



Date 21 July 2006

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Confidential Email

Dear Mr Cosgrave and Mr Home

FOXTEL's Further Submission Regarding its Digital Set Top Unit Service (DSTUS) Special Access Undertaking (SAU)

Please see attached.

Attach

Our Ref JODS:150430

jods A0107316677v4 150430 21.7.2006

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By Email

Dear Mr Cosgrave and Mr Home

FOXTEL's Further Submission Regarding its Digital Set Top Unit Service (DSTUS) Special Access Undertaking (SAU)

We refer to your letter of 4 July 2006 in relation to FOXTEL's further submission regarding its DSTUS and, in particular, its submissions on the legal, commercial and technical constraints involved in FOXTEL providing modem services in the manner suggested by Two Way TV (*TWTV*).

FOXTEL has a number of concerns in relation to the letter.

First, the Commission states that:

...the Commission wishes to note that any additional cost to FOXTEL arising from the provision of interactive services could be readily identified, quantified and recovered from the channel supplier or suppliers on whose half the additional costs were incurred.

...This would be likely to lessen or to eliminate the impact of the commercial constraints claimed by FOXTEL.

Following further discussions, we understand that the reference by the Commission to "additional costs" was meant to be a reference only to the technical costs of accommodating access seekers within FOXTEL's contracted capacity. It was not a reference to the other commercial and legal 'costs' that might be involved in making that capacity available for use by access seekers in conjunction with an existing FOXTEL channel as set out as in FOXTEL's submission of 27 June 2006. Therefore the reference to lessening or eliminating the impact of the commercial constraints claimed by FOXTEL was only in relation to these technical constraints not those other commercial or legal constraints.

Secondly, the Commission states that:

...the Commission remains concerned about inconsistencies in FOXTEL's submissions regarding the nature of the technical constraints alluded to by FOXTEL.

In particular, the Commission refers to:

- FOXTEL's submission of 29 March 2006 in which it indicated that providing interactive services to existing channel users would cause significant technical problems;

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- the telephone call of 15 June 2006 in which the Commission states that FOXTEL indicated that these technical constraints could in fact be "better described as commercial constraints"; and
- FOXTEL's supplementary submission of 27 June 2006 in which FOXTEL "appeared to be articulating a third position" by stating that it relies on the Technical Report in so far as it explains why carriage capacity must be taken from FOXTEL's own contracted capacity but indicating that it understands that the Commission may choose to place little weight on or even disregard the technical difficulties explained in the Technical Report as a result of FOXTEL not responding to the information request.

The Commission has invited FOXTEL to "clarify the inconsistencies that have arisen from these statements".

FOXTEL denies that its statements or submissions in relation to technical constraints have been inconsistent. FOXTEL's submissions have always been consistent. Its position has been at all times that there are technical, legal and commercial constraints on FOXTEL's ability to supply the modem service (and the Commission's ability to force this supply). However, FOXTEL does not believe it is necessary to provide the Commission with further information on the technical constraints as the other legal and commercial issues raised by FOXTEL present insurmountable hurdles to TWTV's proposal.

Yours sincerely



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