



**Australian
Competition &
Consumer
Commission**

Our Ref: M2005/347
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23 March 2006

Ms Jacqueline Downes
Senior Associate
Allens Arthur Robinson
2 Chifley Square
Sydney NSW 2000

By facsimile: (02) 9230 5333

Dear Jacqui

Foxtel Digital Set Top Unit Special Access Undertaking: Request for further information

Pursuant to section 152CBB of the *Trade Practices Act 1974* (the Act), the Australian Competition and Consumer Commission ('ACCC') requests Foxtel Management Pty Ltd for and on behalf of the Foxtel Partnership and Foxtel Cable Television Pty Ltd ('Foxtel') to give the ACCC the following further information about Foxtel's special access undertaking ('SAU') given to the ACCC on 6 October 2005 under section 152CBA of the Act.

1. Can Foxtel subscribers currently view channel listings on the Foxtel EPG for channels that they are not subscribers to?
2. Schedule 10 of the Digital Access Agreement ('DAA') defines 'Operational Procedures' as 'FOXTEL's operating procedures manual as notified to the Access Seeker, which may be amended by Foxtel from time to time'. Foxtel's submission in support of the SAU states that under the DAA, Foxtel will provide access seekers with a copy of the Operational Procedures within 30 Business Days after the Commencement Date, and refers to clauses 4.5, 4.7(d), 8.1(a) and 12(e) of the DAA.¹ However, there appears to be no express obligation (nor specified timeframe) for Foxtel to provide the Operational Procedures to access seekers under the DAA.
 - (a) Has Foxtel prepared an Operational Procedures manual?

¹ Foxtel, Submission to ACCC, FOXTEL Special Access Undertaking (6 October 2005) p.27.



- (b) If Foxtel has not prepared such a manual, is Foxtel proposing to prepare a manual? If not, what are the reasons for not preparing a manual? If Foxtel is proposing to prepare a manual, what is the proposed time frame?
 - (c) If Foxtel has prepared such a manual, Foxtel is requested to provide to the ACCC a copy of the manual. (See paragraph 9 below. The ACCC is seeking a copy of the manual that can be made available to interested parties as part of the ACCC's assessment of the SAU).
 - (d) On what terms and conditions will the Operational Procedures be made available to access seekers?
3. Clause 6.2 (a) of the DAA states that Foxtel will publish the Modem Services Protocol as soon as practicable after the Execution Date. The ACCC understands that Foxtel has not published its Modem Services Protocol.
- (a) What are the reasons for Foxtel having not published its Modem Service Protocol?
 - (b) Under the terms and conditions of the DAA, can access seekers provide interactive services via use of a constant feed forward path and direct access to the Foxtel application streamer?
 - (c) As at the date of this request, how many of the current channels carried as part of the Foxtel digital pay television service include interactive content that uses a constant feed forward path?
4. (a) As at the date of this request, what proportion of Foxtel's Digital Set Top Units have a Modem installed?
- (b) Does Foxtel require all digital subscribers to connect the Modem to a return path as part of its Service Agreement?
5. (a) As at the date of this request, how many of the current channels carried as part of the Foxtel digital pay television service include interactive content that uses a return path?
- (b) Is this return path provided via cable or the PSTN network?
6. Foxtel states that it has included in its digital cost base an amount of \$280 million for cable and \$115 million for satellite (Foxtel submission, paragraph 7.2). It has included Attachments 8 to 11 to its submission in support of the SAU (PricewaterhouseCoopers reports) to demonstrate that there has been a more rigorous verification of the cost inputs, in support of the SAU and in response to statements by the Tribunal.

However, it is not clear in Attachments 8 to 11 how the amounts of \$280 million and \$115 million are derived. It is also not clear how the initial amount of \$858 million for cable (before being reduced to \$280 million) is derived.

Further, Foxtel states that the IBAC costs do not include brand marketing costs but only sales and marketing acquisition costs and retention marketing costs. It also states that non-branded marketing comprises 68 per cent of total marketing costs (Foxtel submission, paragraph 7.2).

- (a) How is the quantum of the initial \$858 million for cable, the reduced \$280 million for cable, and the \$115 million for satellite derived?
- (b) How do Attachments 8 to 11 support the statements made at paragraph 7.2 of Foxtel's submission that (i) IBAC costs do not include brand marketing costs but only sales and marketing acquisition costs and retention marketing costs; and (ii) non-branded marketing comprises 68 per cent of total marketing costs?

7. Foxtel states that for the value of franking credits or gamma, the value of 0.5 is no longer appropriate and the appropriate gamma is zero. Foxtel further states that 'while this does not change the WACC, which is a vanilla WACC, it will impact on the 'tax allowance' in Foxtel's Digital Access Pricing Model, and result in a higher Maximum Allowable Revenue (post tax) and a higher access price' (Foxtel submission, paragraph 7.4).

This statement appears to be inconsistent with paragraph 7.2.3 of Attachment 12 (PricewaterhouseCoopers report on Foxtel's Digital Rate Card RAPM) which assumes a gamma value of 0.5. It also appears to be inconsistent with paragraph 3.4 of Schedule 3 to the DAA, which assumes a gamma value of 0.5.

- (a) How will the use of a gamma value of zero result in a higher access price?
- (b) What gamma value is used to derive access prices in accordance with the SAU?

8. The DAA sets out 'excluded services', that is, services excluded from Foxtel's supply of digital set top unit services to access seekers (DAA paragraph 4.2). It seems reasonable to expect that access seekers should not share in the costs (i.e. all capital, operating and corporate overhead costs) associated with these excluded services as the access seekers do not acquire any benefit from the absence of these services.

It is unclear from Attachment 12 to Foxtel's submission (PricewaterhouseCoopers report on Foxtel's Digital Rate Card RAPM) that these costs are excluded from the base of shared costs that are used to calculate the Rate Cards for access seekers.

- (a) Are these costs excluded from the base of shared costs that are used to calculate the Rate Cards for access seekers?
- (b) If the costs are not excluded, what are the reasons for this approach?

9. In relation to the information provided by Foxtel in accordance with paragraphs 1-8 above, what parts of the information (if any) are confidential? In the event that Foxtel claims confidentiality in relation to part of the information, Foxtel should provide the ACCC with both a confidential and public version of the information; and establish a process for responding to any requests for access to the confidential information.

The information should be forwarded (in both hard and electronic format) to:

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Australian Competition and Consumer Commission
GPO Box 520J
MELBOURNE VIC 3000
Email: arek.gulbenkoglu@acc.gov.au
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In accordance with section 152CBC(6)(b) of the Act, a day during any part of which this request (or part of this request) remains unfilled, is disregarded in calculating the period within which the ACCC must make a decision about the SAU.

Should you have any questions regarding this request, please contact Arek Gulbenkoglu on (03) 9290 1892.

Yours sincerely



Michael Cosgrave
General Manager
Communications Group