

**ACCC DISCUSSION PAPER - LAYER 2 BITSTREAM SERVICE
DESCRIPTION**

RESPONSE FROM iiNET LIMITED AND INTERNODE PTY LTD

1. INTRODUCTION

iiNet Limited and Internode Pty Ltd (**the Access Seekers**) welcome the opportunity to respond to the ACCC's discussion paper on the layer 2 bitstream service description (**the Discussion Paper**). Section 152AL(3C) of the *Competition and Consumer Act 2010 (CCA)* requires the ACCC to declare a layer 2 bitstream service. The Discussion Paper refers to this service as the 'Local Bitstream Access Service'. In considering the appropriate service description for the Local Bitstream Access Service, the ACCC has considered the equivalent NBN Co service description and also service descriptions from other jurisdictions.

The Access Seekers note that:

- the effect of section 152AL (3D) of the CCA is that the obligation to provide the Local Bitstream Access Service will apply in respect of "designated superfast telecommunications networks" (**Captured Networks**)¹;
- one of the requirements for a network to be a Captured Network is that it be used to supply a "superfast carriage service"; and
- a "superfast carriage service" is a service that has a download transmission speed that is normally more than 25 megabits per second².

The purpose of this submission is to request that the ACCC also consider the service descriptions of relevant wholesale services that are currently being used to provide superfast carriage services on fibre networks in Australia³. The Access Seekers believe that it would be appropriate for the ACCC to consider the extent to which any such layer 2 services would come within the proposed Local Bitstream Access Service description, because those services are the types of layer 2 services that are likely to be provided on Captured Networks. Furthermore, the Access Seekers believe that there is a particular need for the ACCC to ensure that the Local Bitstream Access Service description captures the wholesale fibre services that Telstra is offering in the South Brisbane Exchange Service Area (**South Brisbane**) to replace the Unconditioned Local Loop Service (**ULLS**) and Line Sharing Service (**LSS**). This is necessary in order to appropriately address a 'regulatory gap' that has arisen in South Brisbane.

The remainder of this submission:

- sets out the reasons for the 'regulatory gap' in South Brisbane;
- identifies why the regulatory gap in South Brisbane is unacceptable;
- identifies why the Local Bitstream Access Service is capable of addressing the 'regulatory gap' in South Brisbane; and

¹ A designated superfast telecommunications network is defined in section 152AGA of the CCA.

² See section 141(10) of the *Telecommunications Act 1997 (Telco Act)*.

³ These services include access services that are provided using Telstra's 'Velocity' infrastructure: see: <http://telstrawholesale.com/products/voice/pstnresale/telstra-velocity/index.htm>

- identifies why it is appropriate that the service description of the Local Bitstream Access Service should encompass the replacement services for ULLS and LSS in South Brisbane (**Replacement Fibre Services**).

2. THE REASONS FOR THE 'REGULATORY GAP' IN SOUTH BRISBANE

The reasons for the 'regulatory gap' in South Brisbane are as follows:

- In approximately mid 2010 Telstra entered into an agreement for the sale of the site of the South Brisbane exchange building to the Queensland Government.
- Telstra must vacate the South Brisbane exchange by no later than 20 June 2013.
- Telstra will replace the copper network in the South Brisbane with an optical fibre based 'Fibre to the Premises' (**FTTP**) network.
- Over the course of the FTTP network deployment in South Brisbane, as the copper network is being decommissioned, Telstra will progressively withdraw from sale, ULLS and LSS.
- There are currently no regulated replacement services for ULLS and LSS in South Brisbane, hence the existence of a 'regulatory gap'.

3. WHY THE 'REGULATORY GAP' IN SOUTH BRISBANE IS UNACCEPTABLE

The continued declaration of ULLS and LSS (including in South Brisbane) has been subject to extensive scrutiny by the ACCC. In deciding to continue to declare the ULLS the ACCC stated (emphasis added)⁴:

*The ACCC's analysis indicates that continued declaration of the ULLS would promote competition in the relevant wholesale and retail markets. The ACCC considers that the ULLS is an enduring bottleneck service due to structural characteristics of the market. Telstra, the owner of the ubiquitous CAN over which the ULLS is provided, is vertically integrated into the downstream wholesale and retail markets. **Therefore, Telstra has limited incentives to supply the ULLS on reasonable terms and conditions to access seekers.***

In deciding to continue to declare the LSS the ACCC stated (emphasis added)⁵:

*Without the LSS declaration, competitors could seek to acquire the LSS on non-regulated terms and conditions. However, without declaration, Telstra would have significant and ongoing market power in the negotiation of terms and conditions for the service. **The ACCC considers it unlikely that Telstra's commercially agreed prices for the LSS, absent declaration, would be consistent with those that would promote competition in the relevant markets.***

⁴ Fixed Services Review Declaration Inquiry for the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR, Final Decision July 2009, p. 56.

⁵ *ibid*, p. 73.

Given that the ACCC has concluded that regulated access to ULLS and LSS continues to be in the long term interests of end users (**LTIE**), it is obviously unacceptable that Telstra should be able to withdraw ULLS and LSS in South Brisbane without either:

- there being a full public enquiry to determine whether the withdrawal of ULLS and LSS in South Brisbane is in the LTIE; or
- a regulated replacement service being available.

4. **WHY THE LOCAL BITSTREAM ACCESS SERVICE IS CAPABLE OF ADDRESSING THE 'REGULATORY GAP' IN SOUTH BRISBANE**

Telstra's FTTP network in South Brisbane is prima facie a Captured Network, so Telstra will be required to supply regulated access to the Local Bitstream Access Service in South Brisbane. Subject to:

- Telstra not being exempted from the obligation to provide the Local Bitstream Access Service in South Brisbane⁶; and
- the Local Bitstream Access Service having an appropriate service description,

regulated access to the Local Bitstream Access Service would address the 'regulatory gap' in South Brisbane.

5. **WHY IT IS APPROPRIATE THAT THE SERVICE DESCRIPTION OF THE LOCAL BITSTREAM ACCESS SERVICE SHOULD ENCOMPASS THE REPLACEMENT FIBRE SERVICES**

As a matter of principle, it should follow that if a copper based regulated service is unilaterally withdrawn due to the deployment of an FTTP network, access seekers who were in receipt of that regulated copper service should be entitled to receive a regulated fibre service as a replacement for the regulated copper service (**the Fundamental Principle**). The Access Seekers wish to make the ACCC aware that Telstra has expressed the view that the Replacement Fibre Services are unlikely to come within the scope of the Local Bitstream Access Service⁷. If Telstra is correct, achieving the Fundamental Principle in respect of South Brisbane becomes problematic. This is because prior to the declaration of the Local Bitstream Access service, access seekers will have already begun, or committed to begin, providing services using the Replacement Fibre Services (**the Existing Services**). Therefore, in order to achieve regulated access in respect of the Existing Services, an access seeker would be required to migrate the Existing Services to the Local Bitstream Access Service. If such a migration proved to be impossible or impractical (for example because Telstra refuses to implement an efficient migration process) access seekers would be left without regulated access in respect of the Existing Services, and this would be contrary to the Fundamental Principle. In light of this, the Access Seekers request the ACCC to:

⁶ The Minister has the power to exempt certain networks - see new sections 141A and 144 of the Telco Act.

⁷ Telstra has not provided the Access Seekers with the full reasoning on which this view is based.

- consider whether the proposed service description of the Local Bitstream Access Service would capture the Replacement Fibre Services; and, in the event that the ACCC concludes that it would not,
- consider whether it is possible to amend the proposed service description of the Local Bitstream Access Service in order to ensure that the Replacement Fibre Services will be captured so as to achieve the Fundamental Principle.

The Access Seekers understand that as part of the ACCC's investigation into issues in South Brisbane, the ACCC is already in possession of the required information regarding the Replacement Fibre Services⁸.

6. CONCLUSION

The Access Seekers believe that it is appropriate that in finalising the service description for the Local Bitstream Access Service, the ACCC should:

- consider the service descriptions of services that are currently used to provide superfast carriage services over fibre networks in Australia; and
- consistent with the Fundamental Principle, ensure that, so far as possible, the service description for the Local Bitstream Access Service encompasses the Replacement Fibre Services.

**iiNet Limited
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16 September 2011**

⁸ The Enforcement and Compliance Section of the Communications Group has been considering issues that arise from the 'regulatory gap' in South Brisbane.