



**ACCC Draft Report on the review of the declaration for the
Domestic Transmission Capacity Service**

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited

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1. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**).

The declaration for the Domestic Transmission Capacity Service (**DTCS**) is due to expire on 31 March 2014. Accordingly, the Australian Competition and Consumer Commission (**ACCC**) is holding a public inquiry relating to the declaration of the DTCS. The ACCC released a discussion paper: *An ACCC Discussion Paper reviewing the declaration for the Domestic Transmission Capacity Service (the Discussion Paper)*. The ACCC has considered submissions in response to the Discussion Paper and has released the *Draft Report on the review of the declaration for the Domestic Transmission Capacity Service (the Draft Decision)* which sets out the ACCC's preliminary views regarding the declaration of the DTCS. The ACCC is seeking submissions from interested stakeholders in response to the Draft Decision.

iiNet welcomes the ACCC's review of the DTCS declaration and the opportunity to provide a response to the Draft Report.

2. OVERVIEW OF SUBMISSION

If implemented as it currently stands, the Draft Decision will extend the DTCS declaration for a further five years. However, not all transmission routes will be subject to regulation and a large number will be de-regulated. The transmission routes that are subject to de-regulation will be determined by an application of the ACCC's revised competition criteria. These revised competition criteria are set out in section 3.4.2 of the Draft Decision (**the Competition Criteria**).

iiNet makes the following points in response to the Draft Decision:

- iiNet supports the declaration of the DTCS for a further five years.
- iiNet believes that it will only be in the long term interests of end users (**LTIE**) to de-regulate a transmission route between two Telstra exchanges if there is actual competition in respect of that route. Therefore the appropriate threshold for de-regulation of a particular route should be actual competition on that route. iiNet is concerned that the ACCC's application of the Competition Criteria as set out in the Draft Decision will lead to de-regulation of transmission routes in circumstances that fall short of this threshold.
- iiNet agrees that tail end transmission services should be regulated. However, iiNet believes that this regulation should apply to all tail end transmission services including where the tail end transmission service is part of a bundle.
- There is a minor drafting issue which could lead to tail end transmission services being inadvertently de-regulated in de-regulated metropolitan exchange service areas.
- As regards the means by which de-regulation of competitive transmission routes is delivered, iiNet is concerned that by using the DTCS service description as the vehicle for achieving de-regulation of competitive transmission routes, the ACCC is reducing the scope of an important tool that the legislature intended the ACCC to have in order to address obvious

and manifest problems. iiNet believes that given the nature of the Competition Criteria, de-regulation of competitive transmission routes is more appropriately delivered by means of a final access determination (FAD).

The remainder of this submission provides the basis for each of the above points.

3. THE DTCS SHOULD BE DECLARED FOR A FURTHER FIVE YEARS

The ACCC proposes to extend the declaration of the DTCS for a further five years. The ACCC has reached this conclusion in the context of the following facts:¹

- Transmission networks are generally capital intensive and require large sunk investments, which makes it economically inefficient to duplicate network infrastructure in some markets.
- Transmission networks underlie nearly all other telecommunications services and are an essential input for the supply of downstream retail and wholesale services.
- Transmission services play an essential role in allowing access seekers to achieve any-to-any connectivity which is critical if access seekers are to be able to provide downstream services in different locations.
- Transmission services will be required to carry traffic between the NBN points of interconnection and the points of presence of service providers.
- The continued declaration of the DTCS is consistent with the submissions that the ACCC received in response to the Discussion Paper.

On the basis of the above facts, the ACCC considers that continuing to declare the DTCS will promote competition and further investment in the relevant markets which in turn will promote the LTIE. iiNet agrees with this conclusion.

As regards the length of the DTCS declaration extension, iiNet agrees with the ACCC's view that a declaration for a further five years is justified in order to promote industry certainty.

4. IINET'S CONCERNS WITH THE REVISED COMPETITION CRITERIA

iiNet submits that the identification of the appropriate criteria for de-regulation of the DTCS needs to take place within the following context:

- Telstra is the ubiquitous network provider in Australia.
- Telstra's network consists of:
 - Telstra's customer access network which is divided into exchange service areas (**ESAs**) each of which has an exchange building; and
 - Telstra's inter-exchange network which links the ESAs.

¹ Draft Decision at p.8.

- In order to provide competitive services utilizing the unconditioned local loop service (**ULLS**) and the line sharing service (**LSS**), it is necessary for access seekers to install equipment in Telstra exchange buildings. This creates a demand for transmission from Telstra's exchange buildings. Without the availability of competitive transmission services at Telstra's exchange buildings, this demand can only be met by Telstra's monopoly transmission services.
- As a vertically integrated incumbent, Telstra has an incentive to deny access to, or charge monopoly rents for, its transmission services.
- The vast majority of NBN Co POIs will be in Telstra exchange buildings.

Given these facts, iiNet believes that particular consideration needs to be given to transmission routes that have points of interconnection in Telstra exchange buildings, as these are the transmission routes that are most likely to require regulation (i.e. where there is a demand for transmission services but no competitive alternatives to Telstra). In this regard, iiNet notes that the ACCC states the following in the Draft Decision:²

Under the revised competition methodology, the point of interconnection from which competition will be assessed is the Telstra exchange site or NBN built POI.

iiNet agrees that the Telstra exchange building or NBN Co POI should be used to identify the route which is subject to the ACCC's competition assessment. However, iiNet submits that the presence of competitive transmission operators in close proximity to the Telstra exchange building does not necessarily mean that all transmission routes from that exchange building are, or will be, competitive. This point is best illustrated by an example³:

*There are two competitive transmission providers in addition to Telstra who have points of presence (**POPs**) in, or in close proximity to, the Telstra exchange in Ashfield (Sydney). There are two competitive transmission providers in addition to Telstra who have POPs in, or in close proximity to, the Telstra exchange building in Bathurst (NSW). However, none of the alternative transmission providers to Telstra currently provide a transmission service between the Telstra exchange buildings in Ashfield and Bathurst (i.e. the competitive providers in Ashfield provide transmission services to locations other than Bathurst and the competitive transmission providers in Bathurst provide competitive transmission services to locations other than Ashfield).*

In this scenario, the transmission route between Ashfield and Bathurst should not be de-regulated because actual competition on that route does not exist – i.e. there are not at least two substitutable transmission services available as an alternative to Telstra's monopoly service.

iiNet believes that the Competition Criteria are problematic because they have the potential to achieve an outcome where routes are de-regulated without there being actual competition on those routes. This is because the Competition Criteria are ESA focused rather than route focused and they result in all routes between Telstra

² At p.35.

³ Please note this is a hypothetical example only. iiNet is unaware of the actual state of competition in these ESAs.

exchange buildings being de-regulated where the exchange building is in an ESA which satisfies the following criteria:⁴

- there are at least 5,000 services in operation (**SIOs**) in the ESA and at least two DSLAMs;
- the ESA is not in Telstra's zone 3;
- there are at least three competitive transmission providers located in close proximity to the Telstra exchange building; and
- a transmission service is being supplied in the ESA at a competitive price by a provider other than Telstra.

Applying these criteria to the Ashfield/Bathurst scenario above would lead to the transmission route between the Ashfield and Bathurst Telstra exchange buildings being de-regulated even though there is no alternative to Telstra on that route.

In iiNet's respectful opinion, the fundamental problem with the Competition Criteria is that they are focused on the ESA rather than the transmission route – i.e. the question that the Competition Criteria currently answer is:

Is the ESA competitive?

Whereas the question the Competition Criteria should answer is:

Is the transmission route between the relevant Telstra exchange buildings competitive?

iiNet submits that past ACCC decisions that have involved deregulation based on the existence of potential competition rather than the existence of actual competition have been discredited and the ACCC has rightly moved away from such an approach.⁵ iiNet's concern with the ACCC's competition criteria is that because the criteria are focused on identifying competitive ESAs rather than competitive transmission routes, they fall into the trap of capturing routes for de-regulation that are potentially competitive but which have not become competitive. In light of this, iiNet submits that the ACCC's competition test for de-regulation of the DTCS should be revised and it should be route focused rather than ESA focused so that the only routes which are identified for exemption are routes which currently have two or more alternative providers to Telstra providing competitive transmission services on those routes from transmission points in, or in close proximity to, the Telstra exchange.

Alternatively, if the ACCC is not prepared to move away from an ESA focused test, iiNet submits that the SIO threshold should be increased from 5,000 SIOs to 14,000 SIOs. The figure of 14,000 SIOs is based on a previous finding by the ACCC on the number of SIOs that are required to support ULLS/LSS based competition in an ESA.⁶

⁴ Draft decision section 3.4.2.

⁵ For example the ACCC's geographic exemptions in respect of the Wholesale Line Rental and Line Sharing Service in metropolitan areas have been reversed.

⁶ Telstra's local carriage service and wholesale line rental exemption applications Final Decision and Class Exemption, at p.171.

5. REGULATION OF TAIL END SERVICES

In the Draft Decision the ACCC reaches the conclusion that all tail end DTCS services should continue to be regulated, as these services continue to exhibit enduring bottleneck characteristics because there are no effective substitutes for these services.⁷ However, the ACCC only applies this reasoning to tail end services that are sold as a stand alone product and not part of a bundle. iiNet submits that a transmission service that includes a bundled tail also exhibits bottleneck characteristics because the only substitute for a bundled tail end service will be two separate services. As there will be obvious inefficiencies in obtaining two separate services rather than one bundled service, there is no effective substitute for a transmission service that includes a bundled tail. In other words the reasoning process that the ACCC has used to conclude that stand alone tail end services should be regulated also supports the conclusion that bundled transmission services that include a tail should also be regulated.

6. MINOR DRAFTING ISSUE IN RESPECT OF TAIL END SERVICES

Paragraph (e) of the ACCC's revised DTCS service description refers to (emphasis added):

transmission points:

- (1) in any of the deregulated metropolitan ESAs in Sydney
- (2) in any of the deregulated metropolitan ESAs in Brisbane
- (3) in any of the deregulated metropolitan ESAs in Melbourne
- (4) in any of the deregulated metropolitan ESAs in Perth
- (5) in any of the deregulated metropolitan ESAs in Adelaide
- (6) in any of the deregulated metropolitan ESAs in Canberra

If this is taken literally, stand alone tail end services within each of the above referred to ESAs will be de-regulated. This is clearly not the ACCC's intention. In order to rectify this, the following wording could be added:

'except where the transmission points are in the same ESA'

7. THE MEANS BY WHICH DEREGULATION OF COMPETITIVE ROUTES SHOULD BE ACHIEVED

The effect of the Draft Decision will be to lock in the transmission routes that have been identified for deregulation by means of the application of the Competition Criteria for five years. If there is any change in circumstances, or it becomes manifestly obvious that a particular route that has been de-regulated is not competitive, the ACCC will have no power to address any problems that arise unless it varies the DTCS service description. The ACCC's specific statutory power to make binding rules of conduct (**BROC**) under Division 4A of the Competition and Consumer Act 2010 (**CCA**) will be of no use in this scenario because a BROC can

⁷ Draft Decision at p. 11.

only apply to the service as declared, they cannot extend the scope of the declaration.

Given the issues with the Competition Criteria discussed in section 4 above, iiNet is concerned that by using the DTCS service description as the vehicle for achieving de-regulation of competitive transmission routes, the ACCC is surrendering a very important tool, that the legislature intended the ACCC to have in order to address obvious and manifest problems. iiNet is concerned that if it becomes manifestly obvious that a transmission route that has been identified for de-regulation is not competitive and its continued de-regulation is having harmful effects on competition, the ACCC's power to make a BROCC to address the problem will not be available. This situation can be avoided if, instead of using the DTCS service description as the vehicle to achieve de-regulation of competitive transmission routes, the ACCC uses a FAD. This is because the terms of a BROCC will override any inconsistent terms in a FAD.⁸ Indeed, the legislation specifically contemplates that a FAD can be used to achieve de-regulation because the ACCC's powers to make a FAD in respect of a declared service extend to excluding, restricting or limiting the application of the standard access obligations in relation to that declared service⁹.

In light of the above, iiNet submits that the DTCS service description need only describe the service and it can be left to the FAD to identify and describe the transmission routes that are de-regulated. This results in the following service description:

DTCS service description

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

- (a) one customer transmission point directly to another customer transmission point*
- (b) one access seeker network location directly to another access seeker network location*

Definitions

Where words or phrases used in this Annexure are defined in the Competition and Consumer Act 2010 or the Telecommunications Act 1997, they have the meaning given in those Acts

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

*a **customer transmission point** is a point at which an access provider currently delivers a service to its own customers (either wholesale or retail)*

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

⁸ See section 152 BDE of the CCA.

⁹ See sections 152BC(3)(h) and (i) of the CCA

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

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

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

***uncontended** means dedicated and not shared*

iiNet acknowledges that it will be necessary to transition over from the current service description to the new service description above in a manner that avoids a situation where all previously de-regulated routes become declared by default because the new FAD has not yet been made. This can be achieved by introducing the new service description and the new FAD at the same time (i.e. the DTCS will remain declared under the current service description until the new FAD is made, at which point the new service description will come into force).

Herbert Geer Lawyers on behalf of iiNet Limited

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