



Resolution of telecommunications access disputes – a guide – May 2003

Submission by AAPT Ltd



Introduction

AAPT welcomes the opportunity to comment on the Commission's May 2003 revision of *Resolution of telecommunications access disputes – a guide*. This submission only addresses those aspects of the guide that have been amended in this revision. AAPT is particularly conscious of the policy objective of ensuring that future access disputes can be resolved speedily and that the industry experiences with disputes to date not be repeated. AAPT is also conscious that the guide is not binding on the processes of the Commission, but that access disputes will be resolved more readily the more complete the guide can be in its operation.

The submission discusses each of the reforms individually in the order referred to in the Commission's *Overview of proposed revisions to Resolution of telecommunication access disputes – a guide*.

Guideline on backdating of arbitration determinations

AAPT supports the concept of providing for interest on the payments made as a consequence of final determinations. In particular, AAPT supports the proposal to treat such payments as a flow over the period of the dispute rather than a lump sum.

However, the Commission needs to be aware that the ability to accurately reprice the services over the period of time will be limited, and that the estimated flows will be approximations.

The more difficult question is the choice of the actual interest rate to be applied. While the Commission has foreshadowed a kind of opportunity cost approach, this may be extremely difficult to quantify. AAPT's experience of arbitrations and of delay makes the concept of a punitive interest rate appear attractive, especially as the cost to the access seeker of the uncertainty of its reported financial results is greater than it is on the access provider (for example, for the access seeker it could be the difference between reporting a profit or a loss). However, such an approach only creates new incentives for delay, or incentives for access seekers to oppose interim determinations. Consequently, AAPT does not support such an approach.

AAPT notes that the Commission's proposed model terms and conditions for core services includes provision for payment of interest at the resolution of billing disputes between the parties. AAPT proposes that where an interest rate has been agreed between the parties for the purpose of billing disputes, that rate of interest should be used for backdated access disputes.

Guidelines on deferral of an arbitration while considering an access undertaking

This provision of the 2002 Act was a matter on which AAPT commented extensively during passage of the Act. In our submission we identified that there are three bases on which terms of access can be established; by commercial agreement, by provisions of an accepted undertaking, or by arbitral determination. Of these it is only the third that can force the access provider to provide service on terms to which it has not agreed. As an arbitration is likely to result in an access price lower than the provider would otherwise agree to, it is likely to be the most unattractive to the provider.



Consequently, the incentive on an access provider unable to convince an access seeker of the reasonableness of its commercial offer is to use the process of lodging an undertaking to frustrate the access seeker. As identified above, delay is asymmetric on its effect on access seekers and access providers, and such delay is likely to result in the access seeker agreeing to terms less advantageous than would be achieved by seeing through the arbitral process. Again as identified above, financial penalties by way of punitive interest rates on backdating is not advocated as a solution to this problem – the need is for speedy resolution of disputes.

In the consideration of these matters in Chapter 9 of the Guide, the Commission identifies a number of circumstances in which the state of progression of the arbitration may determine whether the arbitration should proceed. AAPT contends that the Commission's consideration needs to progress beyond just the arbitration and consider the whole history of the dispute, and more specifically the question of whether the access provider could have offered the undertaking at an earlier point in the process. As the access seeker has been required to first negotiate with the access provider and some alternative dispute resolution process also been undertaken before the dispute is progressed by the Commission, a significant amount of work on resolving the dispute will have been exercised by both parties well before matters have been "substantively considered in the arbitration".

AAPT therefore requests that the Commission's consideration should have general regard to the timing of the undertaking. As the Commission indicates its view is "it is preferable for access undertakings to be given to it as early as possible". It is not improper for this to be a consideration in the decision on whether to suspend the arbitration, that is, if the Commission is satisfied that the access provider had been aware of the breakdown in negotiation, and had participated in unsuccessful alternative dispute resolution, and only provides the undertaking after the dispute is notified then the Commission should presume the access provider is providing the undertaking for delay unless it can satisfy the Commission as to why the undertaking could not have been provided earlier.

AAPT is also conscious that the new requirements for consideration of access undertakings and the time limits that apply are designed to facilitate speedy decision making. To that end AAPT welcomes the inclusion of procedures for consideration of undertakings in section 9.3.1 of the Guide. However, the guidelines seem to suggest that the access provider is merely required to provide the undertaking, that the Commission prepares a discussion paper and that all parties including the access provider make submissions. AAPT believes that the access provider should be required to lodge both the undertaking and their full reasons in support of the undertaking, and that only other parties be requested for submissions. This appears to be a more normal sequencing of the provision of evidence than the procedure outlined in the guide. This becomes more important where speedy consideration of the undertaking is required because of suspended arbitrations.

Model terms and conditions for core services

AAPT notes and accepts the Commission's discussion on the use of model terms and conditions in the resolution of access disputes, and the circumstances in which determinations might vary from these.

However, the benefit of the model terms and conditions may be lost if other parties are unaware of the Commission's decision in this regard. While the Commission has the power to publish determinations in whole or in part the discussion of this power in section 6.4.5 has not been updated to refer to cases where there are published model terms and conditions. Nor does section 7.3 identify when this will occur.



Either one or both of these sections needs to include a provision that where the Commission does determine a dispute where it has varied from the model terms and conditions then the Commission will at least publish so much of the determination as is necessary to inform access seekers of the variation from the model terms and conditions.

Conclusion

AAPT has no comments to make on other parts of the Guide. AAPT hopes that the Guide will facilitate resolution of disputes in the telecommunications industry. However, the amendments discussed above to the provisions for suspense of arbitrations, and on the consideration of undertakings, are essential if the desire to limit delay and constrain regulatory gaming are to be achieved.