstra.

45 Telstra believes that these draft clauses are unnecessary and would introduce undue complexity and cost into managing the resourcing for the MNM process (which, in any event, is being used less and less by Access Seekers).

46 Historically, all Access Seeker forecasts have fallen within the limits of exchange activity per region per day. In addition, as noted previously, the volumes of actual MNM batches cutover have always been less than these forecasts. Current forecasts are such that that the MNM cutovers can easily be managed on different days.

47 The Commission's proposed process for Telstra publishing a Limitation Notice is a vast over-reach to solve a problem that does not even exist in any practical sense.

**LSS to ULLS transfer**

48 Telstra considers that there is no substantiated justification for the Commission's proposed non-price model term relating to an LSS to ULLS transfer process.

49 Telstra has informed the Commission on several occasions that there remains insufficient substantiated demand to justify the costly development of a LSS-ULLS transfer process.[6] Further, Telstra's view has been corroborated by the communications industry's peak body, Communications Alliance, which instituted a round table to examine the issue of LSS to ULLS migrations following a letter from the Commission in February 2008.

50 The roundtable comprised (among others) representatives of major ULLS acquirers (SingTel Optus, Primus), a major ULLS, LSS and resale services acquirer in AAPT/PowerTel and a significant LSS acquirer (Agile/Internode).

51 The progress report from the Communications Alliance Roundtable, 'ULLS Migration Process - Progress Report - June 2008', as supplied to the Commission on 5 June 2008, forms Annexure B to this response. Among its findings, the following were emphasised:

- *Migration processes do exist for the migration of LSS to ULLS. These processes first require the dismantling of the LSS prior to the establishment of the ULLS.*
- *There is no uncertainty or risk over the LSS – ULLS process. The process appears to be understood and utilized by Industry.*
- *The development of a single process for the migration of LSS to ULLS will be a costly and time consuming activity, and is unlikely to return the investment required to develop such a process before the demand for such a service has either been substantially met, or has declined significantly.*
- *That the demand for a LSS to ULLS single process is not substantiated. Although Roundtable members could hypothesize as to the potential demand, none of the member organizations had any plans to migrate their entire LSS base to ULLS, or could provide data that would substantiate any particular demand level.*[7]

52 As Telstra has already stated[8], if Access Seekers' plans change and if the verifiable demand were to materialise, then Telstra would reconsider its position at that time. However, at this stage there is clearly no commercial rationale for the costly development of such a process, nor has the lack of such a process proven to be a barrier to competition in the market for voice or broadband services nor the deployment of increasing numbers of ULLS services, including by those operators who also deploy LSS. There is therefore no justification for the Commission seeking to mandate a process that the key industry representative body has already determined is unnecessary and unjustified.

53 In any event, and without derogating from the above, if the Commission persists in making a determination for the model terms and conditions that include any changes to existing processes or systems, or that require the implementation of new processes, then it needs to be made clear that the costs incurred by the Access Provider in developing and implementing those changes will be recovered directly from the Access Seekers requesting and using the service.

54 Telstra also notes that while some Access Seekers have been vocal in support for an LSS to ULLS process, they have sought to avoid the development of a process to allow the equivalent of LSS over ULLS. Upper Spectrum Sharing (USS) would allow a rival service provider to use the upper spectrum on the ULL to provide

[6] Telstra, Response to Commission Information request in the WLR/LCS Exemption Application, xx June 2008; also, Telstra, Letter to the Commission providing Supplementary Information in the LSS re-declaration inquiry, 27 July 2007.
[7] Communications Alliance, "ULLS Migration Processes Progress Report", June 2008, pp. 2-3.
[8] Telstra, Submission in response to ACCC Draft Decision on LSS Re-declaration inquiry, September 2007, p. 8.

DSL services to the end user while the ULL Access Seeker continued to provide the PSTN service. Development of an appropriate process, and supporting IT changes, would largely fall to ULL Access Seekers, and Telstra has noted that in a recent industry forum[9] the reason given by Access Seekers for not proceeding with this development work is that it would be far too complex and expensive. Given that the number of ULLS services now exceeds that for LSS, surely USS is more important from the perspective of future competitive developments (and therefore should be capturing the Commission's attention) than an LSS to ULLS transfer process for which demand is unsubstantiated.

**iVULL**

55 The Commission's draft clauses J.16 to J.20 propose that Telstra will support an iVULL ordering and provisioning process, and Annexure 1 to the Draft Determination is based on the iVULL process that Telstra has developed as a result of the Commission's Final Determination on the Optus MDU dispute (as published).

56 Given the iVULL process differs markedly from the Commission's Final Determination on the Optus MDU dispute, Telstra considers the Commission's inclusion of draft clauses J.16 to J.20 and Annexure 1 to be a clear concession that the Commission's Final Determination in the Optus ULLS MDU dispute is unworkable and uncertain. As the Commission is aware, that Final Determination is currently the subject of judicial review proceedings on a number of grounds. In those circumstances, it is curious and clearly inappropriate for model terms and conditions to be developed in relation these matters.

57 Further, Telstra considers the iVULL process substantially agreed between itself and Optus to be a confidential matter. Telstra considers that the Commission should remove the draft clauses and Annexure 1 forthwith.

58 If the Commission insists on inclusion, Telstra emphasises two important points in relation to the iVULL process. First, the Commission has not addressed the issue of how the development costs for the iVULL process are to be recovered. This is a major oversight and the Commission must still consider how the Access Provider will recover the costs of complying with each proposed clause even though the Commission intends limiting its determination of model terms and conditions to non-price issues. Failure to do so would result in an unfair situation which does not appropriately balance the interests of the Access Provider (who has no assurance of cost recovery in implementing the process) with those of the Access Seeker, who may ask for the process to be developed. For this reason, to the extent that the Commission insists on including a model term in relation to iVULL, Telstra believes that the Commission's model terms should specify that the costs of implementing the process must be paid for by Access Seekers availing themselves of that process.

59 Second, Telstra believes that the usage of iVULL process may not ultimately justify the development costs; indeed, Telstra notes that the actual usage of the process since it went live has been [CIC] of that indicated in the Commission's statement of reasons published in relation to the Optus MDU dispute[10].

[9] Communications Alliance ULLS Migration Process – Meeting 02, Monday 31 March 2008.
[10] Provisioning of ULLS to Multi-Dwelling Units, Reasons for Final Determination, November 2007, paragraphs 67 and 91.

**ULLS transfer**

60 The Commission's draft clause J.21 proposes that the parties jointly develop procedures to support the transfer of a ULLS between a losing ULLS Access Seeker and gaining ULLS Access Seeker.

61 Telstra believes that the draft clause is unnecessary because there is already an effective ULLS transfer process as described in ACIF C569:2005, the *Unconditioned Local Loop Service – Ordering, Provisioning, and Customer Transfer*, and as implemented in Telstra's OPM. Moreover, there are already some Access Seekers using the process to facilitate transfer of the ULLS from another Access Seeker.

62 Telstra notes that, in its discussion of the draft clause, the Commission suggests that 'standing consent' could be adopted as in processes such as Broadband Transfer. However, ULLS is capable of supporting multiple services, complex products and multiple end users. A gaining Access Seeker needs to check for these scenarios with the losing Access Seeker prior to ordering a ULL Transfer. Telstra itself has experienced rejects from the losing Access Seeker when attempting to transfer a ULLS to itself. This is appropriate and protects against slamming and other invalid churn, and shields end users from inconvenience and unnecessary service outages. Access Seekers need to establish agreements to manage such query processes between themselves in the same way they do for preselection or third party porting.

## 4.12 Facilities Access

63 Section K of the Commission's Draft Model Non-price Terms and Conditions seeks to impose a raft of conditions on the provision of space in Telstra facilities and the queuing of Access Seekers in the process of installing equipment in exchange space.

64 Furthermore, the Commission's power to make Model Terms and Conditions under section 152AQB does not extend to terms relating to facilities access. Facilities access is not a "core service" and is provided for by Schedule 1 of the Telecommunications Act 1997, not Part XIC of the TPA. Any purported terms relating to facilities access included in Model Terms and Conditions under section 152AQB would therefore be beyond power and invalid. Telstra reserves its rights in this regard.

65 The Commission is seeking to intervene on the basis of issues that have been raised in the past, and which have since been addressed. The proposed clauses K.1 to K.25 are therefore unnecessary and should not be included in any final determination on the model non-price terms and conditions.

66 In the draft model terms discussion paper, the Commission states that;

*"access seekers are concerned by the potential for them to be denied access to an exchange when there is available capacity. They are also concerned by the potential for extensive delays in gaining access to available and/or expanded capacity at an exchange, and what they see as insufficient consultation arrangements around facilities access."*

67 It is important for the Commission to put into perspective the supposed difficulties Access Seekers have with accessing Telstra facilities, compared to the

actual deployment of Access Seeker equipment in Telstra ESAs over the past 24 months:

- There currently more than 520 ESAs in which Access Seekers have installed equipment – including 164 ESAs with 5 or more Access Seekers; and

- Access Seekers have installed more than 3.5 million ports on Telstra MDFs, an increase of more than 600 thousand ports in the 9 months since January 2008.

68 Against the background of this clear evidence that Access Seekers have been able to successfully take advantage of Telstra's facilities access arrangements to install their own equipment, Telstra has continued to listen to its wholesale customers who have recently expressed concerns about not being able to gain access to capped exchanges. In response to those concerns, Telstra earlier this year proactively reviewed the status of exchanges which were considered capped (which included doing detailed site inspections).[11] Telstra has also reviewed its processes and assessment procedures related to exchange capping to ensure consistency and identify any improvements we could make. This should ensure the process is robust moving forward in the face of increasing demand for ULLS/LSS and exchange access.

69 Despite Telstra's own proactive improvements, the Commission has already intervened – instituting a specific Telstra Exchange Facilities Record Keeping Rule (as well as a section 155 notice). The RKR already requires Telstra to provide a significant amount of information to the Commission, including:

- Floor-plans and details on the use of space (and free rack space) within capped and potentially capped exchange buildings;

- Information on Access Seekers who have applied for access to Telstra exchange buildings, and their progress; and

- How much space Telstra has reserved for its own purposes in these exchanges.

70 To reiterate, section K is unnecessary in its entirety and should be removed from the Commission's non-price model terms and conditions. Most of section K echoes Telstra's well established practices regarding the assessment of exchange space and the handling of Access Seeker requests.

**Assessment of space inside an exchange and solutions to space shortages**

71 Telstra considers all practical solutions to overcome exchange space capacity constraints within its exchanges. The criteria that Telstra applies in assessing whether space in an exchange is available for access are clearly set out in the contractual terms and conditions that Telstra has agreed with Access Seekers and are consistent with Telstra's legislative and regulatory obligations.

72 As Telstra has previously informed the Commission, where there appears to be a capacity constraint following a request for space, the planner will now always arrange for an exchange visit to assess the site. Where there are no practical

[11] REF letter to Commission on capped exchange audit.

options for expansion, even after out-of-the-ordinary works, a decision to cap the exchange will be made by a governance committee of senior engineers from Telstra's Network and Technology Group within Telstra Operations.

73 The Commission already requires Telstra to provide detailed information on capped exchanges and the reasons for why an exchange was capped as part of the Telstra Exchange Access RKR. This information enables the Commission to assess, and where it feels necessary inquire further on, the reasons why an exchange (or its MDF) is considered capped.

74 Given the detailed process that Telstra already follows, and the extensive vetting of this process and its results by the Commission, clause K.3 would only add unnecessary further regulation for no benefit.

75 The specificity of clause K.3 also raises concerns. For example, the uses of the term 'adjacent' in subclause K.3(e) raises the possibility that Telstra would be required to allow the installation of Access Seeker equipment on its own land adjacent to an exchange building.

**Telstra's own reasonably anticipated requirements**

76 Clause K.4, specifies how Telstra must deal with its own reasonably anticipated requirements in relation to exchange space. This clause is another example of unnecessary additional regulatory burden for no benefit to the industry. Before reserving space for its own future requirements, Telstra takes into account all current uses and all Access Seeker accepted orders in the relevant exchange. Further, Telstra is required to provide the Commission with detailed information on its reserved space requirements in all capped exchanges as part of the Telstra Exchange Access RKR, which provides the Commission already with the ability to assess the validity of Telstra's space reservation policy. This clause is unnecessary and inappropriate, and should be deleted.

**The provision of specified information to Access Seekers**

77 Clause K.9(d) requires Telstra to provide 'Specified Information' to Access Seekers (as specified in clause K.10). Telstra considers this clause to be unnecessary and potentially prejudicial to Telstra, requiring it to hand over information to Access Seekers that is commercial in confidence. Specified Information includes:

- Exchange floor plans
- Details of existing equipment (including active and inactive equipment) in the exchange – including MDF, racks, power and air conditioning equipment
- Details of all approved plans to expand a facility
- Details of the reasonably anticipated requirements of Telstra and existing Access Seekers in the exchange

78 This information goes far beyond the reasonable requirements of potential Access Seekers and clearly includes material that would be CIC to Telstra (and may also include third party CIC material). It is also completely unnecessary for this type of information to be provided to Access Seekers, considering that pertinent information is already provided to the Commission.

79 Under the Commission's Telstra Exchange Access RKR, Telstra is already required to provide detailed information on the amount of floor space and racks positions

for which it has reserved space *and* details on the nature of equipment Telstra intends to install in that reserved space. The RKR also requires Telstra to provide the Commission with floor plans of the exchange.

**Completion of construction works by Access Seekers**

80 Access Seekers are able to engage their own contractors (provided they are approved by Telstra) to complete construction works in Telstra exchanges. This enables Access Seekers to make their own choices and manage their own build process. Clause K.15(b) would require Telstra to not only manage its own extensive building requirements, and manage the exchange access process, but also manage the building process for Access Seekers, by negotiating with and managing their contractors. This is clearly inappropriate. Access Seekers should bear responsibility for negotiations with the contractors they have engaged.

**Telstra Corporation Limited**

# Annexure A Proposed amendments to draft Model Non-Price Terms and Conditions

## MODEL NON-PRICE TERMS AND CONDITIONS

***Telstra's proposed amendments to the draft model terms are marked up in revision mode or identified by way of comment below. Further discussion of some of the amendments is set out in the body of Telstra's submission.***

### A. BILLING AND NOTIFICATIONS

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

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

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

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

(ii) to the extent that the Charges relate to a new Service being billed for the first time, in which case there shall be no restriction on the period which may have elapsed since the relevant amount was incurred, provided the access provider gives notice to the access seeker as soon as practicable after becoming aware that invoicing will be delayed and that the service will be invoiced retrospectively at a later time~~such Charges may be invoiced up to 8 months after the relevant amount was incurred by the access seeker's customer, subject to agreement with the access seeker (such agreement not to be unreasonably withheld)~~; or

(iii) to the extent that the Charges relate to services supplied by an overseas carrier and the access provider has no control over the settlement arrangements as between it and the overseas carrier,

in which case the access provider shall invoice such amounts as soon as is reasonably practicable.

A.7 Subject to any Billing Dispute validly notified in accordance with this agreement, an invoice is payable in full on the due date for that invoice or such other date as agreed between the parties and the access seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the access provider. All amounts owing and unpaid after the due date shall incur a liability for interest at the rate per annum of the 90 day authorised dealers bank bill rate published in the Australian Financial Review on the first Business Day following the due date for payment, plus 2.5%.

A.9 Unless the parties otherwise agree, there shall be no setting-off (*i.e.* netting) of invoices except where:

(a) a party goes into liquidation; or,

(b) a party has the right to suspend provision of a service or terminate this agreement,

in which case the solvent party or the other party with the right to suspend services or terminate the agreement~~the other party~~ may set-off. However, in order to minimise the administration and financial costs, the parties shall consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.

A.10 The access provider must, at the time of issuing an invoice, provide to the access seeker all information ~~reasonably~~ required by ~~the access seeker to identify and understand the nature and amount of each component of the invoice. Nothing in this clause A.10 is intended to limit~~ subsections 152AR(6) and 152AR(7) of the TPA.

***Clause A.10 goes substantially beyond the legislative requirements under subsections 152AR(6) and (7) of the TPA and imposes a significantly higher***

***burden on the access provider. In so doing, it imposes inefficient costs on the access provider by requiring it to effectively "spoon feed" access seekers lacking in the requisite degree of technical sophistication to understand carrier billing processes. Accordingly, Telstra submits that A.10 should be replaced with an obligation to provide the information required under subsections 152AR(6) and (7) (or deleted altogether).***

A.11 If the access seeker believes a Billing Dispute exists, it may, by written notice to the access provider, invoke the Billing Dispute Procedures. A Billing Dispute must be initiated only in good faith. If the access provider believes, acting reasonably, that a Billing Dispute was not initiated in good faith, it may terminate the Billing Dispute Procedures on five business days' notice to the access seeker, at which point the withheld amount shall become immediately due and payable.

A.15 A Billing Dispute Notice may not be given to the access provider in relation to a Charge later than 6 months after the due date for the Charge.

***A 6 month period for a Billing Dispute Notice is inappropriate for rebill services. The appropriate time frame for rebill services is 65 days.***

A.17 The Parties acknowledge that investigation of a Billing Dispute may require information to be exchanged on an iterative basis.~~Each party shall, as early as practicable after the notification of a Billing Dispute pursuant to clause A.11, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).~~

***Whilst Telstra agrees that investigation of a Billing Dispute may require information to be exchanged on an iterative basis, Telstra submits that draft model clause A.17 is so burdensome as to equate with an obligation to make discovery (contrary to the Commission's intention). Telstra suggests the above drafting, which reflects that information will be exchanged between the parties as required, but a "dump" of all relevant information at the outset of the dispute resolution process is not mandatory.***

A.18 The access provider shall try to resolve any Billing Dispute as soon as practicable and in any event within 30~~25~~ Business Days of receipt of a Billing Dispute Notice (or longer period if agreed by the parties), by notifying the access seeker in writing of its determination~~proposed resolution~~ of a Billing Dispute. That notice shall explain the access provider's determination~~proposed resolution~~ and any action to be taken by:

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

(b) the access seeker (*e.g.* payment of the disputed Charge).

***In its 2003 submission, Telstra noted that 20 Business Days is too short a period for dispute resolution and that such a short period will only impose needless cost on the industry. The same applies to a period of 25 Business Days. Further, the timeframe necessary to consider and determine a billing dispute (which if it is to be done properly), is a relatively time consuming exercise) should be greater than the comparatively straightforward task of escalation by an access seeker. The lengthy time frame for escalation is open to abuse by access seekers and is an incentive to further delay payment to the access provider.***

A.22 If the access seeker is not satisfied with the access provider's determination~~proposed resolution~~ in relation to a Billing Dispute, or if the access provider has not provided the access seeker with a determination~~proposed resolution~~ to the Billing Dispute within the timeframe set out in clause A.18, the access seeker may escalate the matter under clause A.23. If the access seeker does not do so within 10~~25~~ Business Days of being notified of the access provider's determination~~proposed resolution~~ (or a longer period if agreed by the parties), the access seeker shall be deemed to have accepted the access provider's determination~~proposed resolution~~ and clauses A.19 and A.20 shall apply.

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

(a) stating why it does not agree with the access provider's determination~~proposed resolution~~; and

(b) seeking escalation of the Billing Dispute.

A.24 A notice under clause A.23 must be submitted to the nominated billing manager for the access provider within 10 Business Days of being notified of the access provider's determination under clause A.18, who shall discuss how best to resolve the Billing Dispute with his or her counterpart in the access seeker's organisation as nominated and made available by the access seeker for that purpose.

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

(a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation shall be conducted in accordance with the mediation guidelines of the ACDC; or

(b) if the parties either do not agree to proceed to mediation or are unable to resolve the entire Billing Dispute by mediation within 10 Business Days of the determination under clause A.18, either party may terminate the Dispute Resolution Process by written notice and commence legal or regulatory proceedings to resolve the matter including, in the case of the access provider, taking action to recover the amount determined under clause A.18 as a debt due.

~~A.30 If it is determined by the Billing Dispute Procedures or by any other dispute resolution procedure (including arbitration under Part XIC of the TPA or litigation) or by agreement between the parties that three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more, then, for the purposed of clause A.20, the interest payable by the access provider in respect of the overpaid amount of the invoices in question shall be the rate set out in clause A.7, plus 2%. The remedy set out in this clause A.30~~

~~shall be without prejudice to any other right or remedy available to the access seeker.~~

~~A.31 If three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more, then without prejudice to any other right or remedy available to the access seeker, the access provider shall be deemed to have breached this agreement and the seeker shall have a right of damages for such a breach.~~

***Clauses A.30 and A.31 are unnecessary and should be deleted entirely as industry standard arrangements and indeed model terms A.19 and A.20, already contain sufficient and proportionate disincentives on access providers to issue incorrect invoices.***

## B. CREDITWORTHINESS AND SECURITY

B.4 The access provider may ~~from time to time where the circumstances reasonably require~~in its absolute discretion, request from the access seeker Ongoing Creditworthiness Information to determine the ongoing creditworthiness of the access seeker. The access seeker must supply Ongoing Creditworthiness Information to the access provider within 10~~15~~ Business Days of receipt of a request from the access provider for such information. The access provider may, as a result of such Ongoing Creditworthiness Information, having regard to clause B.3 and subject to clause B.6, reasonably require the access seeker to alter the Security, and the access seeker must provide that altered Security within 15~~20~~ Business Days of being notified by the access provider in writing of that altered requirement.

***Telstra submits that 10 Business Days for an access seeker to provide creditworthiness information to the access provider is a more balanced timeframe reflecting a reasonable period for an access seeker to gather the relevant information, without unfairly lengthening the access provider's exposure to potential credit risk. In addition, a 15 day time frame, rather than 10 days, is adequate for provision of the altered Security.***

***Further, to protect its interests, an access provider must be able to request a credit worthiness review at any time.***

B.5 The access seeker may from time to time request the access provider to consent (in writing) to a decrease in the required Security and/or alter the form of the Security. The access provider must, within 15 Business Days of the access seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to clause B.3). The access provider may request, and the access seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause B.5.

***Telstra submits that:***

- ***the drafting in model clause B.5 should reflect that the request will be "considered" in light of draft clause B.3 and where the request is reasonable in this context the access provider will reduce the security by an appropriate amount;***
- ***as it stands, draft clause B.5 implies that any request must be complied with on the access seeker's terms provided that it is not unreasonable to do so;***
- ***the current drafting of model clause B.5 does not recognise the risk an access provider necessarily assumes when reducing security and that any reduction should be carefully considered and determined by the access provider; and***
- ***allowing an access provider to consider and assess such requests will not affect the frequency of reductions of security where it is reasonable to do so, given that from a commercial perspective an access provider would only reject a request where a reduction is not economically viable.***

~~B.8 The access seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing~~

~~Creditworthiness Information prior to such information being provided to that person.~~

## C. LIABILITY (RISK ALLOCATION) PROVISIONS

C.10 Subject to clauses C.11 and C.12, each party indemnifies the other party against all Loss arising directly from or incurred in connection with a claim by a third person against the Innocent Party to the extent that the claim relates to any negligent act or omission of the Indemnifying Party or any of its People in relation to this agreement.

***The omission of C.12 appears to have been a drafting error.***

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

## D. GENERAL DISPUTE RESOLUTION PROCEDURES

D.4 Any Non-Billing Dispute notified under clause D.3 shall be referred:

(a) initially to the nominated manager (or managers) for each party, who shall endeavour to resolve the dispute within 10~~5~~ Business Days of the giving of the notice referred to in clause D.3 or such other time agreed by the parties; and

(b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then unless the parties agree in writing within a further 10~~5~~ Business Days to refer the Non-Billing Dispute to an Expert Committee under clause D.12, either party may submit it to mediation in accordance with clause D.11.

D.5 If:

(a) under clause D.11(f), the mediation is terminated; and

(b) after a period of 10~~5~~ Business Days after the mediation is terminated as referred to in paragraph (a), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise), either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

***Telstra submits that:***

- ***the proposed time frames are insufficient for the parties to properly investigate and resolve disputes;***
- ***"speeding up" the process and allowing less time for the proper review of disputes will have a negative impact on the efficiency of the dispute resolution procedure and will only service to increase the number of unresolved disputes; and***
- ***the amended time frames above balance the interests of the parties and are in line with s 152AH concepts of reasonableness, allowing reasonable timeframes in order to achieve best possible results for all parties.***

D.6 A party may not commence legal proceedings in any court or commence any arbitration whether pursuant to Part XIC of the TPA or otherwise (except proceedings seeking urgent interlocutory relief ~~or the making of an interim determination~~) in respect of a Non-Billing Dispute unless:

(a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this clause D or clause D.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause D.5 or

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

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

***The requirement in clause D.9 is so burdensome as to equate with an obligation to make discovery (contrary to the Commission's intention). Telstra submits that this clause should be redrafted to reflect that information will be exchanged between the parties as required, but a "dump" of all relevant information at the outset of the dispute resolution procedure is not mandatory.***

## E. CONFIDENTIALITY PROVISIONS

***End User Details***

***Additional terms should be included to provide that:***

***(a) where the access provider had information about the end user before the end user because a customer of the access seeker, or where the access provider obtains the detail from the end user or another source who warrants it is entitled to disclose the information, then the access provider may access, use and disclose without restricting that information;***

***(b) where the end user acquires telecommunications services from a carrier or carriage service provider other than the access seeker (eg. by dialling an override code or carriage service provider specific access code) then user details may be provided by the access provider to the relevant carrier or carriage service provider, or used by the access provider itself if the services are being supplied by the access provider for:***

***(i) the purposes of billing and marketing to the end user; or***

***(ii) as required by Part XIC of the TPA, or any industry code (such as the ACIF C515:2005 Preselection Code) or any other law or regulation with which Telstra or the relevant carrier or carriage provider complies.***

***A further term should be included which provides that in all of these circumstances the end user's details will cease to be Confidential Information of the access seeker.***

E.2 For the avoidance of doubt, information generated within the access provider's Network as a result of or in connection with the supply of the relevant Service to the access seeker or the interconnection of the access provider's Network with the access seeker's Network (other than the aggregate Network information of the access provider and all access seekers to whom the relevant service is supplied) is the Confidential Information of the access seeker.

***This clause should also provide that aggregated information about Services or particular types of Services supplied by the access provider to the access seeker, such as the total volume of a particular Service supplied to the access seeker, is information of both the access provider and the access seeker and may be used by either of them.***

~~E.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the disclosing party that the Confidential Information is or will be correct.~~

~~E.10 If the access seeker believes there is prima facie evidence which tends to show that the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4, the access seeker may invoke the audit procedures set out in this clause E.10 as follows:~~

~~(a) The audit procedures in this clause E.10 must be initiated only in good faith;~~

(b)The access seeker shall give the access provider a written notice that it intends to initiate an audit in accordance with this clause E.10;

(c)The access seeker shall nominate an Independent Auditor to conduct an audit of the access provider's systems for the purpose of determining whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4;

(d)If the access provider objects to the person nominated by the access seeker or the parties have not agreed on an Independent Auditor within 5 Business Days of the notice given under clause E.10(b), then the Independent Auditor shall be a person nominated by the President for the time being of the Institute of Chartered Accountants in the State in which the access provider holds its registered office;

(e)The access seeker shall bear all reasonable costs of the access provider relating to the audit, as well as the costs of the Independent Auditor;

(f)The Independent Auditor shall be required to give a confidentiality undertaking to the access provider in terms reasonably required by the access provider;

(g)The Independent Auditor's first task shall be to determine whether there is prima facie evidence which tends to show that the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4. The Independent Auditor may obtain advice from a barrister or solicitor (who does not act for and has not acted for either of the parties in relation to any matter in question) in determining whether such prima facie evidence exists;

(h)If the Independent Auditor so determines, then he/she shall be required to proceed with the audit;

(i)If the Independent Auditor is required to proceed with the audit in accordance with clause E.10(h), he/she shall be required to conduct an audit of the access provider's systems (including but not limited to its computer systems, databases, records and processes) for the purpose specified in clause E.10(c);

(j)The audit shall be conducted expeditiously and in any event for no longer than 20 Business Days (excluding any delays caused by the access provider);

(k)The access provider must permit the Independent Auditor to audit and inspect its systems (including but not limited to its computer systems, databases, records and processes) and the access provider must provide the Independent Auditor with such assistance as he/she reasonably requires in order to conduct the audit;

(l)At the conclusion of the audit, the Independent Auditor shall be required to provide a report to both parties setting out his/her findings and conclusions as to whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4;

(m)If the Independent Auditor's report contains Confidential Information of the access provider, then he/she will mask such information in the version of the report provided to the access seeker, provided that the access seeker's solicitors are given an unmasked copy of the report (subject to them first giving confidentiality undertakings to the access provider in a form reasonably required by the access provider);

(n)The parties acknowledge that the Independent Auditor's report shall be *prima facie* evidence of the matters contained in the report and (subject to any obligation of confidence attaching to the report or the information contained therein) may be used in connection with any dispute concerning whether the access provider has used, is using or is likely to use Confidential Information relating to the access seeker's end-users for a purpose other than as permitted under clause E.4.

***Telstra submits that the audit provisions introduced by the Commission are unjustified, unworkable and inefficient and should be removed in their entirety. In Telstra's experience, provisions of this kind are certainly not usual in comparable commercial contracts and Telstra submits that they are unreasonable and unnecessary as part of the model terms.***

***Telstra submits that the model provisions E.1 to E.9[1] adequately address the specific circumstances in which each party is permitted to disclose the other's confidential information. Telstra submits that these specified exceptions to the fundamental principle of non-disclosure of the other party's confidential information are reasonable and reflect current industry practice.***

***Telstra submits that the audit provisions are inefficient and unworkable for the following reasons:***

***(a) audit provisions of this kind necessarily involve visibility of all other access seeker's confidential information, as well as Telstra's own, and would therefore require consent (which they would be unlikely to give to the benefit of a competitor). Consent complications of this kind would make practical implementation of such provisions virtually impossible (particularly in view of Telstra's significant customer base);***

***(b) neither an access seeker, nor an auditor would be competent to judge whether there is "prima facie" evidence of a misuse of confidential information. That is clearly a matter for a court, which is the appropriate forum for any such dispute to be heard;***

***(c) audit provisions of this kind are likely to increase disputes and may also be seen as fruitful preparation for litigation in circumstances where an access seeker experiences financial difficulties. Telstra submits that this would clearly be contrary to the intention of Part XIC of the TPA; and***

[1] With the exception of clause E.8. Telstra's comments on that clause are set out in the body of Telstra's submission.

***(d) there is no requirement for an access seeker to demonstrate any substantial evidence of misuse of confidential information, nor is there a requirement to prove any material impact on the access seeker's business: on the contrary the audit is triggered where the access seeker simply "believes there is prima facie evidence which tends to show…", which is hardly a difficult threshold to satisfy.***

***Accordingly, Telstra submits that the audit provisions are clearly contrary to the promotion of the LTIEU and will simply promote disputes and impair the delivery of services to access seekers as a whole.***

## F. COMMUNICATIONS WITH END USERS

F.2 Subject to clause F.3, the access provider may communicate and deal with the access seeker's end-users:

(a) in relation to goods and services which the access provider currently supplies or previously supplied to the end-user;

(b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;

(c) where the access provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;

(d) in a manner or in circumstances agreed by the parties; ~~or~~

(e) in an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property~~.~~; or

(f) where there is a suspension or termination of services under this Agreement, as required to ensure continuity of supply of basic telephone services to end users.

***The additional provision at (f) above addresses the situation where the access provider needs to contact end users of an access seeker in circumstances where that access seeker has become insolvent and arrangements need to be put in place to ensure continuity of supply to end users. The additional term is in the interests of protecting consumers and reducing the need for a cessation of supply.***

F.3 If:

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

***Telstra summits that the deleted part of F.3(a) is unnecessary. Whilst an access seeker is entitled to protect its relationship with its customers, an access provider must also be "entitled to engage in fair marketing in the same manner as its competitors". In line with this approach, the draft terms and conditions for communications with end users should reflect the objectives of s152AB of the TPA. In particular, Telstra submits that the Commission should give weight to the objective of promoting competition. Telstra submits that these objectives can only be met by model terms which clearly recognise that there is no ownership in an end user.***

(b) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider, the access provider may engage in

any form of marketing or discussion of the access provider's goods and/or services; and

(c) an end-user of the access seeker initiates a communication with the access provider in relation to goods and/or services supplied to that end-user by the access provider and the access seeker, the access provider must advise the end-user that they should discuss any matter concerning the access seeker's goods and/or services, with the access seeker, but may otherwise engage in any form of marketing or discussion of the access provider's goods and/or services.

~~F.4 Where a party communicates with the end-user of the other party, that first mentioned party must make and maintain records of that communication with the other party's end-user in circumstances where that communication discusses anything concerning the other party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other party (however such a requirement may arise pursuant to any dispute resolution procedure).~~

***Telstra submits that the requirement that an access provider's staff make and maintain records of their communications with an access seeker's end users is simply unworkable. For example, if an access seeker's end user calls Telstra front-of-house staff but does not have a contractual relationship with Telstra, there will be no "screen" on which front-of-house can record what is discussed in the enquiry. Furthermore, where a technician makes a site visit, recording information (by hand on a note pad?) and then ensuring it is later transferred to an electronic file becomes even more difficult. Requirements of this nature are contrary to the legitimate business interests of access providers and LTIEU as they impose unjustified and inefficient costs on the access provider which must ultimately be passed on to access seekers and consumers. Telstra submits that the costs to the industry as a whole must be carefully weighed by the Commission against any benefit that this type of provision may afford.***

F.6 Neither party may represent that:

(a) it has any special relationship with or special arrangements with the other party;

(b) there are consequences for an end-user when an end-user signs an authority to transfer their accounts or services;

(c) a Service has any characteristics or functionality other than as specified in ~~a relevant standard form of agreement~~ or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or

~~(d)the other party participates in the provision of the first mentioned party's services, provided that a party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other party~~

***Telstra submits that an access provider should be able to advise end customers that it provides services to the access seeker. Draft clause F.6(d) implies that an access provider is prohibited from advising the end customer this fact. For this reason Telstra submits that draft clause F.6(d) should be deleted, or amended accordingly.***

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

***Telstra submits that this provision is unnecessary, in view of the fact that bilateral agreements have priority over ACIF Codes as long as there is no inconsistency.***

## G. NETWORK MODERNISATION AND UPGRADE PROVISIONS

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

(a) require the access seeker to take particular action in order to continue to use a Service; or

(b) result in a Service no longer being supplied or adversely affect the quality of a Service (or any services supplied by access seekers to their end-users using the Service),

by giving the access seeker notice of the Major Network Modernisation and Upgrade. The type of notice given and the length of the period of notice given will vary depending on the type of Major Network Modernisation and Upgrade. In the case of a Major Network Modernisation and Upgrade:

(c) that is not an Emergency Upgrade, the access provider will provide the access seeker with ~~an equivalent period of notice (in writing) to that which is provides itself (and in any event~~ not less than 15 weeks~~6 months~~ written notice (or another period as may be agreed in writing between the parties) before any such modernisation and upgrade is scheduled to take effect; and~~; and~~

(d) that is an Emergency Upgrade, the access provider will use its best endeavours to provide the access seeker with notice before, and will otherwise notify the access seeker as soon as practicable after, implementing any such modernisation and upgrade.

~~(a)provided that the access provider has consulted with the access seeker and negotiated in good faith any reasonable concerns of the access seeker, in relation to the modernisation and upgrade.~~

G.2 The terms and conditions that apply to a Major Network Modernisation and Upgrade done ~~pursuant to~~as a result of or in connection with the roll out or operation of ~~a~~the National Broadband Network (if any) are to override this clause G ~~to the extent of inconsistency between them~~.

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

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

G.5 ~~If the access seeker seeks an amendment to a Major Network Modernisation and Upgrade, or an amendment to the period of notice to be provided, the access provider shall consider in good faith the amendment sought by the access seeker and shall negotiate in good faith with the access seeker in relation to such amendment.~~

G.6 ~~In attempting to reach a mutually acceptable resolution in relation to the amendment, the parties must recognise any need that the access provider may have to ensure that the specifications for Services which the access provider supplies to more than one of its customers need to be consistent (including without limitation having regard to the incorporation by the access provider of any relevant international standards).~~

G.7 For the avoidance of doubt, nothing in this clause G is intended to give the access provider a right to amend the definition or service description of a Service (as set out in the then current service declaration for that Service).

G.8 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter shall be resolved in accordance with the dispute resolution procedures set out in clause D of this agreement.

G.9 For the purposes of this clause G:

(a) an '**Emergency Upgrade**' means a Major Network Modernisation and Upgrade that is required to protect the security or integrity of the access provider's Network or the health or safety of any person;

(b) ~~,~~ a '**Major Network Modernisation and Upgrade**' means~~, and~~ the maintenance and upgrade of the access provider's Network and includes remediation, reconfiguration, enablement, augmentation, maintenance and repair of the access provider's Network (including the removal, rearrangement, replacement (for example with fibre optic cable) or decommissioning of the continuous metallic pair used for the supply of ULLS to the access seeker) and may:

~~(a)~~(i) include~~s~~ the installation of Telstra customer access modules closer to ULL end-users than a Telstra exchange building; or

~~(b)~~(ii) require~~s~~ the truncation of ULLS provided from Telstra exchange buildings, or the establishment of a new point of interconnection (or relocation of an existing point of interconnection) for a Service, or alteration of deployment classes of equipment used on a Service~~; or,~~; and

~~(c)results in a Service no longer being supplied or adversely affects the quality of a Service (or any Services supplied by access seekers to their end-users using the Service).~~

(c) "**National Broadband Network**" means a Network to be rolled out or operated as a result of or in connection with the access provider or any other party being selected by a government of Australia (including the government of the Commonwealth of Australia or the government of any state or territory of Australia) to roll out or operate a national broadband network.

## H. SUSPENSION AND TERMINATION

H.1 The access provider may immediately suspend the supply of a Service or access to the access provider's Network, provided it notifies the access seeker

where practicable and provides the access seeker with as much notice as is reasonably practicable:

(a) during an Emergency; or

(b) where in the reasonable opinion of the access provider, the supply of that Service or access to the access provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network security or is likely to impede the activities of authorised persons responding to an Emergency; or

(c) where, in the reasonable opinion of the access provider, the access seeker's Network or equipment adversely affects or threatens to affect the normal operation of the access provider's Network or access to the access provider's Network or equipment (including for the avoidance of doubt, where the access seeker has delivered Prohibited Traffic onto the access provider's Network),

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

***In addition to the triggers for immediate suspension of services set out in clause H.1, Telstra submits that the access provider should be entitled to immediately suspend an access seeker's service if:***

***(a) its access to the access provider's network, or use of the access provider's services, contravenes any law;***

***(b) it is insolvent; or***

***(c) it fails to provide or maintain any security required by the access provider.***

H.2 If:

(a) the access seeker has failed to pay monies owing under this agreement;

(b) the access seeker's use either of its Facilities or the access provider's Facilities is in contravention of any law;

(c) the access seeker breaches a material obligation under this agreement; or

(d) ~~any of the events described in clause H.7 occurs in respect of~~ the access seeker breaches three or more obligations of this Agreement which collectively have a material impact on the access provider,

***The matters giving rise to a right to suspend a service or terminate the agreement (if the breach is not or cannot be rectified) should also include persistent breaches of an agreement which, although they may be individually minor, have a cumulative effect on the access provider which is material. An example of this is a persistent failure to comply with a process requirement which means that extra resources are spent to monitor and rectify the situation.***

("**Suspension Event**") and:

(e) within 10~~20~~ Business Days after becoming aware of the Suspension Event, the access provider gives a written notice to the access seeker:

(i) citing this clause;

(ii) specifying the Suspension Event and the Service in respect of which the event has occurred;

(iii) requiring the access seeker to institute remedial action (if any) in respect of that event; and

(iv) specifying the action which may follow due to a failure to comply with the notice,

("**Suspension Notice**") and:

(f) the access seeker fails to institute remedial action as specified in the Suspension Notice within 10~~20~~ Business Days after receiving the Suspension Notice (in this clause H.2, the "**Remedy Period**"),

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

(g) refuse to provide the access seeker with ~~the~~ Services until the remedial action specified in the Suspension Notice is completed; and~~:~~

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

~~(ii)a request for which is made after the date of the breach,~~

~~until the remedial action specified in the Suspension Notice is completed; and~~

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

***A period of 20 Business Days for rectification is simply too long in view of the fact that these events are likely to include the failure to pay overdue amounts which have not been disputed. In Telstra's experience, such a failure to pay is a fairly strong indication of an access seeker approaching insolvency. Telstra submits that the time period for access seekers to remedy in these circumstances is intended to enable access seekers to obtain interlocutory relief in respect of the threatened suspension or termination: it is not intended to allow access seekers a lengthy period to seek to reorganise their finances. It is Telstra's strong submission that notice within 10 business days of the suspension event and a further 10 business days to institute remedial action is a more than adequate timeframe for the access seeker to obtain interlocutory relief. Any extension on this timeframe is imposing an unfair burden and risk on the access provider and is contrary to LTIEU. It is also likely to require the access provider to extend its***

***security coverage to protect itself against the additional risk which is, in Telstra's view, a less efficient remedy.***

H.4 If:

(a) ***[this clause should be included at H.7 below]*** ~~a party ceases to be a carrier or carriage service provider; or~~

(b) ***[this clause should be included at H.7 below]*** ~~a party cease to carry on business for a period of more than 10 consecutive Business Days without the prior written consent of the other party (such consent not to be unreasonably withheld); or~~

(c) in the case of the access seeker, any of the reasonable grounds specified in subsection 152AR(9) of the TPA apply; or

(d) a party breaches a material obligation under this agreement or three or more obligations which collectively have a material impact on the access provider and:

(i) that breach or those breaches materially impair(s) or is/are likely to materially impair the ability of the other party to deliver Listed Carriage Services to its customers; and

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

(iii) the other party fails to institute remedial action as specified in the Breach Notice within 10~~20~~ Business Days after receiving the Breach Notice (in this clause H.4, the "**Remedy Period**"),

the other party may terminate all or any part of this agreement by written notice given to the first mentioned party ~~within 20 Business Days after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be)~~.

***See above arguments regarding multiple breaches and the time periods for rectification.***

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

…

***The following additional matters should be included at H.7:***

(i) the other party breaches a term or condition of a security provided under a Security; or

(j) the other party ceases to be a carrier or a carriage service provider; or

(k) the other party ceases to carry on business for a period of more than 10 consecutive Business Days without the prior written consent of the Notifying Party; or

~~(i)~~(j) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

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

***H.9 should be made subject to any early cancellation or termination charges that the access seeker has agreed to pay.***

## Annexure B Communications Alliance Ltd, ULLS Migration Processes Progress Report June 2008

COMMUNICATIONS ALLIANCE LTD

# ULLS MIGRATION PROCESSES
# PROGRESS REPORT
# JUNE 2008

# TABLE OF CONTENTS

**ULLS MIGRATION ROUNDTABLE PROGRESS REPORT SUMMARY ..... 2**

**LSS – ULLS MIGRATION ROUNDTABLE INPUT ..... 5**

**Part 1: Why is LSS to ULLS migration being rejected as a complex service? ..... 7**

Physical Cable Set Up: LSS and ULL ..... 7
Cable recording and assignment ..... 9
Workforce Impacts ..... 10
System impacts ..... 10
Billing impacts. ..... 11

**Part 2: What is the level of demand for transfers from LSS to ULLS and what level of demand is sufficient to develop changes to processes and systems? ..... 12**

**Part 3: Possible Solutions (LSS to ULL only) ..... 15**

Scenario 1: LSS to ULL; same acquirer ..... 15
Scenario 2: LSS to ULL; different acquirer ..... 16
Scenario 3: LSS to ULL, multiple services, same acquirer ..... 17
Scenario 4. LSS to ULL, multiple services, different acquirer ..... 17

**Part 4: ULLS to LSS migration and Mass Network Migration ..... 18**

ULLS to LSS migration ..... 18
Mass Network Migration ..... 18

**Part 5: Other Relevant Information ..... 19**

Improvements in the current processes can be made by; ..... 19
Participants in the Roundtable were ..... 20

# TABLE OF FIGURES

Figure 1: Spectrum Sharing Service Network Topology: ..... 8
Figure 2: Unconditioned Local Loop Network Topology ..... 8
Figure 3 Example of Standard PSTN cable record array. ..... 9
Figure 4: Introduction of LSS to Standard PSTN Service ..... 9
Figure 5: Cancellation of LSS ..... 9
Figure 6: ULL where LSS is Present (same pair) ..... 9
Figure 7: LSS to ULL System Impacts ..... 10

## ULLS MIGRATION ROUNDTABLE PROGRESS REPORT SUMMARY

In February 2008, the ACCC wrote to Communications Alliance regarding the need for industry agreed processes for Unconditioned Local Loop Service (ULLS) migrations, in particular Line Sharing Service (LSS) to ULLS. The letter from ACCC went on to state that:

- the lack of migration processes and safeguards may create uncertainty and risk for access seekers wishing to transition to ULLS based supply;
- that the ACCC has received representations about the current lack of industry agreed ULLS migration processes, including
  - LSS to ULLS;
  - ULLS to LSS, and
  - Managed network migrations.
- That the ACCC considers that these are matters that Communications Alliance should examine as a matter of urgency.
- That these processes should be technology neutral.
- That Communications Alliance is requested to seek to address the current lack of industry agreed migration processes by the end of August with a progress report to the ACCC by the end of May;

In response, Communications Alliance formed the ULLS Migration Roundtable to investigate the matters raised by the ACCC, with representatives invited from Communications Alliance membership. This roundtable met 5 times between 17th March and 20 May 2008.

The Roundtable's scope was limited to the matters raised by the ACCC in its letter of February 2008. Some of the findings of the Roundtable may directly or peripherally apply to other inter carrier transactions that are not within the scope of this Roundtable. Where a finding may apply to an 'out of scope' inter carrier transaction, the finding has been documented due to its relevance to 'in scope' inter carrier transactions.

The Roundtable was not constrained by procedural rules that would normally apply to a Communications Alliance Working Group, adopting instead a more open approach so as to facilitate discussion and discovery. Accordingly, this progress report represents a majority rather than consensus view.

This report is the progress report requested by the ACCC, and whilst it deals primarily with the matter of the migration of LSS to ULLS, other matters raised by the ACCC have been addressed.

The Communications Alliance Roundtable finds that:

With regards to LSS to ULLS migration;

- Migration processes do exist for the migration of LSS to ULLS. These processes first require the dismantling of the LSS prior to the establishment of the ULLS.
- There is no uncertainty or risk over the LSS – ULLS process. The process appears to be understood and utilized by Industry.

- The End User's Standard Telephone Service and Rights of Use are protected during the dismantling of LSS and establishment of ULLS.
- That the presence of LSS is one of 100 features that may cause a ULLS order to be initially rejected as a service that has a complex feature present.
- That in migrating from LSS to ULLS, an End User will have a period of time where they are not able to access a broadband service from the copper pair servicing their Standard Telephone Service.
- That where an acquirer is migrating LSS from a third party to ULLS on its own network, the current process requires the End User to contact its LSS provider to cancel the LSS. The Roundtable felt that the involvement of the End User was an unnecessary step that did nothing to assist the timeliness of the migration, or create a reasonable opportunity for the migration to proceed in a controlled or managed manner. The Roundtable noted that this matter was under review by a Communications Alliance Working Group reviewing the ULLS Ordering, Provisioning and Transfer Code. No further action will be taken on this matter until the Working Group has concluded its review.
- That acquiring providers were experiencing significant delays where a complex feature was present on a service they wished to provision ULLS on. Where an order is rejected because of the presence of a complex feature, the acquiring provider is unable to determine what complex feature is present. This is largely caused by existing Privacy Principles which currently prevent the gaining acquirer from accessing relevant information prior to placing a ULLS order, or after an order is rejected. The acquirer has to rely on the End User to provide the information. In many cases, the End User is simply not able to do this.
- The development of a single process for the migration of LSS to ULLS will be a costly and time consuming activity, and is unlikely to return the investment required to develop such a process before the demand for such a service has either been substantially met, or has declined significantly.
- That the demand for a LSS to ULLS single process is not substantiated. Although Roundtable members could hypothesize as to the potential demand, none of the member organizations had any plans to migrate their entire LSS base to ULLS, or could provide data that would substantiate any particular demand level.
- That demand for LSS was likely to peak in July 2009 and then decline, with negative growth forecasted from that point.

With regards to ULLS to LSS migration:

- That no demand for such a service currently exists. None of the Roundtable members saw a need for such a service.
- If such a service were required, it is unlikely that the level of demand would substantiate the building of a process to manage the transaction.

With regards to Managed Network Migrations:

- Processes currently exist for the mass network migration of Telstra Wholesale Resale xDSL services to ULL.

- That the demand for the managed network migration process for the migration of Telstra Wholesale Resale xDSL services to ULL is declining significantly.
- That as no organization had any plans to mass migrate LSS to ULLS, there was no requirement for such a process.
- That industry has considerable experience in conducting mass migrations, and can, if and when required, co operatively create such processes to meet any particular requirement.
- The Roundtable believes that improvements to the current processes can be made by;
- Further automation of acquirers provisioning systems;
- The development of industry processes to remove the involvement of the End User in circumstances where the ULLS acquirer is different from the LSS supplier.
- The development of industry systems and processes to allow acquirers to accurately determine End User service configuration, and address the presence of a complex feature on the service prior to the submission of a ULLS order.

The Roundtable has also noted a more general requirement for the streamlining of cross platform churn, transfer and migration processes.

## LSS – ULLS MIGRATION ROUNDTABLE INPUT

In February 2008, the ACCC wrote to Comms Alliance[1] regarding the need for industry agreed processes for Unconditioned Local Loop Service (ULLS) migrations, in particular Line Sharing Service (LSS) to ULLS.

The letter from ACCC went on to state that:

- the lack of migration processes and safeguards may create uncertainty and risk for access seekers wishing to transition to ULLS based supply;
- that the ACCC has received representations about the current lack of industry agreed ULLS migration processes, including
- LSS to ULLS;
- ULLS to LSS, and
- Managed network migrations.
- That the ACCC considers that these are matters that Comms Alliance should examine as a matter of urgency.
- That Comms Alliance is requested to seek to address the current lack of industry agreed migration processes by the end of August with a progress report to the ACCC by the end of May;
- That these processes should be technology neutral.

In response, Comms Alliance formed the ULLS Migration Roundtable, with representatives invited from Comms Alliance membership (List of invitees and participants at Part 5). This roundtable first met on 17th March 2008.

ULLS provisioning, ordering and transfers are provided for under the ACIF C569:2005 Unconditioned Local Loop Service - Ordering, Provisioning and Customer Transfer (the Code). The objectives of this Code are to establish operational principles which will enable an access seeker to be supplied with a ULLS to provide content and or carriage service to End Users, and to set out the principles for the implementation and operation of ULLS in accordance with the Trade Practices Act 1994 and the ACCC Declaration of Local Telecommunications Services.[2]

The Code defines any service that is not a simple telephone service as a complex service. Telstra has a list of ULLS complex products [3]. This list of approximately 100 features available on a Standard Telephone Service ( STS) includes LSS, some Message Bank services, Hunt Groups, CVPN services, and private coin phone services, amongst others The presence of any one of these features will result in a ULLS order being rejected as complex. Once the complex feature is removed, the ULLS order will typically proceed.

LSS is a service provided over ULLS, allowing the End User to source their Plain Old Telephone Service (POTS) from one supplier, whilst obtaining their broadband service from another. This is achieved by 'splitting' the spectrum available over the copper pair

[1] Letter from ACCC 25 February 2008 Unconditioned Local Loop Service migration processes.

[2] Source: ACIF C569:2005 Unconditioned Local Loop Service - Ordering, Provisioning and Customer Transfer

[3] Telstra ULL Complex Product List: http://telstrawholesale.com//products/data/unconditioned-local-loop.htm

servicing the End User. The lower spectrum provides the standard telephone service and the higher spectrum provides the broadband service.

At its first meeting, the Roundtable determined that whilst there were a number of matters that it could address itself to within its scope, the most pressing issue for most participants was the migration of services from LSS to ULLS and that this would be the immediate focus for the Roundtable.

Stakeholders identified two key issues with the current industry processes for the migration of LSS to ULLS:

- The classification of LSS as a complex service and the effect this classification has on the migration of a LSS service to ULL.
- A general industry issue of streamlining cross platform churn processes.

Further discussion on these two issues raised three main questions, with a number of related sub-questions:

- Why is LSS to ULLS migration being rejected as a complex service?
  - Why is LSS classified as a complex service?
  - Can the classification of the LSS be changed or removed?
  - If the classification of the LSS can be changed or removed, what is the timeframe to remove/change the classification?
- What is the level of demand for transfers from LSS to ULLS?
  - What is the existing demand for transfers from LSS to ULLS?
  - What is the forecast demand – with no change to existing processes?
  - What is the forecast demand – with a new process that streamlines the transfer of a LSS to ULLS?
- What level of demand is sufficient to develop changes to processes and systems?

This report investigates and documents 5 specific matters;

- Part 1: Why is LSS to ULLS migration being rejected as a complex service?
- Part 2: What is the level of demand for transfers from LSS to ULLS and what level of demand is sufficient to develop changes to processes and systems?
- Part 3: Possible Solutions
- Part 4: ULLS to LSS/DSL migration and Mass Network Migration
- Part 5:Other Relevant Information

## Part 1: Why is LSS to ULLS migration being rejected as a complex service?

LSS is considered a complex service by Telstra for a number of reasons;

- Physical cable set-up
- Cable recording and assignment
- Workforce impacts
- System impacts
- Volume impacts
- Billing impacts.

Each of these is examined below.

As noted in the Background, the presence of LSS is 1 of 100 features that may result in a ULLS order being rejected as a complex service.

**Physical Cable Set Up: LSS and ULL**

Figure 1 illustrates the physical cable topology for an LSS service.

The "C-Pair" carries both high and low spectrum from the End User. The "X-Pair" carries the low spectrum (voice) back into the Telstra network, allowing voice calls to originate and terminate.

Removal of the "C-Pair" jumper or tie cable renders the End User service inactive.

Removal of the "X-Pair" tie cable or jumper renders the voice service inactive. If the acquirer were in this circumstance to terminate the voice calls from the End User, there is no path for voice calls to terminate on the End Users CPE.

Note that the "X-Pair" tie cable carries voltage. Telstra advises that in trials conducted to create a ULL by simply remove the Telstra "X-Pair "jumper, the voltage in the tie cable interferes with the remaining services.

Figure 2 illustrates the physical cable topology for a ULL service.

Note that there is no "X-Pair". High and low spectrum is carried via the "C-Pair" to the acquirer for their management.

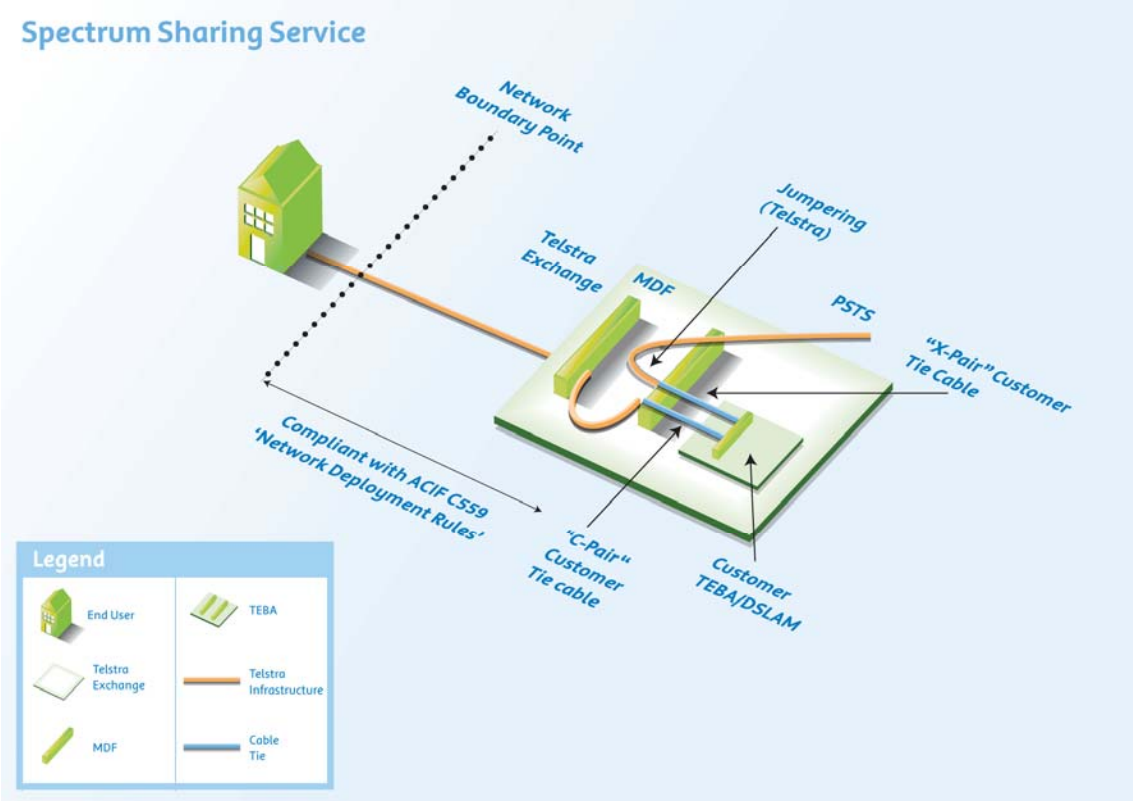


**Figure 1: Spectrum Sharing Service Network Topology:**

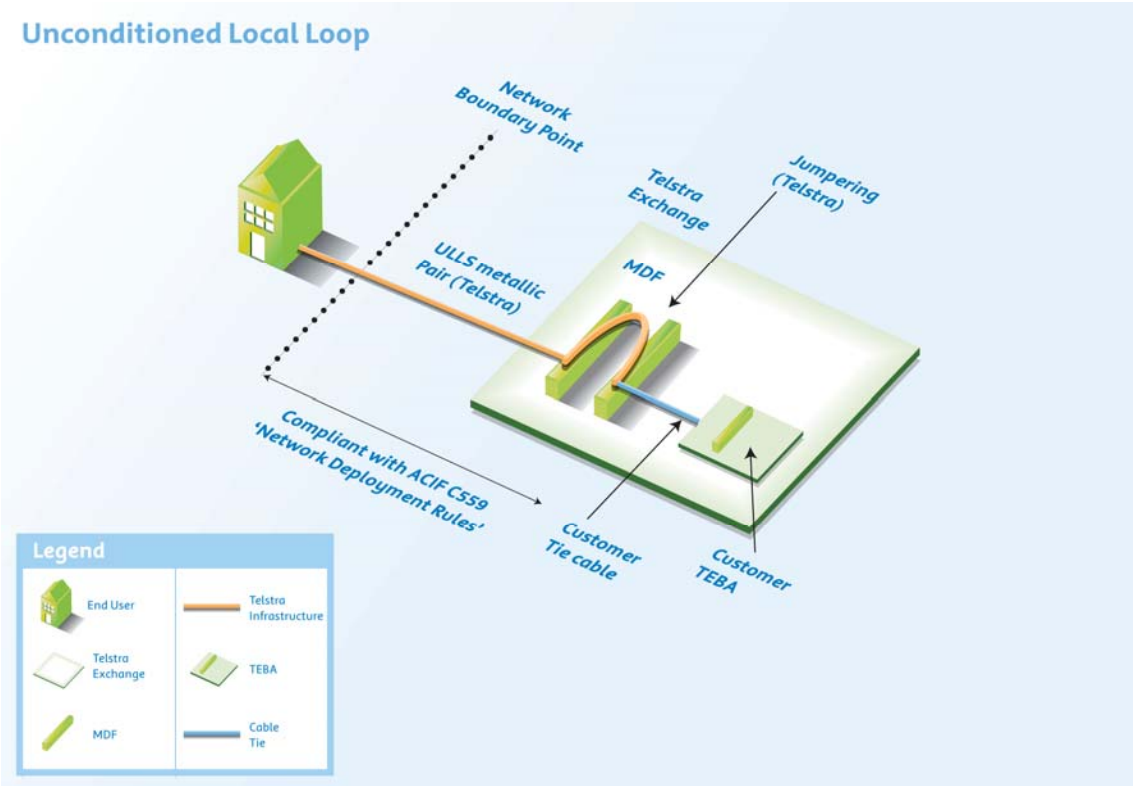


**Figure 2: Unconditioned Local Loop Network Topology**

**Cable recording and assignment**

Cable record complexity is best described by examining the cable record array, and what occurs to these records in a number of scenarios.

Figure 3 below illustrates a standard PSTN Cable Record before an LSS order is processed.

| Standard cable record array for PSTN | | |
|---|---|---|
| | F | 0298765432 |
| | L | NSYK MOSM13L1361387 |
| | M | MOSM01 38 2046 |
| | D | MOSM P14 0 216 |

**Figure 3 Example of Standard PSTN cable record array.**

Figure 4 below illustrates a Cable Record after an LSS service is provisioned. Note the addition of 2 records. (Highlighted). The first additional record refers to the "X-Pair, and the second additional record refers to the C-Pair" (see also Figure 1).


**Figure 4: Introduction of LSS to Standard PSTN Service**

Figure 5 below illustrates a Cable Record after an order to cancel LSS is processed. After the order is received, but is in a Pending state, the two G records remain in place. The cancellation order triggers the removal of the jumpers, returning the service to a standard PSTN service, once completion of the order is processed.

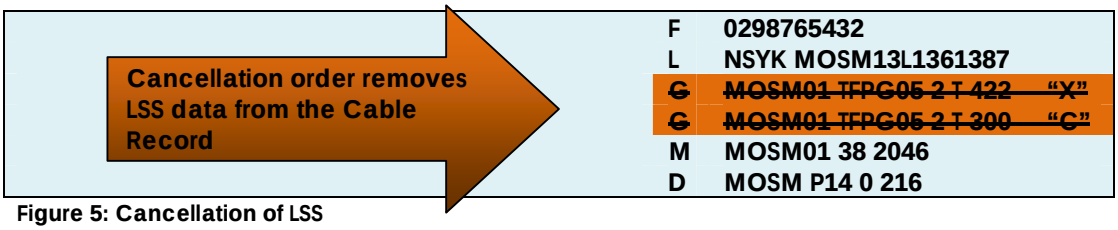


**Figure 5: Cancellation of LSS**

When a ULL order is received for a service that has LSS present, (same pair) the ULL order will reject because the requested plant (the "C –Pair) is already in use. This is illustrated in figure 6 below.

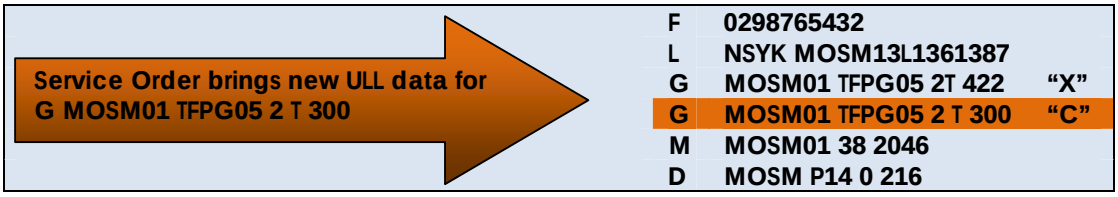


**Figure 6: ULL where LSS is Present (same pair)**

There is a further case where a different pair is used for the same End User. This would also fail, because the "C-Pair" path is replaced but the "X-Pair" path is maintained, triggering no technical work, effecting no change at the exchange and creating an invalid cable record.

From the above, it can be seen that currently the only way to migrate from LSS to ULL is to first take down the LSS service to free up the plant, and then build the ULL. Note that both the ULL and LNP codes recognise that complex services require dismantling prior to the relevant request being confirmed. Checks for complex services occur prior to Service Qualification.

**Workforce Impacts**

Every change to the cable ties and jumpers within the exchange requires the deployment of technicians to complete the work.

Where a LSS is taken down to be replaced by a ULL service, current processes require two exchange visits. The first visit removes the LSS; the second visit builds the ULL. Both activities cannot be done at the same time as each activity is processed separately so that cable assignment can be managed. Cable records to support the ULL service cannot be assigned until after the LSS order is processed and closed.

**System impacts**

Migration from LSS to ULL impacts a number of systems. Figure 7 below provides an overview of the systems an order would pass through, and how each of these systems would be impacted by a change to provide migration from LSS to ULL in a single order.

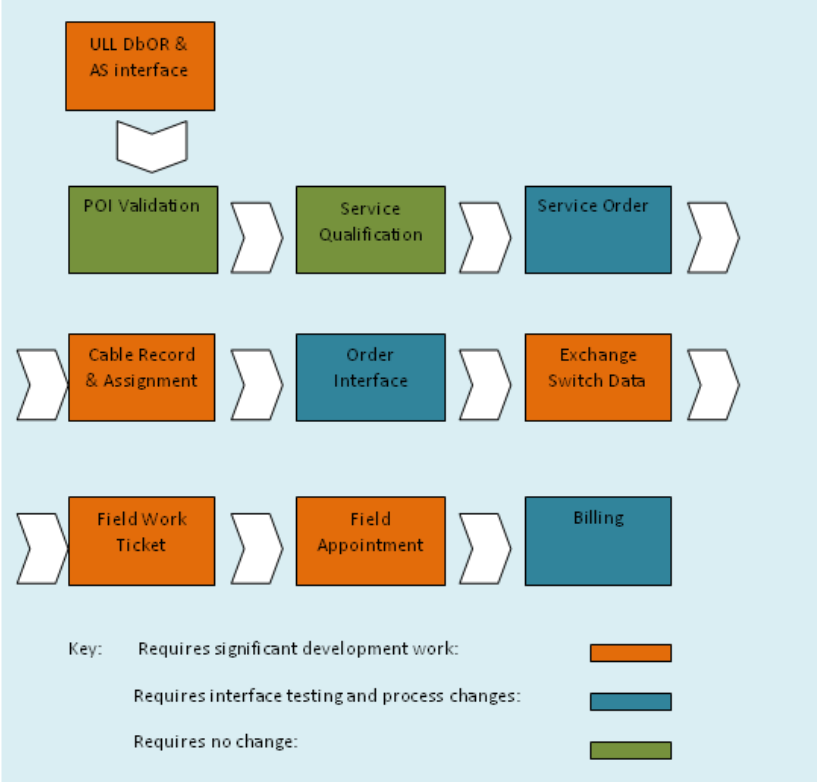


**Figure 7: LSS to ULL System Impacts**

There are four areas that require significant development work to enable a single order process to migrate LSS to ULLS.

**Billing impacts.**

Changes to the current processes for cancelling LSS and establishing ULL necessarily require some changes to billing processes and applicable charges. The primary changes required to facilitate a single order migration from LSS to ULL are;

- LSS cancellation charges must be suppressed. Currently, a charge is applied for the cancellation of an LSS service. In a migration process from LSS to ULL there is a sound argument for these charges to not be applied.
- ULL connection charges capture the C-Pair field work required. In a single process migration from LSS to ULL a review of the ULL connection charge will be required to ensure that this activity is not charged twice.
- When migrating from LSS to ULL, additional work on the X-Pair is not currently covered in any charges applied.
- Manual adjustments could be used to resolve any billing matters; however, the use of manual adjustments on an ongoing basis is not generally an efficient or effective way to operate. Some of these charges are the subject of various ACCC instruments. There would need to be agreement and negotiation around what charges apply,

## Part 2: What is the level of demand for transfers from LSS to ULLS and what level of demand is sufficient to develop changes to processes and systems?

The Australian Bureau of Statistics reports [4] that as at December 2007, there were 3.8mill DSL subscribers in Australia. Approximately half of these services are provided directly by Telstra, the other services are provided under various wholesale relationships such as ULLS, LSS, Telstra Rebill, and direct connect services with other Carriers.

As at April 2008, there are approximately 485,000 ULL services and 416,000 LSS services[5]. Growth rates for ULL over the last year averaged at 6.7% per month, and for LSS 3.5% per month (growth is calculated as new services as a percentage of previous measurement period volume).

Notwithstanding that comparing the ABS statistics (which measure subscribers) and the Telstra data (which measures Services in Operation) is imperfect, this available data indicates that approximately 10% of DSL subscribers are provisioned using LSS.

The LSS growth rate is declining as industry participants increasingly use ULL to provide services to End Users. Extrapolating data provided in confidence by Telstra, and assuming that no event occurs to influence current trends, LSS will peak in June 2009, at approximately 522,000 services. By June 2010, it is expected that the number of LSS services will have declined to less than 500,000, and will continue to decline. This means that the greatest number of LSS services that can be migrated to ULL is approximately 522,000 services, assuming no other event influences this.

ULL services continue a strong growth. A historical peak in August 2007 of 9.3% has not been sustained, however current growth is still in excess of 5%, and has shown month on month growth this Calender year. Expectation is that, absent any other factors, this growth rate will continue. This means that a proportion of approx 13% and growing of DSL subscribers are provisioned using ULL.

The reject rate for ULL orders where LSS is present varies between acquirers, ranging from 0.1% to 1.7%.[6] per month, calculated as the reject rate / total ULL requests submitted. This is a surprisingly low average percentage of 0.4%, and would tend to indicate that either;

- Very few ULL orders are placed where LSS is present.; or
- As it is not immediately apparent for the ULL acquirer to know whether the service has LSS with a third party, the level of discrimination that the gaining acquirer may exercise is likely to be a significant factor;7 or
- There are two markets in operation, one that significantly seeks out LSS solutions, and another that actively seeks out a ULL based solution. The former market preferring to segment their services for either quality or price, the latter more focused on convenience.

---

[4] 8153.0 - Internet Activity, Australia, Dec 2007 Latest ISSUE Released at 11:30 AM (CANBERRA TIME) 24/04/2008

[5] Source: Telstra

[6] Telstra notes that two providers in similar markets shared the extreme ends of this occurrence. Further In Confidence information available from Telstra,

[7] Telstra notes In Confidence, that the most active combined LSS and ULLS player showed 4.4% of complex service rejects were where their own LSS was present – April 08 data

The question of demand for LSS to ULL migration has still not been adequately addressed. Figures ranging from 20% of LSS to 5% of LSS per annum have been mentioned, but there is no empirical data that supports either end of this spectrum. Looking at other port, transfer and churn rates would suggest that demand would be at the lower end of the scale;

- PSTN to In Use ULL - 0.22% per month (completed ULL services/ Total PSTN services)
- DSL Resale Transfer between ISP's - 0.12%8 per month (total months transfers/total DSL resale services)
- Fixed Rebill churn - 0.62% (total churns/total PSTN)
- MNP - 0.46% per month (total ports/total number of services.

For every $1,000,000 spent on reengineering systems and processes to accommodate a single order LSS to ULL migration process, at 50% migration factor, recovery would cost $3.80 per order, and at a 5% migration factor, recovery would cost $20 per order. A Hypothetical investment recovery model is below;

| *$1,000,000* | *YR1* | *YR2* |
|---|---|---|
| | *2009* | *2010* |
| *SIOs* | *552000* | *490000* *(assumes a figure below 500000)* |
| *Churn (5%)* | *27600* | *24500* |
| *Cumulative* | ***27600*** | ***52100*** |
| *Cost per unit* | *$36* | *$19* |

**Figure 8: Hypothetical model for investment recovery**

Utilising the lower end of the forecast (5%) and with reference to the greatest number of LSS services forecasted to be in use, the number of LSS to be migrated is 52,100 services. For every $1mill spent in development work, an additional $20 would need to be recovered from every migration from LSS to ULLS.

By the same reasoning, the potential migration demand for ULL to LSS/DSL is 135,600 services over the same period, assuming the ULL growth rate continues.

Note that these numbers do not include relocations. Relocations by their nature tend to occur where the End User remains with the same service provider after the relocation as they had prior to the relocation. Also, where relocation occurs, the physical path to the new location will be different to the previous location and hence be provisioned as a cancellation and a new service. One Roundtable participant suggested that relocations could account for 10% of changes to a service.

It is difficult to predict what the cost of developing changes to the existing processes to support a single order LSS/ULLS migration would be, indeed, determining with any certainty what the developments costs were likely to be would in itself cost a significant amount.

Given other developments occurring in the industry at present, the time to develop and implement is also of significance, since there is little value in developing a new process if the need for that new process is likely to be in decline by the time that the process is deployed. Information from Telstra indicates a minimum of 6 to 8 months for

[8] Telstra considers that this figure is the most pertinent comparison, since it represents actual broadband transfers.

development, with additional time required for final in service testing and deployment. The forecasted growth rate of LSS shows a negative growth from approximately July 2009.

For similar reasons, and even though there is a stronger mathematical case, there is little value in developing a new industry process for enabling DSL customer movement by transferring upper spectrum from ULL at this time.

## Part 3: Possible Solutions (LSS to ULL only)

During the second ULL Roundtable meeting[9], Telstra noted that one industry participant employs an alternate process to manage the migration of LSS to ULL.

To examine this in context, each of the potential migration possibilities needs to be examined. Note that Telstra does not use LSS, therefore, the scenario Telstra LSS to different acquirer ULL does not exist. Note that these scenarios apply equally to all acquirers, including Telstra.

There are 4 scenarios;

- Scenario 1. LSS to ULL, single service, same acquirer;
- Scenario 2. LSS to ULL, single service, different acquirer;
- Scenario 3. LSS to ULL, multiple services, same acquirer, and
- Scenario 4. LSS to ULL, multiple services, different acquirer.

**Scenario 1: LSS to ULL; same acquirer**

In this scenario, the acquirer is providing LSS to its End User, and wishes to migrate the service to ULL. The acquirer would follow the steps below;

- Submit order to cancel LSS.
  - 3 day lead time.
  - Service returns to Standard PSTN once LSS is removed.
  - LSS cancellation is confirmed.
- Submit "In Use" ULL order.
  - 5 to 30 day lead time, lead time controlled by acquirer.

Confirmation of the cancellation of the LSS service is available by polling LOLO/LOLIG. The submission of the "In Use" ULL order can be triggered by a process in the acquirers systems, thus removing the need for manual polling of LOLO/LOLIG.
In this scenario;

- The service number remains the same;
- The End User does not lose their line;
- The cable pair remains the same, and
- The PSTN service, upon LSS cancellation, returns to the previous owner.

Operational experience with one acquirer indicates that the average time taken after LSS cancellation to connect ULL is 12 calendar days, and as few as 9 calendar days.10

[9] Comms Alliance Notes from Meeting 2
[10] Source: Confidential Telstra collected Feb 2008

**Scenario 2: LSS to ULL; different acquirer**

This scenario is more complex, since the ULL acquirer has no immediate visibility of the status of the End User's line, or control over the cancellation of the LSS. To improve the efficiency of this process;

- Revise information gathering at point of sale;
  - Does the End User currently have internet?
  - Does the End User currently have dial up or another type of internet?
  - Does the End User currently have DSL?
  - Who is the End User's current internet provider?
  - Does the End User receive separate bills for internet and voice?

If the End User has dial up, then it is a reasonable assumption that LSS does not exist on the service. If the End User has Internet, does not have dial up, and the service qualification does not show ULL, then it's likely that the internet is provided via LSS. When this is determined the AS has to discover if there are other complex services precluding ULLS and instruct the end user to have those removed prior to a ULLS order being accepted. Gathering additional information so that the order for ULL can be more efficiently processed and reduce significantly the propensity for rejected orders, appears to be a reasonable step to take, however, it assumes that the End User has an in depth knowledge and understanding of their existing service

In this scenario, there is no industry process for the cancellation of LSS by a different acquirer. Current practice is that the End User is asked to contact their current provider and cancel the service, and then advise the new acquirer when this has been completed. This is an extremely inefficient process and places a burden of activity and responsibility on the End User that is unreasonable. From the acquirers' perspective, there is no control over time lines, no visibility that the End User has actually done anything, and no visibility that a LSS cancellation order has been submitted, and with what timeline.

Under existing industry processes, Telstra cannot cancel the LSS on the request of a third party, and in any event, the third party would have insufficient information to place such an order. The logical approach therefore, is to create a separate process to manage the exchange of information between the gaining acquirer and loosing supplier such that the activity currently undertaken by the End User is conducted between the two parties. Industry has experience in, and regularly migrates services between participants. The addition of a process to manage the release of LSS ought not to tax industry too much.

The Comms Alliance ORP Working Group 36 is currently reviewing ACIF C569 ULLS Ordering Provisioning and Customer Transfer Code.[11] The issue of End User involvement in the cancellation of LSS prior to the provisioning of ULLS in this scenario is being addressed within this review. Working Group 36 is also reviewing a number of issues that impact on Scenario 2, including information provision for complex rejects.

[11] ORP Working Group 36(ORP/WG36) Minutes Meeting 3 7 May 2008

**Scenario 3: LSS to ULL, multiple services, same acquirer**

The migration of a number of LSS services to ULL for a number of End Users needs to produce separate orders for each LSS cancellation and "In Use" ULL. As each service migration requires two distinct activities (cancellation of LSS, creation of ULL), and each is likely to be at different exchanges, and need to respond to different End User dependant time lines, it is difficult to see how a single order mass migration process could easily or safely be arrived at. If there is an area for improvement, it is in the planning and project managing of the activities between the acquirer and Telstra. If a mass migration is to be undertaken, it should be done as a project with the full involvement of all parties. Mass network migration is addressed further in this paper.

**Scenario 4. LSS to ULL, multiple services, different acquirer**

The concept of a mass migration where the supplier of the LSS and the new provider of the ULL services are different is difficult to envisage. Whilst this scenario could occur in the event of a merger or acquisition, it is unlikely to occur in the normal course of business and therefore would be managed as a distinct project by all parties.

If ULL to LSS/DSL was considered in equal detail for the four scenarios above many similar issues would exist for the gaining party.

## Part 4: ULLS to LSS migration and Mass Network Migration

### ULLS to LSS migration

The Roundtable concluded at its first meeting that since there were few, if any, instances of a migration from ULLS to LSS, and the industry trend was to either use ULLS as first choice, or to migrate from LSS to ULLS, there was no requirement for a process to migrate from ULLS to LSS.

It was pointed out that there was no process for providers to acquire the upper spectrum from a ULL with an access seeker, even though this met the LSS declaration and had potentially more and increasing demand than LSS to ULL.

### Mass Network Migration

Mass migration of services is addressed above in Scenario's 3 and 4.

Scenario 4 was considered an unlikely event, and if it should occur, then it should be managed as a distinct project.

Whilst Scenario 3 would appear to be a real possibility, none of the Roundtable participants knew of any plans to conduct such an activity.

Telstra advised that a mass network migration process had been used to migrate from Telstra Wholesale DSL to acquirers ULLS (ULL MNM). Information provided to ORP Working Group 36 [12] was that;

- ULL MNM demand and participation was limited to 2 acquirers;
- That 1 of the acquirers had no current issues with the process;
- That the last 6 months ULL MNM completions had fallen 37.7% from the previous 6 months; and
- That forecast demand over the next 3 months was for completions to fall by a further 50% compared to the current month for both the ULL MNM acquirers.

The consensus of the Roundtable was that no formal MNM processes were required for LSS – ULLS migration for the reasons outlined in Scenario 3 and 4. It was noted that industry had considerable operational experience in conducting mass migrations that it could rely upon in the event that a requirement to conduct a mass LSS – ULLS migration should arise.

[12] ORP Working Group 36(ORP/WG36) Minutes Meeting 3 7 May 2008

## Part 5: Other Relevant Information

The migration of an LSS service to ULL is undoubtedly complex, both from a physical infrastructure and supporting systems and process view point.

It appears unlikely that the investment needed to make the necessary changes to support a single order LSS to ULL migration process would ever be recovered. This is especially important when considering that;

- If, as would appear reasonable, the growth rate of LSS declines into negative growth, any single order migration process would have a short life span as LSS volumes would be in decline by the time any new systems and processes were deployed.
- If there is a significant latent demand for LSS to ULL migration, and improved processes are created, this would hasten the demise of LSS in sufficient volumes to warrant a migration process. In other words, the higher the latent demand for LSS/ULLS migration, the quicker the rate of decline for LSS, and hence the life span for any new systems and processes would be shortened.
- Current uncertainty over the outcome of the Government's NBN proposals, such as who may be awarded the tender, what the time lines are, whether LSS and ULL survive any transition to NBN, impacts the value of any investment made in process and system changes.
- End User's do not choose LSS as a solution. End User's choose a Service Provider based on either price or service. The Service Provider determines what mechanism to use to provide the End User with the service. To this end, it may be useful to ensure that the End User is fully aware of the implications of a service that is based on LSS, especially any delays that may be incurred in migrating to another Service Provider. A similar approach is used where VOIP services are provided, to ensure that the End User is aware of any limitations and future implications associated with the service.

**Improvements in the current processes can be made by;**

- further automation of acquirers systems to accommodate Scenario 1; and
- The development of industry processes to remove the End User from the LSS cancellation process in Scenario 2.
- The development of industry systems and processes to speed up and simplify the determination of an End User's service configuration , reducing downtime and delays caused by the presence of complex services. (Note that there are approximately 100 products and services that may deem a service complex).

In the first Roundtable meeting, stakeholders identified a general industry issue of streamlining cross platform churn processes. This matter has not been addressed by the Roundtable, as it was considered out of scope. Notwithstanding this, it is apparent that this matter is to a certain extent, responsible for churn, migration and transfer process issues.

Telstra has advised of an additional service qualification process due for release no earlier than July. Enhanced Service Qualification will assist acquirers with the qualification of street addresses. Order rejects for invalid addresses is currently the highest single reject reason.

ORP Working Group 36 is investigating other order reject reasons; including orders rejected as complex services. Orders rejected as complex services cause acquirers significant delay as the reject does not specify the reason for the reject. There are legal and privacy concerns regarding the release of information to third parties that may assist in resolving the complex service reject issue and these are under investigation.

**The following organisations were invited to participate in the Roundtable:**

Primus Telecommunications
SingTel Optus
AAPT/Powertel
NEC Australia
Agile/Internode
Soul Communications
TransACT Communications
Telstra

**Participants in the Roundtable were**;

| **Name** | **Organisation** |
|---|---|
| John Green | Chair |
| Michael Edwards | AAPT/Powertel |
| Amy Beazley | AAPT/Powertel |
| Josh Faulks | Communications Alliance |
| Margaret Fleming | Communications Alliance |
| James Duck | Communications Alliance |
| Simon Hackett | Internode |
| Rod Westland | Internode |
| Richard McCarthy | NEXTep Broadband/ NEC Australia |
| David Thompson | SingTel Optus |
| Anna Gum Gee | SingTel Optus |
| Ian Porter | SingTel Optus |
| Melina Rohan | SingTel Optus |
| Nigel Lee | Primus Telecoms |
| Warwick Broxom | Telstra |
| Dino Georgiou | Telstra |
| Jim Coburn | Telstra |
| Craig McAinsh | Telstra |

Published by:
COMMUNICATIONS
ALLIANCE LTD

Level 9
32 Walker Street
North Sydney
NSW 2060 Australia

Correspondence
PO Box 444
Milsons Point
NSW 1565

T 61 2 9959 9111
F 61 2 9954 6136
TTY 61 2 9923 1911
E info@commsalliance.com.au
www.commsalliance.com.au
ABN 56 078 026 507