

28 July 2003

Ken Walliss
Director - convergence
Telecommunications Group
Australian Competition &
Consumer Commission
GPO Box 520J
Melbourne VIC 3001

Dear Mr Walliss

Resolution of Telecommunications Access Disputes - Revised Guide

We refer to the Australian Competition & Consumer Commission's (the **Commission's**) request for comment on the revisions to the Dispute Resolution Guidelines for Telecommunications Access Disputes (the **Guidelines**) dated May 2003 as a result of the amendments to the Trade Practices Act 1974 (Cth) (the **Act**) effected by the Telecommunications Competition Act 2002.

As you know we act for FOXTEL and have been requested to respond to the Guidelines on its behalf.

FOXTEL welcomes the opportunity to participate in the development of the Guidelines as it regards the timely resolution of telecommunications access disputes to be of fundamental importance to the development of competition in Australian telecommunications markets, particularly the subscription television industry.

In particular, FOXTEL wishes to comment on the issue of deferral of arbitrations while the Commission is considering an access undertaking and the restrictions which the Commission can impose in arbitration determinations.

Calculation of interest on backdating of arbitration determinations

FOXTEL notes that the Commission states in the first bullet point on page 61 of the Guidelines that 'interest will be calculated on the amounts of money that have been overpaid'. FOXTEL submits that the Commission should include the words 'or underpaid'. This would be consistent with the Commission's statement on page 62 that 'the rate of interest should reflect the opportunity cost of the under or over payment' and its comment on page 63 that '...it is conceivable that the reverse situation may occur, where the determination sets a charge higher than that currently being paid by the access seeker'.

FOXTEL requests that the Commission clarify its position. FOXTEL believes that this must be an error as it is clearly conceivable that there could be situations in which an access provider may have been underpaid during an interim determination.

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Deferral of arbitrations while considering access undertakings

Section 152CLA of the Act deals with the situation of the Commission simultaneously considering an access undertaking and conducting an arbitration in relation to the same matter (Guidelines at 68). Section 152CLA of the Act provides that the Commission may defer consideration of an arbitration in whole or in part while it is considering an access undertaking.

Section 152CLA(4) of the Act lists the matters which the Commission must have regard to in considering whether to defer consideration of the arbitration, including:

- the fact that the access undertaking, if accepted, will apply generally to all access seekers, not just those involved in the arbitration;
- any guidelines that it has made, and which are enforced, in relation to the deferral of arbitrations; and
- such other matters which the Commission considers relevant.

The Commission acknowledges that it should give priority to the consideration of undertakings in preference to arbitrations (Guidelines at 69).

FOXTEL agrees that primary consideration should be given to the fact that access undertakings, if accepted, will apply generally to all access seekers (Guidelines at 69) and that access undertakings are most likely to achieve the most efficient allocation of resources and have the potential to promote the long term interests of end-users (*LTIE*) to a greater extent than arbitration determinations. FOXTEL also agrees that it is important to note that the pro-competitive effects of an undertaking will be available to all access seekers rather than being confined to a few, particularly in relation to issues that are common to multiple arbitrations, such as price (Guidelines at 70). In addition, the public nature of the undertaking process seeks to facilitate input from all interested parties and allows for a greater degree of transparency (Guidelines at 70).

The benefits of access undertakings, as opposed to the 'one-on-one' nature of arbitrations is evident. FOXTEL's analogue undertaking, provided to the Commission in November 2002 as a result of the Content Supply Agreement (*CSA*) between FOXTEL and Optus Vision is a clear example of the benefits of an undertaking as opposed to access arbitrations. FOXTEL offered its analogue access undertaking as a result of its history of access disputes with C7 Pty Ltd (*C7*) and Television & Radio Broadcasting Services Australia Pty Ltd (*TARBS*) in relation to access to its analogue subscription television service. These arbitrations have been conducted over a period of almost 4 years. These arbitrations are time and resource intensive and are now on hold while the Commission considers FOXTEL's analogue access undertaking which was formally lodged with the Commission in November 2002. The offer to lodge the undertaking was designed to alleviate the need to continue the arbitrations. The fact that FOXTEL's analogue access undertaking will apply to any access seeker, is open to public comment and includes price transparency are obvious and clear benefits of the undertaking process as compared to access arbitrations.

The Commission notes that it is concerned to ensure that access providers have the incentive to offer undertakings as early as possible and do not use the undertaking process as a delay tactic in relation to the arbitrations (Guidelines at 71).

FOXTEL submits that it is highly unlikely that undertakings would be used as 'delay' tactics as the undertakings could be considered by the Commission in a short period of time and have a wider application than an access determination. As the Commission is not obliged to defer an arbitration,

the Commission will have the ability not to defer when it is of the view that an undertaking is clearly not given bona fide.

The Commission has itself recognised that where there has been material market change, the undertaking process may be the most appropriate forum for determinations (Guidelines at 71). FOXTEL submits that, in the case of subscription television services, access undertakings are the most appropriate forum in which to assess access issues. FOXTEL's analogue access undertakings were offered in the context of the CSA and the various section 87B undertakings offered by FOXTEL, Telstra, Austar and Optus which have changed and will continue to significantly change the structure of the subscription television industry in Australia.

Section 152CLA(5) of the Act provides that the Commission must formulate guidelines that it will take into account when deciding whether to defer consideration of an arbitration (Guidelines at 70). The Commission states that it envisages three situations in which it may be appropriate to continue with an arbitration including:

1. where matters covered by the undertaking have already been substantively considered in the arbitration;
2. where the arbitration concerns issues additional to those covered in the undertaking; and / or
3. where consideration of the undertaking is likely to involve a long time frame.

FOXTEL submits that even when the matters covered by the undertaking have already been substantially considered in the arbitration, unless an undertaking is clearly not given bona fide, the benefits of considering an access undertaking outweigh the costs that might be involved (such as additional time). It is worthwhile noting that the Commission can use the information provided to it and the work already undertaken by it in the arbitrations when assessing the access undertaking (Guidelines at 74).

FOXTEL agrees however, that it may be appropriate to continue an arbitration where an arbitration deals with additional issues (so long as the arbitration only deals with the additional issues not relevant to the undertaking).

In relation to continuing arbitrations because consideration of an undertaking may involve a long time frame, FOXTEL submits that even if that is the case, the benefits of an access undertaking outweigh the costs (including time costs).

FOXTEL notes that the Commission is able to have regard to 'such other matters which the Commission considers relevant' (Guidelines at 72). FOXTEL submits that if the Commission considers other matters (within its power under section 152CLA(4) of the Act), it should disclose those matters it has taken into consideration so as not to undermine the public and open nature of the undertaking process.

FOXTEL also notes that where a person whose interests are affected by the Commission's decision in respect of an access undertaking seeks review by the Australian Competition Tribunal, the Commission has said that it may be appropriate in some circumstances for the Commission to make an interim determination in any arbitration previously deferred pending consideration of the access undertaking (Guidelines at 75). Once the Tribunal has completed its review, the Commission can proceed towards finalising the arbitration (Guidelines at 75).

FOXTEL agrees that there may be some circumstances in which it will be appropriate for the Commission to make an interim determination pending review of a Commission decision in relation to an undertaking. In FOXTEL's view, if the Commission accepts an access undertaking which decision is then the subject of review by the Tribunal, the Commission should only make an interim determination which is consistent with the access undertaking. If the Commission rejects an access undertaking which decision is then the subject of review by the Tribunal and the Commission makes an interim determination, FOXTEL submits that if the Tribunal then accepts the undertaking, a final determination should be made consistent with the undertaking. If that occurs, the final determination should be backdated to the date that access was granted under the interim determination (under section 152DNA) to ensure that if an access provider is required to provide access at a certain price during the interim determination there is an adjustment of any over or under payment.

Restrictions the Commission can impose on access determinations

FOXTEL notes that the Telecommunications Competition Act 2002 amended section 152CQ(1)(f) of the Act to provide that the Commission cannot make a determination that would have the effect of requiring a party (other than the access seeker) to bear *an unreasonable amount* of the costs of extending or enhancing the capability of the facility, or maintaining extensions or enhancements to the facility. Section 152CQ(1)(f) of the Act previously required the Commission not to make a determination requiring a party to bear 'some or all' of the costs of extending or enhancing.

FOXTEL submits that the Commission should provide guidelines in relation to what it will regard as 'an unreasonable amount' so as to indicate how the Commission will approach this issue. FOXTEL would regard costs as 'unreasonable' if, for example, such costs distorted an access provider's investment incentives. FOXTEL submits that the Commission should have regard to the over-riding LTIE test – and in particular whether a thing will achieve the objective of encouraging the economically efficient use and economically efficient investment in the infrastructure by which listed services are supplied-in considering what will be regarded as 'an unreasonable amount'.

FOXTEL submits that the Commission should expand on what it means by 'an unreasonable amount' so that investors in telecommunications infrastructure are provided with certainty pre-investment as to whether they will be required to spend additional amounts on enhancements or extensions. FOXTEL therefore requests that the Commission provide draft guidelines for discussion on how the Commission will approach this issue in the future.

Yours sincerely

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