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Public Inquiry to make a Final Access Determination for the Wholesale ADSL Service
Draft Report

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited

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Public Version

1. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**), in response to the ACCC's draft report of March 2013 entitled *Public Inquiry to make a final access determination for the Wholesale ADSL service* (**the Draft Report**).

iiNet welcomes the opportunity of responding to the Draft Report. iiNet notes that the Draft Report is divided into two parts and includes a draft final access determination (**the Draft FAD**). Part A of the Draft Report deals with price terms for the Wholesale ADSL Service (**WDSL**). Part B of the Draft Report deals with other terms and conditions for WDSL. Accordingly, this submission is also divided into two parts, with part A providing iiNet's response to issues relating to price terms for WDSL, and Part B providing iiNet's response to issues relating to other terms and conditions.

Please note that this submission contains commercial in confidence information which is marked '[c-i-c]' and highlighted in yellow.

2. EXECUTIVE SUMMARY

2.1 Price terms

iiNet makes the following submissions regarding price terms.

- iiNet agrees that it is appropriate for prices for WDSL to be cost-based and for those prices to be determined by a building block pricing methodology. However, iiNet has concerns with the ACCC's implementation of this pricing methodology.

- The proposed port and AGVC charges are significantly higher than comparable costs incurred by iiNet in providing broadband services on its own network and using competitive backhaul, which makes it difficult to accept that the proposed charges reflect Telstra's efficient costs of providing the service.

- The lack of transparency and granularity in the modelling that the ACCC has made available, particularly with regard to Core network asset costs allocated to WDSL, makes it impossible to properly assess or comment on the reasonableness of the ACCC's modelling. iiNet is simply unable to be confident that the ACCC has delivered access charges that reflect Telstra's efficient costs or the statutory criteria the ACCC is required to follow when making a FAD.

- Apart from the ACCC, Telstra is the only other party with access to all of the data which is required to undertake a proper assessment of the ACCC's application of its pricing methodology. This lack of transparency is unacceptable in the FAD process, given WDSL's importance to competition in telecommunications markets and its impact on the interests of access seekers, such as iiNet, that utilise the service to provide competitive services to consumers.

- iiNet believes that the benchmarking of transmission costs supports the view that the ACCC's draft WDSL FAD prices do not reflect the efficient costs of providing WDSL. Transmission prices for NBN Co's connectivity virtual circuit (**CVC**) and those based on Domestic Transmission Capacity Service (**DTCS**) are significantly lower than the ACCC's proposed AGVC/VLAN prices.

2.2 Other terms and conditions

(a) Scope of the application of the standard access obligations

iiNet agrees with and supports the ACCC's conclusions regarding geographic and carrier specific exemptions in the Draft Report. For several years iiNet has expressed the view that Telstra's conduct in regards to the provision of WDSL has damaged competition. iiNet believes that the ACCC correctly decided that WDSL should be declared on a national basis and the ACCC's has again correctly decided in the Draft Report that regulated access should continue to be on a national basis.

A carrier specific exemption has been included in the IAD which has the effect of exempting all carriers except Telstra from the WDSL declaration. iiNet agrees with and supports the view expressed by the ACCC in the Draft Report that the a carrier specific exemption should also be included in the WDSL FAD[1].

(b) Bundling with PSTN services

In the Draft Report the ACCC proposes not to require Telstra to provide an unbundled service but to maintain the status quo which involves enforced bundling. This appears to be due largely to the costs that would be involved in requiring Telstra to provide an unbundled WDSL service. iiNet is not in a position to comment on what the costs to Telstra would be in providing an unbundled service.

iiNet submits that the ultimate question that the ACCC should ask itself concerning this issue is as follows:

> *Do the costs that Telstra would be required to incur in providing an unbundled service lead to a level of investment in infrastructure that is so inefficient as to outweigh the positive effects on competition and consumer choice that would result if an unbundled service were provided?*

iiNet is concerned that the ACCC has not asked itself this question but has instead concluded that the costs to Telstra of providing an unbundled service mean that competition would not be promoted and there would be no increase in consumer choice - i.e. it appears to iiNet that the ACCC has not properly weighed the positive factors in favour of unbundling when it has undertaken its statutory assessment in the Draft Report. Instead the ACCC appears to have concluded that the fact that Telstra will incur costs in providing unbundling means that there are no positive factors in favour of unbundling.

(c) Points of interconnection for the wholesale ADSL service

iiNet acknowledges that in forming its view in the Draft Report to maintain the status quo, the ACCC has weighed the costs to Telstra in changing its network against the potential benefits arising from potential increased competition and investment in transmission infrastructure. However, iiNet's primary concern is that access seekers be allowed to compete with Telstra Retail on a level playing field. iiNet submits that the ACCC should establish what aggregation points Telstra uses for its own traffic

[1] Draft Report at pp. 93 to 95.

and include a term in the WDSL FAD that allows interconnection at those aggregation points. Such a term would have the advantage of promoting competition in transmission service markets without the disadvantage of requiring Telstra to substantially alter its existing network.

(d) Standard non-price terms and conditions

iiNet supports the inclusion of schedules 2 to 10 of the draft FAD in the WDSL FAD which relate to the following subject matter:

- Billing and Notifications (subject to the comments in section 10.1 below);
- Creditworthiness and Security;
- General Dispute Resolution Procedures;
- Confidentiality Provisions;
- Communications with End Users;
- Suspension and Termination;
- Liability and Indemnity;
- Network Modernisation and Upgrade; and
- Changes to Operating Manuals.

iiNet believes that the inclusion of such terms in the WDSL FAD will promote the LTIE by ensuring that in the event that an access seeker and access provider cannot agree on the applicable terms of access, there will be a set of core reasonable terms available as a default. iiNet believes that the existence of these terms is likely to encourage negotiated outcomes.

iiNet also submits that terms that reflect the following three provisions in Telstra's Structural Separation Undertaking (**SSU**) should be included in the WDSL FAD:

- Overarching equivalence commitment (Clause 9 SSU);
- DSL upgrades (Clause 15 SSU); and
- Equivalence and transparency metrics (Schedule 3 SSU) with applicable service level rebates in accordance with Schedule 7 of the SSU.

(e) Restrictions on resale

iiNet notes that the IAD includes terms which expressly allow an Access Seeker to acquire the WDSL service for the purpose of supplying to a reseller without the need to obtain Telstra's consent to do so[2]. iiNet believes that these terms are appropriate, are required to promote competition and should be included in the WDSL FAD. iiNet therefore agrees with the ACCC's view expressed in the Draft Report that such terms be included in the WDSL FAD.

[2] Schedule 10 - Interim Access Determination No. 1 of 2012 (WDSL).

(f) Business grade services

iiNet notes the ACCC's view that specific terms relating to business services should not be included in the WDSL FAD and that the ACCC has not received any submissions calling for the inclusion of such terms[3]. iiNet has no comments on this issue.

(g) Commencement

iiNet notes that the ACCC has maintained its view expressed in its issues paper of July 2012[4] (**the Issues Paper)** that the WDSL FAD pricing should not be backdated[5]. iiNet believes that the way in which Telstra introduced the issue of congestion charging and Telstra's failure to provide the ACCC with requested information has significantly delayed the ACCC from making the FAD. iiNet believes that this is a justification for backdating.

(h) Expiry

iiNet agrees that an expiry date of 30 June 2014 is appropriate in order to allow the WDSL prices to be reviewed at the same time as the prices for other fixed line services.

(i) fixed principles provisions

iiNet agrees with including fixed principles that relate to the use of the building block methodology to calculate prices for the WDSL. iiNet agrees that such an approach provides certainty to industry. However, as regards the particular circumstances arising with regard to the setting of prices for WDSL, iiNet has concerns with clauses 6.5A(b) and 6.6A(b) of the Draft FAD which lock in the RAB values for the data equipment asset class. iiNet submits that these fixed principles should be subject to being modified in the event that it is established that errors were made in calculating the opening regulatory asset base value for data equipment asset class.

PART A - PRICE TERMS

iiNet's submissions on price terms relate to:

- The ability to assess the application of the ACCC's cost-based pricing methodology;
- Port charges;
- AGVC charges; and
- Early termination charges.

3. THE ABILITY TO ASSESS THE APPLICATION OF THE ACCC'S COST-BASED PRICING METHODOLOGY

iiNet agrees with the ACCC's decision to implement a cost-based Building Block Method (**BBM**) pricing methodology for WDSL, however iiNet is concerned that the

[3] Draft Report at p. 151.
[4] Public inquiry to make a final access determination for the wholesale ADSL service Issues Paper (a Second Discussion Paper) - July 2012.
[5] Draft Report at p. 153.

ACCC's application of this methodology allows Telstra to over-recover its investment and results in excessive WDSL charges that will impede competition and are contrary to the LTIE. The proposed port and AGVC charges are significantly higher than comparable costs incurred by iiNet in providing broadband services on its own network and using competitive backhaul, which makes it difficult to accept that the proposed charges reflect Telstra's actual efficient costs of providing the service. The lack of transparency and granularity in the modelling that the ACCC has made available, particularly with regard to Core network asset costs allocated to WDSL, makes it impossible to assess or comment on the model's reasonableness. When combined with the ACCC's decision to base aspects of the WDSL FAD costs on assumptions owing to lack of data or Telstra's failure to provide requested data, iiNet is simply unable to be confident that the ACCC has delivered access charges that reflect efficient costs or the statutory criteria the ACCC is required to follow when making a FAD.

4. PORT CHARGES

As the ACCC has said, a drawback of a BBM approach is that a significant amount of data is required in order to build the costs model[6]. To determine which new assets should be added to the FLSM to account for WDSL costs, the ACCC analysed Telstra's October 2012 WDSL asset register and compared it to asset information provided by Telstra during the July 2011 fixed line services FAD inquiry. The ACCC added assets from three RAF asset classes into the regulatory asset base (**RAB**), namely 'Data Equipment', 'Pair Gain Systems' and 'Switching Equipment - Local', which were reclassified into a combined 'Data Equipment' asset class. A significant 1 July 2012 RAB value of $1.094 billion was placed on 'Data Equipment'. As Telstra failed to supply requested forecast data, the ACCC estimated capex for the 'Data Equipment' asset class based on 2011/12 actual expenditure. This ranged from **[c-i-c]**. Again these are very significant amounts. The total asset life attributed to 'Data Equipment' is 6 years. As Telstra did not provide requested opex forecasts, the ACCC estimated opex by applying an 80% mark-up to a 5 year average of RAF data, again this resulted in very significant amounts being allocated to WDSL[7].

Unfortunately, the Draft Report and associated model provide no reasonable level of granularity, meaning it is impossible for the ACCC's conclusions to be assessed and given fair scrutiny. It is impossible for access seekers that are directly affected by pricing decisions that flow from the modelling to understand if the ACCC's model produces reasonable results. For example, beyond stating that the 'Data Equipment' asset class includes 'Data Equipment', 'Pair Gain Systems' (ADSL line cards, DSLAMs and other related equipment), and 'Switching Equipment - Local'[8], the ACCC fails to explain what assets, or nature of assets, it has concluded must be added to the FLSM to account for WDSL. Apart from the ACCC, Telstra is the only other party with access to the data that is fundamentally vital to a proper assessment of the ACCC's application of its pricing methodology. Telstra refused our request for access to the WDSL asset register for the purpose of responding to the ACCC's public inquiry, stating the WDSL asset register contains commercially sensitive information. Access seekers are simply unable to evaluate the ACCC's reasoning or comment on whether they consider certain assets should be removed from the model or part allocated to other services. This lack of transparency is unacceptable in the FAD process, given WDSL's importance to competition in

[6] Draft report p.18
[7] ibid pp. 34 - 45
[8] ibid p.35

telecommunications markets and its impact on the interests of access seekers, such as iiNet, that utilise the service to provide competitive services to consumers.

5. AGVC CHARGES

iiNet notes that the ACCC has decided it has insufficient cost information to determine AGVC costs. In light of this, iiNet believes that the ACCC should have regard, and give weight to, the benchmarking of transmission costs when determining what are the efficient costs of providing the AGVC. iiNet believes that such a benchmarking exercise should include consideration of NBN Co's CVC charging and also the rates for the Domestic Transmission Capacity Service (**DTCS**). Though the general industry view is that the DTCS FAD rates are well above market rates for backhaul, the ACCC's benchmarking analysis subjected DTCS rates to significantly more scrutiny than currently being applied to AGVC costs, are relatively simple to apply, and are likely to have a greater chance of meeting the legislative criteria than the method currently proposed. Application of the DTCS FAD to the AGVC charge was recently discussed in 'The Register' in a post by Richard Chirgwin, which we ask the ACCC to consider[9]. Applying the DTCS rates to WDSL results in a significantly lower AGVC charge than the ACCC's currently proposed pricing relativity method.

The AGVC service starts and ends at a Telstra exchange, so unlike the DTCS, AGVC does not require tails or require a cost component for tails. The difficulty in applying the DTCS rates to AGVC is in calculating distance, however, this could be averaged across metro and regional services to calculate the AGVC charge.

The DTCS FAD sets prices for inter-capital, metropolitan and regional routes using the following formula:[10]

Table 1: Price terms for the Service

$$Price = exp[log_e(Annual\ Charge)] \times 1.102$$

The term $log_e(Annual\ Charge)$ is defined as:

$$log_e(Annual\ Charge) = 7.682 + 0.623 \times log_e(Speed) + 0.199 \times log_e(Distance) + c + t$$

where: $c = \begin{cases} 0.078 & \text{Protected Service; and} \\ 0.000 & \text{Unprotected Service} \end{cases}$

$t = \begin{cases} 0.000, & \text{Intercaptial Routes} \\ -0.081, & \text{Metro Routes} \\ 0.052, & \text{Regional Routes} \end{cases}$

Note: The "t" coefficients have been established based on a network having QoS 1 (Quality of Service 1).

The DTCS FAD refers to the DTCS Pricing Calculator on the ACCC's website to help use this formula. The amount generated by the Calculator is an end-to-end price. The formula can also be used with commonly available software such as Excel.

[9] Available from: http://www.theregister.co.uk/2013/03/18/avgc_too_expensive_accc_slip/
[10] Final Access Determination No.1 of 2012 (DTCS) at p. 5.

The pricing formula works the following way for declared services:

- *Enter the speed (data rate in Mbps) and distance (km) of a service into the formula. Then determine the values for 'c' and 't' as set out below. The values for 't' have been determined based on a network with the highest quality of service (QOS 1).*

- *Protected prices apply to inter-capital, metropolitan and regional routes but not to tailend routes. This sets the value for 'c'.*

- *Inter-capital prices apply if the A-end and B-end are in different capital city boundaries, excluding Darwin and Hobart. This sets the value for 't'.*

- *Metropolitan prices apply if the A-end and the B-end are both in the same capital city boundary. This sets the value for 't'.*

- *Regional prices apply if the A-end or the B-end, or both, are outside a capital city boundary. This sets the value for 't'.*

  Though there are tools to work out the distance between any two exchanges and from any one exchange to every other exchange, the following example provides an estimate of the DTCS model's resulting price:

  Given the distance from Sydney to the border is around 750KM, the average distance to an exchange from, for example Sydney, would be around 300KM (because radius / 2.4 ~= radius that covers half the area of arc).

DTCS FAD Pricing calculator

Australian Competition & Consumer Commission

Version date: June 2012

Change the blue cells to generate price output in the green cell

Route category	Regional
Data rate (Mbps)	1000
Protected	No
Distance (km)	300
Output ($)	$ 579,378

The ACCC calculator says this should be charged at $48/megabit/month, which is very close to the IAD rate to 30 June 2012.

The Draft FAD rate appears to be the result when the $25/megabit/month routes in Metro areas are factored in.

DTCS FAD Pricing calculator

Version date: June 2012

Change the blue cells to generate price output in the green cell

Route category	Metro
Data rate (Mbps)	1000
Protected	No
Distance (km)	21
Output ($)	$ 298,797

Estimating that 84% of exchanges are metro (460 / 5500) results in the blended AGVC rate being $29, i.e ($25 X 84%) +($48 X 16%) for NSW.

In geographically larger States such as South Australia, Queensland and Western Australia, the regional rate would be closer to $52 than $48 for regional backhaul, however, the point remains that using the ACCC's own wholesale input components for DTCS yields an obviously lower cost than the proposed AGVC rate.

In his article in the Register, Richard Chirgwin made the following comments about using DTCS rates to estimate AGVC charges[11]:

'For a first pass, The Register assumed the following spread of connections:

- ***Metro exchanges average 5 Km from the capital** – 10 percent of customers*
- ***Metro exchanges average 21 Km from the capital** – 50 percent of customers*
- ***Metro exchanges average 30 Km from the capital** – 20 percent of customers*
- ***Regional exchanges average 75 Km from the capital** – 15 percent of customers*
- ***Regional exchanges average 150 Km from the capital** – 5 percent of customers*

The outcome of this exercise is that DTCS would be cheaper than the AVGC – quite a lot cheaper, at an average $AU27 per customer.

Hang on, that can't be right can it?

It certainly can. Since there's mapping software handy – Grass-GIS, the powerhouse of open source geographical analysis – since the ADSL-enabled exchange list is published by Telstra, and since exchange locations can be discovered and mapped, the refinement wasn't too difficult.

So, state-by-state, The Register then calculated the distances from ADSL-enabled exchanges to their relevant capital cities, set an arbitrary 30 Km boundary between

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[11] Richard Chirgwin, *Has the ACCC tripped up in its ADSL declaration? Virtual circuits for ADSL are way too expensive: The Register tallies up the numbers,* The Register, 18 March 2013, http://www.theregister.co.uk/2013/03/18/avgc_too_expensive_accc_slip/

> *metro and regional locations, and worked out the average DTCS prices for metro and regional exchanges.*
>
> *From here, there was only one blind assumption made, that the metro-regional subscriber split is 80:20 – 80 percent in cities, 20 percent in regional areas.*
>
> *The average DTCS price an access-seeker would pay is well below the ACCC's $36.08 for wholesale ADSL AGVCs: $AU28.87. Even if you take an extreme – and wrong – case that the metro-regional split is 50:50, the DTCS is still the cheaper option at $AU35.50 per megabit per second, per month.'*

iiNet submits that the fact that the market benchmark calculated DTCS charges are lower than the proposed AGVC charges strongly suggests that the costs allocated to WDSL in the FLSM are excessive and do not reflect Telstra's efficient costs of providing WDSL.

6. EARLY TERMINATION CHARGES

iiNet notes that the ACCC's preliminary view is to include an early termination charge (**ETC**) in the WDSL FAD that is consistent with the ETC included in the IAD. The ACCC's conclusion on this issue in the Draft Report is as follows[12]:

> *For the ETC, the ACCC did not receive information regarding how frequently this charge is typically incurred. Therefore, it is difficult to assess the impact of the ETC on access seekers. In addition, the ACCC notes that Telstra may incur costs that would not be recovered if access seekers terminate their wholesale ADSL services early. The ACCC remains concerned that the imposition and waiving of the ETC have the potential to distort commercial decisions of access seekers regarding migration to other networks. However, as noted in the ACCC's February 2012 Statement of Reasons for the IAD, it is not clear that there will be a significant migration of services from wholesale ADSL to fibre networks during the period in which the FAD will be in effect. The ACCC proposes therefore to maintain the ETC at its existing level in the IAD and to seek further information during the next FAD inquiry.*

iiNet believes that an appropriate issue for the ACCC to consider is whether the ETC charge should be applicable to services that are migrated to the NBN. iiNet believes that this specific issue should be raised by the ACCC in the ACCC's public inquiry relating to the next FAD inquiry.

PART B - OTHER TERMS AND CONDITIONS

This part of the submission sets out iiNet's views on chapters 7 to 12 of the Draft Report which relate to:

- Scope of the application of the standard access obligations;
- Bundling with PSTN services;
- Points of interconnection for the wholesale ADSL service;
- Standard non-price terms and conditions;
- Other issues; and

[12] Draft Report at p. 69.

- Fixed principles provisions.

7. SCOPE OF THE APPLICATION OF THE STANDARD ACCESS OBLIGATIONS

The ACCC has considered two potential exemptions which would limit the application of the Standard Access Obligations (**SAOs**) relating to the WDSL. These exemptions relate to:

- geographic exemptions; and
- an exemption to carriers or carriage service providers other than Telstra (**the Carrier Specific Exemption**).

Each exemption will be considered in turn.

7.1 Geographic Exemptions

The issue of geographic exemptions has been raised by Telstra. By way of high level summary, Telstra has argued that specified Exchange Service Areas (**ESAs**) should be exempt from the SAOs relating to WDSL. Telstra argues that the deployment of DSLAM infrastructure in those ESAs by Telstra's competitors provides a sufficient competitive constraint on Telstra which removes the rationale for regulated access to WDSL in those ESAs.

As the ACCC is aware, for several years iiNet has expressed the view that Telstra's conduct in regards to the provision of WDSL has damaged competition. iiNet believes that the ACCC correctly decided that WDSL should be declared on a national basis. iiNet submits that granting geographic exemptions will:

- impede the ability of access seekers, particularly those without DSLAMs, to compete;
- give Telstra the opportunity to leverage its non-regulated position in the exempt ESAs in a manner that could negatively impact competition in both the exempt and non-exempt ESAs. For example: by not providing the service in the exempt ESA; by charging a higher price if an access seeker uses another service provider in any ESAs; refusing to supply the service in an exempt ESA unless the access seeker agrees to minimum commitments of other Telstra products; or by refusing to supply the service in an exempt ESA unless the access seeker agrees to use Telstra as wholesale aggregator on NBN;
- encourage inefficient use of infrastructure by pressuring investment in infrastructure that otherwise would not be considered by an efficient operator, in order to gain access to services either not available or not available without unsatisfactory conditions;
- provide no advantage to the LTIE, i.e. if an access seeker can obtain a preferable service via another network then it will do so despite Telstra's SAOs;
- repeat the WLR/LCS experience where Telstra kept access prices at higher CRA rates in exempt ESAs, i.e. the exemption did not promote LTIE as prices didn't drop across the board and remained higher in the exempt exchanges;

- increase access seeker costs if they have to negotiate access terms with a range of other service providers in different exempt ESAs; and

- not address access issues faced where a service is connected via a RIM or large pair gain system.

iiNet notes that the ACCC has reached the conclusion in the Draft Report not to include any geographic exemptions in the WDSL FAD[13]. iiNet submits that the ACCC's approach to this issue in the Draft Report is sound and in accordance with the statutory criteria.

7.2 The Carrier Specific Exemption

As regards the Carrier Specific Exemption, this exemption has been included in the IAD. iiNet agrees with and supports the view expressed by the ACCC in the Draft Report that the Carrier Specific Exemption should also be included in the WDSL FAD[14]. iiNet agrees that the inclusion of the Carrier Specific Exemption promotes the LTIE.

8. BUNDLING WITH PSTN SERVICES

In the Issues Paper, the ACCC formed the preliminary view that unbundling WDSL from the underlying PSTN voice service would be likely to promote competition. In reaching this conclusion, the ACCC stated the following[15] (footnotes omitted):

> *Telstra has raised various service quality issues that would arise if the requirement for an underlying PSTN service is removed. Whilst the ACCC generally considers that a lower quality service is less likely to promote the LTIE, these quality issues do not appear to have acted as a barrier to end-user take up of naked ADSL services. In this respect, it is not the ACCC's role to make a choice between competing goods and services based on their quality; those choices are made by consumers.*

iiNet agrees with this view.

However, in the Draft Report, the ACCC proposes not to require Telstra to provide an unbundled service but to maintain the status quo which involves enforced bundling. This appears to be due largely to the costs that would be involved in requiring Telstra to provide an unbundled WDSL service. After setting out what Telstra claims those costs would be, the ACCC states the following[16]:

> *The relevant differences in costs of providing a retail naked ADSL service for access seekers between ULLS and Telstra naked wholesale ADSL would be in the provision for Telstra's recovery of capital costs and contribution to the cost of a line in a greater number of regional areas (such as bands 3 and 4). Therefore, the ACCC considers that the cost for access seekers of providing a naked ADSL service via Telstra naked wholesale ADSL inputs is likely to be higher than the current costs of providing naked ADSL over ULLS.*
>
> *The ACCC considers that these costs are likely to be passed on to end-users, either substantially diminishing or eliminating any retail price advantage which currently exists for naked ADSL provided over ULLS by access seekers using their own DSLAM equipment. If this is the case, the ACCC considers that the expected*

[13] Draft Report at p. 84.
[14] Draft Report at pp. 93 to 95.
[15] Issues Paper at p.31.
[16] Draft Report at p.107.

> *pricing flexibility associated with a naked wholesale ADSL service, a key benefit of full unbundling, will not result from requiring Telstra to provide a naked wholesale ADSL service at this time. For these reasons, the ACCC does not currently propose to depart from the status quo.*

iiNet is not in a position to comment on what the costs to Telstra would be in providing an unbundled service or whether in fact a naked service provided using unbundled WDSL will be more expensive than a naked service using ULLS. However, even if a naked service using unbundled WDSL will be more expensive than a naked service using ULLS, this does not mean that unbundling WDSL from the underlying PSTN service would not promote competition or increase consumer choice. In many areas where there is no competitive DSLAM presence and obtaining a naked ADSL service from a competitive DSLAM provider is not an option, consumers are only able to obtain a bundled service. Giving such consumers the choice between a bundled or naked service would increase consumer choice and promote competition. Even if the naked service is more expensive than a naked service using ULLS, it would still provide a cheaper option than the bundled product (i.e. end users may not want a PSTN service, preferring instead to use a mobile or VoIP service, meaning that even a small reduction in price is likely to be attractive). Therefore, in iiNet's view, the ACCC should maintain its view that unbundling the WDSL FAD would increase consumer choice and promote competition. This fact weighs in favour of including terms in the WDSL FAD that require Telstra to provide an unbundled service.

iiNet submits that the ultimate question that the ACCC should ask itself concerning this issue is as follows:

> *Do the costs that Telstra would be required to incur in providing an unbundled service lead to a level of investment in infrastructure that is so inefficient as to outweigh the positive effects on competition and consumer choice that would result if an unbundled service were provided?*

iiNet is concerned that the ACCC has not asked itself this question but has instead concluded that the costs to Telstra of providing an unbundled service mean that competition would not be promoted and there would be no increase in consumer choice - i.e. it appears to iiNet that the ACCC has not properly weighed the positive factors in favour of unbundling when it has undertaken its statutory assessment in the Draft Report. Instead the ACCC appears to have concluded that the fact that Telstra will incur costs in providing unbundling means that there are no positive factors in favour of unbundling.

9. POINTS OF INTERCONNECTION FOR THE WHOLESALE ADSL SERVICE

This section of the submission relates to whether a term should be included in the WDSL FAD requiring:

- additional points of interconnection (POIs) for Telstra's ADSL network; and/or
- Telstra to provide a separate wholesale ADSL service where the wholesale ADSL local access component is provided separately from the backhaul component

The justification for including such terms is to promote competition in markets for transmission services and encourage investment in non Telstra transmission infrastructure.

iiNet acknowledges that in forming its view in the Draft Report to maintain the status quo, the ACCC has weighed the costs to Telstra in changing its network against the potential benefits arising from potential increased competition and investment in transmission infrastructure. However, iiNet's primary concern is that access seekers be allowed to compete with Telstra Retail on a level playing field. Telstra has publicly stated that BigPond has access to 147 aggregation points, indicating that it can reach customers far deeper into the network than the access pickup points forced upon its competitors, which are limited to capital city pickup points (and only ever have been). iiNet submits that the ACCC should establish what aggregation points Telstra uses for its own traffic and include a term in the WDSL FAD that allows interconnection at those points. Such a term would have the advantage of promoting competition in transmission service markets without the disadvantage of requiring Telstra to substantially alter its existing network.

10. STANDARD NON-PRICE TERMS AND CONDITIONS

Given that a FAD is intended to provide a base set of terms and conditions that access seekers can rely on if they are unable to come to an agreement with an access provider on the terms and conditions of access to a declared service[17], iiNet believes that the WDSL FAD should include reasonable terms relating to standard non price commercial matters. iiNet notes that schedules 2 to 10 of the draft WDSL FAD include terms and conditions on the following matters:

- Billing and Notifications;
- Creditworthiness and Security;
- General Dispute Resolution Procedures;
- Confidentiality Provisions;
- Communications with End Users;
- Suspension and Termination;
- Liability and Indemnity;
- Network Modernisation and Upgrade; and
- Changes to Operating Manuals.

Subject to the comments below, iiNet believes that the inclusion of these terms in the WDSL FAD will promote the LTIE by ensuring that in the event that an access seeker and access provider cannot agree on the applicable terms of access, there will be a default set of reasonable core terms and conditions of access. Furthermore, the existence of these default reasonable terms will lessen the chances of Telstra taking advantage of its stronger bargaining position and forcing access seekers to accept unreasonable terms of access by acting as a benchmark for commercially agreed terms.

[17] Public Inquiry to make a Final Access Determination for the Wholesale Adsl Service, Discussion Paper - February 2012, p.1.

iiNet's comments in relation to the standard non-price terms and conditions relate to the following:

- issues relating to the Billing and Notifications terms and conditions; and
- the absence of terms relating to ordering and provisioning and the inclusion of terms requiring Telstra to provide equivalence in accordance with its Structural Separation Undertaking (**SSU**).

These issues will be considered in turn.

10.1 Issues relating to the Billing and Notifications terms and conditions

iiNet submits that in order to ensure that the terms and conditions relating to Billing and Notifications are reasonable, the following three issues should be addressed as regards the terms in Schedule 2 of the draft WDSL FAD.

Firstly, iiNet maintains the view that, as with clause 2.5, clause 2.14 should reflect the regulatory obligations that are placed on retail providers in terms of resolving billing disputes with end users. iiNet believes that as a matter of regulatory principle, the default position in regulated terms of access should be that where the Telecommunications Industry Ombudsman investigates a billing complaint from an end user that involves disputation about charges that were levied on the Access Seeker by the Access Provider, the Access Seeker should be able to lodge a corresponding billing dispute or query with the Access Provider. iiNet submits that in such a situation it is not in the LTIE for an Access Provider to be able to rely on a term in a FAD that allows it to avoid having to respond to that billing dispute or query. iiNet respectfully submits that whether or not this issue has given rise to issues in the past should not be the determining factor. iiNet submits that this issue should be determined on the basis of proactive regulatory policy rather than reactive pragmatism. In accordance with proactive regulatory policy, iiNet submits that clause 2.14 should be redrafted as follows:

> *A Billing Dispute Notice must be given to the Access Provider in relation to a Charge within six Months of the invoice for the Charge being issued in accordance with 2.6 unless the Billing Dispute Notice arises from a complaint by a customer of the Access Seeker that has been referred to the Telecommunications Industry Ombudsman, in which case the Access Seeker is required to provide the Billing Dispute Notice to the Access provider within 1 Month of the Access Seeker being notified by the Telecommunications Industry Ombudsman that the Telecommunications Industry Ombudsman is investigating the complaint.*

Secondly, clause 2.15(b)(ii)(C) allows the Access Provider to reject a Billing Dispute Notice if the Billing Dispute Notice is incomplete or contains inaccurate information. In order to avoid doubt, it should be made clear that the rejection of a Billing Dispute Notice under clause 2.15(b)(ii)(C) does not prevent the Access Seeker from submitting an amended Billing Dispute Notice relating to the same dispute provided that it is submitted within the required timeframe under clause 2.14.

Thirdly, clause 2.16 requires the Access Seeker to provide within a maximum of five Business Days any further relevant information or materials on which it wishes to rely on in the billing dispute. iiNet submits that this requirement should be subject to the parties agreeing a longer period of time.

10.2 **The absence of terms relating to ordering and provisioning and the inclusion of terms requiring Telstra to provide equivalence in accordance with its Structural Separation Undertaking**

In the Issues Paper, the ACCC considered including in the WDSL FAD the following three provisions in Telstra's Structural Separation Undertaking (**SSU**):

- Overarching equivalence commitment (Clause 9 SSU) (i.e. Telstra will provide wholesale ADSL on an equivalence of outputs basis as compared to the Layer 2 component of Telstra's Retail ADSL service);
- DSL upgrades (Clause 15 SSU) (i.e. if Telstra develops a naked DSL product it will offer the wholesale naked DSL product to wholesale customers); and
- Equivalence and transparency metrics (Schedule 3 SSU) (i.e. the service levels that relate to the wholesale ADSL service),

(referred to collectively as **the SSU Terms**).

The ACCC's consideration of including the SSU Terms has been confined to the context of ordering and provisioning terms (i.e. terms relating to how service orders are to be placed and how those orders are to be fulfilled). The ACCC's conclusion on this issue in the Draft Report is as follows[18] (footnotes omitted):

> *The ACCC considered that replicating Telstra's existing commitments in the SSU in the FAD would provide greater clarity to parties and allow these obligations to be directly enforced by Access Seekers. However, the ACCC expressed concerns in relation to the inclusion of these specific terms in the FAD, such as impracticality of administration and their lack of relevance to ordering and provision. The ACCC does not consider that the submissions by stakeholders addressed these concerns. At this stage, the ACCC does not consider that the three identified clauses of the SSU should be replicated in the FAD. Therefore, the ACCC has not included a schedule relating to ordering and provisioning in the draft FAD.*

As regards the ACCC's concerns, iiNet respectfully submits that:

- the ACCC should consider each of the three SSU Terms individually rather than proceeding on an all or nothing basis; and
- the ACCC should not confine its consideration of the desirability of including these terms in the WDSL FAD to issues relating to ordering and provisioning but should instead consider whether it would promote the LTIE if the SSU Terms are included in the WDSL FAD more generally.

iiNet's views on the ACCC's concerns in relation to each of the three SSU Terms is below.

(a) Overarching equivalence commitment

iiNet submits that a term in the WDSL FAD that requires Telstra to provide equivalence as between Telstra Retail and the Access Seeker in relation to ordering and provisioning would clearly be in the LTIE because it would:

[18] Draft Decision at p.149.

- promote competition by achieving a level playing field between Telstra Retail and Access Seekers; and

- not have any negative impacts on efficient investment in, and use of, infrastructure (on the contrary infrastructure that is used in a competitive environment is more likely to be used efficiently).

Furthermore, as pointed out in the Draft Report inclusion of such a term in the FAD would provide a means of allowing access seekers to directly enforce Telstra's commitments under the SSU. This would clearly add benefit as compared to the status quo because it provides an additional incentive to Telstra to comply with its obligations under the SSU.

However, iiNet acknowledges that the overarching commitment to equivalence in Telstra's SSU is a complex provision and there are aspects of it, such as the commitment in relation to price equivalence, that would not be appropriate to include in a FAD.

In light of the above, iiNet suggests that a modified overarching equivalence term is included in the FAD. As regards the scope of this term, iiNet can see no reason in principle why the commitment should apply only to ordering and provisioning and should not also apply to fault rectification. Suggested drafting is as follows:

1. *Subject to [clauses 2 and 3 - number as appropriate] the Access Provider will ensure equivalence in respect of the ordering, provisioning and fault rectification systems, procedures and processes it provides to the Access Seeker.*
2. *Whether the Access Provider has provided equivalence in accordance with clause 1 will be determined in accordance with the Structural Separation Undertaking.*
3. *To avoid doubt, a failure by the Access Provider to provide equivalence will not be a breach of clause 1 unless the failure is also a breach of the Structural Separation Undertaking.*

[New definition]: Structural Separation Undertaking means the Structural Separation Undertaking given by Telstra Corporation Limited to the Australian Competition and Consumer Commission under section 577A of the Telecommunications Act 1997 dated 23 February 2012

(b) DSL Upgrades

The relevant clause of the SSU is clause 15. iiNet's view on the inclusion of clause 15 in the WDSL FAD is as follows:

- iiNet acknowledges that clause 15 of the SSU is not strictly relevant to terms and conditions relating to ordering and provisioning. However, this fact should not lead to the conclusion that clause should not be included in the WDSL FAD. In order to decide whether or not to include clause 15 of the SSU in the WDSL FAD, the ACCC should apply the statutory criteria.

- The obligations imposed on Telstra by clause 15 of the SSU promote the LTIE for the same reasons as the overarching commitment to equivalence.

- Clause 15 of the SSU will have no effect for so long as WDSL remains an active declared service[19]. Therefore, there is a compelling reason to replicate clause 15 of the SSU (without clause 15(e)) in the FAD.

(c) Equivalence and transparency metrics

The relevant metrics are metrics 8 to 11[20]. iiNet submits that metrics 8, 9 and 11 are clearly relevant to ordering and provisioning. However, iiNet believes that an application of the LTIE test would also determine that metric 10 (which deals with fault rectification) should also be included. iiNet submits that inclusion of these metrics in the FAD would promote the LTIE for the same reason as inclusion of the other SSU Terms. iiNet submits that in order to give teeth to these service levels, the WDSL FAD should provide that service level rebates will be payable in accordance with Schedule 7 of the SSU.

11. OTHER ISSUES

There are three such issues considered in the Draft Report:

- Restrictions on resale;
- Business grade services; and
- Commencement and expiry of the FAD.

Each issue will be considered in turn.

11.1 Restrictions on resale

iiNet notes that the IAD includes terms which expressly allow an Access Seeker to acquire the WDSL service for the purpose of supplying to a reseller without the need to obtain Telstra's consent to do so[21]. iiNet believes that these terms are appropriate, are required to promote competition and should be included in the WDSL FAD. iiNet therefore agrees with the ACCC's view expressed in the Draft Report that such terms be included in the WDSL FAD.

11.2 Business grade services

iiNet notes the ACCC's view that specific terms relating to business services should not be included in the WDSL FAD and that the ACCC has not received any submissions calling for the inclusion of such terms[22]. iiNet has no comments on this issue.

11.3 Commencement and expiry

(a) Commencement

iiNet notes that the ACCC has maintained its view expressed in the Issues Paper that the WDSL FAD pricing should not be backdated[23]. iiNet respectfully requests

[19] See clause 15(e) of the SSU which provides that clause 15 only applies during a period in which WDSL is not an active declared service under Part XIC of the CCA.
[20] See Schedule 3 of the SSU.
[21] Schedule 10 - Interim Access Determination No. 1 of 2012 (WDSL).
[22] Draft Report at p. 151.
[23] Draft Report at p. 153.

the ACCC to consider the points below which engage with the ACCC's view on backdating as expressed in the Issues Paper by means of facts which came to iiNet's knowledge after it had submitted its response to the Issues Paper.

In February 2012 the ACCC declared WDSL and also commenced a public inquiry into making a FAD for WDSL, which included the release of a discussion paper[24] (**the Discussion Paper**). The Discussion Paper sought submissions from interested parties in relation to price terms and non-price terms for WDSL. Telstra provided a submission in response to the Discussion Paper[25]. Telstra's submission in response to the discussion paper referred to the issue of network congestion as being relevant to Telstra's investment decisions[26]. However, Telstra's submission in response to the Discussion Paper did not call on the ACCC to adopt a particular pricing approach to address the issue of network congestion.

In July 2012 the ACCC released the Issues Paper. The Issues Paper did not seek submissions on price terms because the ACCC was of the view that the submissions it had received in response to the Discussion Paper were sufficient[27]. It was clearly implicit from the Issues Paper that the ACCC was intending to publish a draft FAD after considering the submissions received in response to the Issues Paper, as well as any information received in response to the ACCC's targeted requests for information in respect of price terms[28]. Despite the fact that the Issues Paper did not call for submissions on price terms, Telstra provided a submission in response to the Issues Paper which raised the issue of network congestion as requiring the ACCC to adopt an RMRC pricing methodology to address the issue of network congestion (**the Telstra Network Congestion Submission**)[29]. This caused the ACCC to delay publishing the draft FAD and instead embark on a further round of consultation in respect of the issues raised in the Telstra Network Congestion Submission. In this regard, we note that the ACCC's notice of extension includes the following explanation (emphasis added):

> *The Commission has been unable to make a final access determination within the previously extended period due to the time and complexity involved in determining the price and non-price terms for the wholesale ADSL service. It was necessary for the Commission to conduct further targeted consultations with stakeholders on key issues.* ***<u>Stakeholders have also provided a number of new and/or delayed substantive submissions, which the Commission is considering as part of this process.</u>***

iiNet notes that the ACCC stated the following in the Issues Paper as regards backdating of the WDSL FAD (footnotes omitted and emphasis added)[30]:

> *An FAD can be 'backdated' to apply in relation to the period covered by a preceding IAD, overriding the provisions of the IAD. Under the previous access dispute arbitration regime,* ***<u>one rationale for backdating was to limit regulatory</u>***

[24] Public Inquiry to make a Final Access Determination for the Wholesale Adsl Service, Discussion Paper - February 2012.
[25] Telstra Corporation Limited Response to the Commission's Discussion Paper into the public inquiry to make a final access determination for the wholesale ADSL service Public version 10 April 2012.
[26] ibid, at paragraph 88.
[27] ibid at p.7.
[28] ibid.
[29] Telstra Corporation Limited Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL service: Pricing to Improve Customer Experience Public version 24 August 2012.
[30] Issues Paper, at p.7.

<u>gaming by an access provider by reducing incentives to delay the finalisation of the arbitral determination.</u>

In the context of access determination inquiries, concerns around regulatory gaming may be less likely to arise. There are fewer procedural steps than in an arbitration, and the ACCC has greater control over the timing of the process. The ACCC is therefore currently not minded to backdate the wholesale ADSL FAD. ***<u>However, the ACCC may depart from this position if there is any evidence to suggest that regulatory gaming has occurred while the IAD is in effect.</u>***

iiNet respectfully submits, that the manner in which Telstra has raised the issue of network congestion amounts to clear regulatory gaming because:

- the IAD sets prices on the basis of an RMRC methodology which is the pricing methodology that Telstra wants[31];
- the issue of network congestion was clearly something that Telstra was aware of when it made its submission in response to the Discussion Paper;
- there appears to be no valid reason why Telstra could not have made the Telstra Network Congestion Submission in response to the Discussion Paper; and
- the effect of Telstra submitting the Network Congestion Submission when it did has been to prolong the ACCC's public inquiry, and delay the application of a cost based pricing methodology.

Furthermore, iiNet notes that Telstra failed to provide requested information to the ACCC and this is also likely to have contributed to the delay. Therefore, in accordance with the ACCC's own reasoning as expressed in the Issues Paper, there appears to be a good case for backdating of the WDSL FAD pricing.

(b) Expiry

iiNet agrees that an expiry date of 30 June 2014 is appropriate in order to allow the WDSL prices to be reviewed at the same time as other fixed line services.

12. FIXED PRINCIPLES PROVISIONS

iiNet agrees with including fixed principles that relate to the use of the building block methodology to calculate prices for the WDSL. iiNet agrees that such an approach provides certainty to industry. However, as regards the particular circumstances arising with regard to the setting of prices for WDSL, iiNet has concerns with clauses 6.5A(b) and 6.6A(b) of the Draft FAD which lock in the RAB values for the data equipment asset class. Due to confidentiality restrictions applying to the relevant information, iiNet has not been able to access the information required for iiNet to form a view on whether these RAB inputs are correct[32]. iiNet intends to continue to seek access to the required information and to revisit this issue when the WDSL FAD is reviewed in June 2014. In order to deal appropriately with this issue and ensure that iiNet has been afforded a proper opportunity to provide submissions on what is the correct initial RAB value for the WDSL, iiNet submits that an additional

[31] Telstra Corporation Limited Response to the Commission's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL service: Pricing to Improve Customer Experience Public version 24 August 2012, at p.24.
[32] Please refer to our letter to the ACCC of 3 April 2013.

sub-clause (d) should be included in clause 6.2 of the Draft FAD as follows (or to the following effect):

> *(d) such amendment or adjustment relates to clauses 6.5A(b) and 6.6A(b) and is necessary to correct any errors made in calculating the opening regulatory asset base value for the asset data equipment.*

Herbert Geer on behalf of iiNet Limited
5 April 2013