Submission in response to the

Draft Decision of the

Australian Competition and Consumer Commission

Access Undertakings

domestic digital mobile terminating access service

Hutchison Telecommunications (Australia) Limited and

Hutchison 3G Australia Pty Limited

May 2006

Introduction

On 7 October 2005, Hutchison Telecommunications (Australia) Limited (***HTAL***) and Hutchison 3G Australia Pty Limited (***H3GA***)(together ***Hutchison***) submitted access undertakings (the ***Undertakings***) to the Commission under the *Trade Practices Act 1974* (Cth)(the ***Act***) in relation to the domestic digital mobile terminating access service (***MTAS***).

Hutchison submitted six Undertakings: three on behalf of H3GA and three of behalf of HTAL. The Undertakings set out the terms and conditions on which HTAL and H3GA will supply the MTAS to access seekers in respect of different types of voice calls: public mobile telecommunications service calls (***PMTS Calls***) and other telecommunications service calls (***Non-PMTS Calls***).

On 26 April 2006, the Commission issued its draft decision to reject the Undertakings submitted by the Hutchison companies on 7 October 2005 (the ***Draft Decision***).[1]

Section 152BV(2) of the Act sets out the matters of which the Commission must be satisfied before accepting an undertaking:

> (2) The Commission must not accept the undertaking unless:
>
> (a) the Commission has:
>
> (i) published the undertaking and invited people to make submissions to the Commission on the undertaking; and
>
> (ii) considered any submissions that were received within the time limit specified by the Commission when it published the undertaking; and
>
> (b) the Commission is satisfied that the undertaking is consistent with the standard access obligations that are applicable to the carrier or provider; and
>
> (c) if the undertaking deals with price or a method of ascertaining price—the Commission is satisfied that the undertaking is consistent with any Ministerial Pricing Determination; and
>
> (d) the Commission is satisfied that the terms and conditions specified in the undertaking are reasonable; and
>
> (e) the expiry time of the undertaking occurs within 3 years after the date on which the undertaking comes into operation.

The Commission believes that:

- it has satisfied subsections 152BV(2)(a)(i) and (ii) of the Act by publishing the Undertakings and considering submissions in relation to the Undertakings;
- while the non-price terms contained in Attachment B to the Undertakings are likely to be consistent with the Standard Access Obligations (***SAOs***) as required by s152BV(2)(b) of the Act, it cannot be satisfied that the non-price terms contained in the existing agreements between Hutchison and access seekers, insofar as they form part of the Undertakings, are consistent with the SAOs;

[1] Australian Competition and Consumer Commission, *Hutchison's undertakings with respect to the supply of its Mobile Terminating Access Service (MTAS), Draft Decision*, April 2006 (the ***Draft Decision***).

- it is not satisfied that all of the price and non-price terms and conditions contained in the Undertakings are reasonable as required by s152BV(2)(d); and
- the Undertakings comply with the 3 year time limit set by s152BV(2)(e) of the Act.[2]

The Commission has therefore expressed the view that, overall, the Undertakings do not satisfy the statutory criteria pertaining to reasonableness (s152BV(2)(d)) and compliance with the SAOs (s152BV(2)(b)).

In the Draft Decision, the Commission raises three specific areas of concern:

- the reasonableness of the price terms of PMTS Dual Rate and Non-PMTS Undertakings;
- the reasonableness of clause 4.1 of the Undertakings, which purports to override any existing commercial agreements; and
- the reasonableness of clause 5 of the Undertakings (the ***existing agreement option***) and its implications for the overall consistency of the Undertakings with the SAOs.

Hutchison makes the following submission to address the concerns raised by the Commission in relation to the reasonableness of the Undertakings and their consistency with the SAOs.

Structure of the submission

The submission is structured as follows:

1. Summary of the Undertakings
2. Reasonableness
    - Price Terms
        - PMTS Single Rate Undertaking
        - PMTS Dual Rate Undertaking
        - Non-PMTS Undertaking
    - Non-Price Terms
        - Clause 4.1 of the Undertakings
        - Clause 5 of the Undertakings
3. Compliance with the SAOs
4. Conclusion

[2] Hutchison agrees with the Commission's view that it is not required to assess the Undertakings against the criterion set out in s152BV(2)(c) of the Act.

1. Summary of the Undertakings

As noted above, the Undertakings set out the terms and conditions on which HTAL and H3GA will supply the MTAS to access seekers in respect of different types of voice calls: PMTS Calls and Non-PMTS Calls. Hutchison explains the key concepts employed in each of the PMTS and Non-PMTS Undertakings below.

1.1 PMTS Undertakings

'PMTS Call' is defined in the Undertakings as 'a voice call originating from a Mobile Service Number on a Mobile Network in Australia and terminating on a Mobile Service Number on a Mobile Network in Australia'. The Undertakings which relate to PMTS Calls apply exclusively to domestic mobile-to-mobile traffic. HTAL and H3GA have each submitted two alternative undertakings regarding the supply of MTAS in respect of PMTS Calls:

- an undertaking which provides for two optional usage charges for the MTAS – one reciprocal, the other non-reciprocal (the ***PMTS Dual Rate Undertaking***);[3] and
- an undertaking which provides for a single, reciprocal usage charge for the MTAS (the ***PMTS Single Rate Undertaking***).[4]

The PMTS Dual Rate Undertaking contains an offer by Hutchison to supply the MTAS at the usage charge of 12 cpm on a reciprocal basis. A default rate 21 cpm is offered to those access seekers that do not accept Hutchison's 12 cpm reciprocal offer or are not otherwise required to supply the MTAS to Hutchison at 12 cpm.

In contrast, the PMTS Single Rate Undertaking contains an offer to supply the MTAS at a single usage charge of 12 cpm on a reciprocal basis.

1.2 Non-PMTS Undertakings

'Non-PMTS Call' is defined in the Undertakings as 'a voice call other than a PMTS Call'. The Undertakings which relate to Non-PMTS Calls apply to all traffic which is excluded from the PMTS Calls Undertakings, namely, domestic fixed-to-mobile traffic and traffic originating on overseas networks.

H3GA and HTAL each submitted an undertaking to the Commission offering to supply the MTAS in respect of Non-PMTS Calls at the rate of 18 cpm (the ***Non-PMTS Undertaking***).[5]

1.3 Relationship between PMTS and Non-PMTS Undertakings

In its previous submission to the Commission in support of its Undertakings,[6] Hutchison described the relationship between the Undertakings as follows:

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[3] In this submission, a reference to 'PMTS Dual Rate Undertaking' singular includes the PMTS Dual Rate Undertakings submitted by H3GA and HTAL.

[4] In this submission, a reference to 'PMTS Single Undertaking' singular includes the PMTS Single Rate Undertakings submitted by H3GA and HTAL.

[5] In this submission, a reference to 'Non-PMTS Undertaking' singular includes the undertakings submitted by H3GA and HTAL in respect of Non-PMTS Calls.

The PMTS Dual Rate Undertaking and PMTS Single Rate Undertaking are submitted by Hutchison as alternatives.

Hutchison submits that the LTIE is best served by the Commission accepting the PMTS Dual Rate Undertaking coupled with the Non-PMTS Undertaking.

Hutchison submits that the LTIE would also be served by the Commission accepting the PMTS Single Rate Undertaking coupled with the Non-PMTS Undertaking. This approach, however, would not be as beneficial to the LTIE as the former approach.

Notwithstanding the views expressed above, Hutchison submits that each individual Undertaking promotes the LTIE. Acceptance of one or more of the Undertakings submitted by each of HTAL and H3GA would therefore be in the LTIE.[7]

As to Hutchison's rationale for the price structures contained in the Undertakings, Hutchison made the following comments:

Hutchison maintains the view that 12 cpm represents an appropriate price for the MTAS.[8]

Hutchison has previously submitted that a regulated reduction in MTAS prices would promote competition in the mobile services market, and that the delayed transition to 12 cpm is restricting the development of effective competition in that market.[9] However, lower MTAS charges are unlikely to promote competition in the fixed-to-mobile market unless they are coupled with commensurately lower fixed-to-mobile prices. Lower fixed-to-mobile call prices are unlikely to be achieved through reductions in MTAS charges alone given the uncompetitive state of the fixed-to-mobile market.[10] Rather, such reductions create a windfall for providers of fixed-line services.

The Undertakings aim to strike an appropriate balance between the benefits that a reciprocal price of 12 cpm would bring to the mobile-to-mobile market and the limited role that reduced MTAS prices are likely to play in improving competition in the fixed-to-mobile market in the absence of an effective pass-through mechanism.[11]

[6] HTAL and H3GA, *Submission to the Australia Competition and Consumer Commission, Access Undertakings, domestic digital mobile terminating access service*, October 2005 (the ***Hutchison submission***).

[7] Hutchison submission, page 5.

[8] Hutchison, *Submissions by Hutchison in response to the Commission's discussion papers on Vodafone MTAS Undertaking and Optus MTAS Undertaking*, 2005 and ACCC, Mobile Services Review, *Final Decision on whether or not the Commission should extend, vary or revoke its existing declaration of the mobile terminating access service*, June 2004 (the ***MTAS Final Decision***).

[9] Hutchison, *Submission by Hutchison to the Mobile Services Review*, June 2003.

[10] Productivity Commission, *Telecommunications Competition Regulation*, 21 September 2001 at page 133; Professor Allan Fels, *Regulatory competition in converging markets; telecommunications and broadcasting*, 30 April 2003 at page 4; Professor Allan Fels, *Competition in Telecommunications*, 6 March 2003 at page 40.

[11] Hutchison submission, page 4.

2. Reasonableness of the Undertakings: s152BV(2)(d)

The Commission cannot accept an undertaking unless it is satisfied that its terms and conditions are reasonable in accordance with s152AH(1) of the Act, which provides that:

> (1) For the purposes of this Part, in determining whether particular terms and conditions are reasonable, regard must be had to the following matters:
>
> (a) whether the terms and conditions promote the long term interests of end users of carriage services or of services supplied by means of carriage services;
>
> (b) the legitimate business interests of the carrier or carriage service provider concerned, and the carrier's or provider's investment in facilities used to supply the declared service concerned;
>
> (c) the interests of persons who have rights to use the declared service concerned;
>
> (d) the direct costs of providing access to the declared service concerned;
>
> (e) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;
>
> (f) the economically efficient operation of a carriage service, a telecommunications network or a facility.

Hutchison agrees with the Commission's approach to the application of the reasonableness test. In particular, Hutchison notes that:

- the Commission accepts Hutchison's view that it is appropriate to use the 'with or without test' applied by the Australian Competition Tribunal in *Sydney Airports Corporation Ltd* (2000) 156 FLR 10 when determining the overall reasonableness of an undertaking's terms and conditions;[12] and
- the Commission agrees that, generally, TSLRIC is the appropriate cost measure to employ in assessing whether an undertaking is in the LTIE.

Hutchison's response to the Commission's specific views on the reasonableness of the price and non-price terms and conditions contained in each of the Undertakings is set out below.

Price Terms

In the Draft Decision, the Commission accepts Hutchison's submission that the price terms contained in the PMTS Single Rate Undertakings are reasonable in accordance with s152AH(1) of the Act.

However, the Commission has indicated that it cannot be satisfied that the price terms contained in the PMTS Dual Rate Undertaking and the Non-PMTS Undertaking are reasonable. Hutchison deals with each in turn.

[12] Draft Decision, page 37.

2.1 PMTS Single Rate Undertaking

The PMTS Single Rate undertaking proposes a rate of 12 cpm, conditional upon access seekers' compliance with reciprocity and transit traffic conditions, with no fall back or default rate in the event of non-compliance.

The Commission has found the price terms contained in the PMTS Single Rate Undertaking to be reasonable in accordance with s152AH of the Act given that:

- Hutchison's offer to supply the MTAS at 12 cpm would serve the LTIE by:
  - promoting competition in the fixed-to-mobile (***FTM***) market and the retail mobile services market;[13]
  - achieving any-to-any connectivity;[14] and
  - promoting the efficient use of and investment in infrastructure by which telecommunications services are provided.[15]
- supply of the MTAS at 12 cpm would not compromise Hutchison's legitimate business interests;
- a price of 12 cpm for the MTAS would not adversely affect the interests of persons who have a right to use the MTAS;[16]
- a price of 12 cpm is likely to reflect the direct costs of supplying the MTAS;[17] and
- a price of 12 cpm is likely to promote the economically efficient operation of a carriage service/ telecommunications network/facility, in the absence of better information about the net impact on efficiency of a reduction in the price of MTAS for PMTS calls without a commensurate reduction in the price of MTAS for FTM calls.[18]

The Commission also approves of the conditional aspects of the price terms contained in the PMTS Single Rate Undertaking. In particular:

- The Commission endorsed the principle of ***reciprocity*** as inherent to a TSLRIC+ approach. The Commission noted that, at a conceptual level, its MTAS Pricing Principle is a reciprocal pricing arrangement to the extent that it applies a single, industry-wide price for the MTAS.[19]
- The Commission noted that while ***differential pricing*** may emerge as a result of the reciprocity condition contained in the PMTS Single Rate Undertaking, such differential pricing would not make any access seeker worse off than it would be if

[13] Draft Decision, pages 45 to 48.

[14] Draft Decision, page 49.

[15] Draft Decision, page 51.

[16] Draft Decision, pages 51 to 55.

[17] Draft Decision, page 57

[18] Draft Decision, page 58.

[19] Draft Decision, page 26.

the PMTS Single Rate Undertaking were rejected. Further, some access seekers may be better off, thereby promoting efficiencies and competition in the relevant markets.[20]

- The Commission rejected Telstra Corporation Ltd's (***Telstra***) submission that the ***restriction on transit traffic*** contained in the PMTS Single Rate Undertaking amounts to a breach of ss45 and 47 of the Act, which prohibit exclusionary provisions and exclusive dealing. The Commission stated that, "on the information before it, it cannot be satisfied that a breach of ss45 or 47 of the Act would (or is even likely to) occur".[21]
- The Commission regarded ***Hutchison's discretion to cease charging 12 cpm*** as reasonable given that the non-price terms of the PMTS Single Rate Undertaking contain an overall obligation to act reasonably and in good faith. This involved a rejection of Telstra 's submission that clause 2.4 of the PMTS Single Rate Undertaking is unreasonable because:
  - Hutchison should not have the right to cease charging 12 cpm solely by reference to its reasonable belief; and
  - Hutchison should not have the right to cease charging 12 cpm simply because it has a belief that the access seeker is unlikely to comply with the conditions associated with the rate of 12 cpm.[22]

Hutchison therefore concurs with the Commission's assessment of the price terms and conditions contained in the PMTS Single Rate Undertaking.

Further, Hutchison submits that the Commission's views on the reasonableness of the 12 cpm reciprocal rate proposed by the PMTS Single Rate Undertaking apply equally to the PMTS Dual Rate Undertaking, discussed below.

2.2 PMTS Dual Rate Undertaking

The PMTS Dual Rate Undertaking proposes a rate of 12 cpm, conditional upon access seekers' compliance with reciprocity and transit traffic conditions, with a 'fall back' or default rate of 21 cpm for those access seekers that choose not to comply with the conditions associated with the 12 cpm rate.

Hutchison's rationale for including the default rate of 21 cpm in the PMTS Dual Rate Undertaking is as follows:

> …12 cpm is an appropriate price for the MTAS in the mobile-to-mobile context, being at the higher end of the range of best estimates of the cost of supplying the MTAS. While Hutchison does not intend to suggest that the rate of 21 cpm is in any way reflective of the underlying cost of providing the MTAS, this optional rate is appropriate when coupled with the offer of the lower, reciprocal rate of 12 cpm.

[20] Draft Decision, page 27.

[21] Draft Decision, page 30.

[22] Telstra Corporation Ltd, *Submission on the Commission's Discussion Paper*, page 11.

> The rate of 21 cpm contained in the PMTS Dual Rate Undertaking should not be viewed in isolation. A review of all of the price related terms and conditions *in context* reveals a broader consistency with the principles expressed by the Commission in its MTAS Final Decision and the LTIE.
>
> The PMTS Dual Rate Undertaking provides access seekers with a choice: a reciprocal, forward-looking efficient cost-based price, or 21 cpm… Hutchison submits that there is no basis for offering a lower rate to an access seeker who does not accept the 12 cpm rate on a reciprocal basis. The key concept in this alternative pricing approach is choice for the access seeker.[23]

Despite Hutchison's submission, the Commission has found the price terms contained in the PMTS Dual Rate Undertaking to be unreasonable in accordance with s152AH(1) of the Act. The Commission's reasoning, and Hutchison's response, is set out below.

The LTIE

The Commission's conclusion is based on the assumption that the PMTS Dual Rate Undertaking, in particular the default usage charge of 21 cpm, would not benefit the LTIE. As to the objects that make up the LTIE test, the Commission concluded that:

- the differential pricing proposed by the PMTS Dual Rate Undertaking would not promote competition in the relevant related markets primarily because the MTAS would be supplied to at least some access seekers at 21 cpm – a higher rate than even a conservative estimate of the underlying cost of providing the service and well above the prices the Commission expects would otherwise emerge if the PMTS Dual Rate Undertaking was rejected;[24]
- the PMTS Dual Rate Undertaking is consistent with the object of achieving any-to-any connectivity; and
- the differential pricing outcomes inherent to the PMTS Dual Rate Undertaking are likely to have potentially distortionary impacts for investment and so would not promote the efficient use of and investment in telecommunications infrastructure.

Hutchison disagrees with the Commission's assessment of the LTIE and submits that usage charge of 21 cpm will:

- promote competition in the FTM and retail mobile services markets; and
- encourage the efficient use of and investment in infrastructure,

by compelling access seekers to choose the 12 cpm reciprocal rate, thereby promoting the LTIE. Hutchison notes the Commission's view that 12 cpm is an appropriate price for the MTAS, having regard to the fair and reasonable costs of providing the service, and that such a price satisfies the LTIE test.

In finding the PMTS Dual Rate Undertaking to be unreasonable on account of the 21 cpm usage charge, the Commission has failed to view the 21 cpm rate in context, ie, as an incentive for reasonable MNOs to accept the 12 cpm reciprocal rate. Instead, the

[23] Hutchison submission, page 7.

[24] Draft Decision, page 67.

Commission has assessed the default price of 21 cpm as a stand alone rate, independent of the 12 cpm option. To this extent, Hutchison believes that the Commission has not properly assessed the pricing structure proposed by the PMTS Dual Rate Undertaking.

In its Draft Decision, the Commission states that 'Hutchison makes no reference about how the 21 cpm addresses the criteria of promoting competition' or 'encouraging the economically efficient use and investment in infrastructure'.[25] Hutchison disagrees – its previous submission made clear that the 21 cpm rate was included solely for the purpose of achieving faster and more widespread implementation of the target price of 12 cpm. The criteria of promoting competition and economically efficient use of and investment in infrastructure are satisfied by the combination of prices specified by the PMTS Dual Rate Undertaking; the higher usage charge of 21 cpm is justified to the extent that it creates a strong incentive for access seekers to agree to the lower, reciprocal target rate of 12 cpm.

Further, in opposing the 21 cpm usage charge, the Commission has not considered the interplay between the PMTS Dual Rate Undertaking and those access disputes on foot under Part XIC of the Act that will establish the price charged by carriers (being 'access seekers' for the purposes of the Undertakings) to Hutchison for the MTAS. Hutchison submits that the Commission must consider current market conditions and relevant regulatory developments in order to fulfil its statutory obligation to take into account the matters listed in s152AH(1) of the Act. The factors that make up the reasonableness test, including the LTIE and the interests of persons who have a right to use the declared service, cannot be assessed in isolation. The practical effect of the Undertakings, having regard to the likely commercial behaviour of access seekers in all the circumstances, is crucial to their reasonableness.

Hutchison submits that no access seeker will choose to pay Hutchison 21 cpm for the MTAS in circumstances where that access seeker is required, by reason of a final determination, to charge Hutchison a rate less than 21 cpm. In particular, Hutchison refers to the following access disputes:

- the Hutchison/Vodafone MTAS access disputes, comprising;
    - two access disputes notified by Hutchison regarding the price payable by Hutchison for the MTAS supplied by Vodafone; and
    - two access disputes notified by Hutchison regarding the price payable by Vodafone for the MTAS supplied by Hutchison;[26]
- the Hutchison/Optus MTAS access disputes, comprising:
    - two access disputes notified by Hutchison regarding the price payable by Hutchison for access to the MTAS supplied by Optus; and
    - a single access dispute notified by Optus regarding the price payable by Optus for the MTAS supplied by Hutchison;

[25] Draft Decision, pages 62 and 63.

[26] These access disputes were withdrawn on 20 March 2006 following agreement with Vodafone that the terms of the final determination made in the existing Hutchison/Vodafone access disputes would apply on a reciprocal basis.

- the Hutchison/Telstra MTAS disputes, comprising:
    - the two access disputes notified by Telstra regarding the price payable by Telstra for access to the MTAS supplied by Hutchison; and
    - the two access disputes notified by Hutchison regarding the price payable by Hutchison for access to the MTAS supplied by Telstra.

These access disputes will establish the price to be paid by Hutchison for the MTAS supplied by other carriers, such carriers also being access seekers for the purposes of the PMTS Dual Rate Undertaking.

Given that the Commission has declared a stand alone price of 21 cpm to be unreasonable, Hutchison submits that it is highly unlikely that the Commission would determine a rate of 21 cpm or more for the MTAS in an access dispute under Part XIC of the Act. Accordingly, the price payable by Hutchison for the MTAS supplied by carriers will be less than 21 cpm.

If access seekers are required, by reason of a final determination, to charge Hutchison a price less than 21 cpm for the MTAS supplied by them, it follows that such access seekers will not choose to be charged a rate of 21 cpm for the MTAS supplied by Hutchison. This would result in the access seeker paying Hutchison 21 cpm for the MTAS while Hutchison pays the access seeker a lesser rate in accordance with the final determinations. Hutchison submits that asymmetrical pricing is an unacceptable commercial outcome for access seekers, particularly where such asymmetry results in a net loss to the access seeker.

Accordingly, the majority of access seekers will be faced with a simple choice under the PMTS Dual Rate Undertaking: a reciprocal rate of 12 cpm, a rational choice for any access seeker, or an asymmetrical arrangement whereby Hutchison charges the access seeker more for the MTAS than Hutchison is required to pay that access seeker by reason of the Commission's final determinations. As to the remaining access seekers, AAPT Pty Ltd and PowerTel Pty Ltd, Hutchison submits that neither access seeker would accept the non-reciprocal rate of 21 cpm in circumstances where a lower, reciprocal rate is available.

Hutchison therefore submits that the Commission must reassess its view on the consistency of the PMTS Dual Rate Undertaking with the LTIE, taking into account the commercial realities in the market faced by Hutchison and access seekers in relation to the supply of the MTAS. In particular, the Commission should consider:

- the interplay between undertaking process and the arbitrations;
- the likelihood that no access seekers will be charged the 21 cpm rate if the PMTS Dual Rate Undertaking is accepted; and
- the likelihood that all access seekers will be charged the reciprocal rate of 12 cpm for the MTAS if the PMTS Dual Rate Undertaking is accepted.

Legitimate Business Interests

The Commission believes that the pricing proposed by the PMTS Dual Rate Undertaking would not compromise Hutchison's legitimate business interests, and that the default price

of 21 cpm is 'significantly beyond what Hutchison has indicated… represents an appropriate price reflecting the fair and reasonable costs of providing the MTAS'.[27]

Hutchison agrees that the 21 cpm usage charge contained in the PMTS Dual Rate Undertaking would not compromise its legitimate business interests. In any event, for the reasons expressed above in relation to the LTIE criterion, Hutchison considers it highly unlikely that the 21 cpm usage charge will be chosen by any access seeker for the duration of the PMTS Dual Rate Undertaking. Accordingly, Hutchison is extremely unlikely to garner a commercial advantage from the 21 cpm rate proposed by the PMTS Dual Rate Undertaking.

Interests of persons who have the right to use the MTAS

The Commission has decided that the 21 cpm rate proposed by the PMTS Dual Rate Undertaking would not serve the interests of persons that have the right to use the MTAS as this rate is above the best estimate of the TSLRIC+ of providing the service.[28]

Again, the Commission has assessed the rate of 21 cpm independent of its 12 cpm counterpart, rather than as a catalyst for the universal acceptance of the reciprocal 12 cpm rate – a result which the Commission acknowledges would serve the interests of persons who have the right to use the MTAS.

For the reasons expressed in relation to the LTIE criterion above, Hutchison submits that the Commission should reassess its decision in relation to those who have a right to use the MTAS, taking into account the pricing structure proposed by the PMTS Dual Rate Undertaking *as a whole*.

Further, Hutchison submits that the Commission is obliged to consider the commercial interests of such access seekers in the context of the price terms contained in the PMTS Dual Rate Undertaking. Given that the 12 cpm reciprocal rate is the only rational, commercial option for access seekers when faced with a 21 cpm, non-reciprocal alternative, Hutchison submits that the PMTS Dual Rate Undertaking will ensure that all access seekers adopt the lower usage charge for the MTAS.

Direct costs of providing access to the MTAS

In considering this criterion, the Commission states that:

> …were the PMTS Dual Rate Undertakings to be accepted the price of the MTAS would exceed the direct costs of the MTAS under certain circumstances in which the default usage charge of 21 cpm applied.[29]

Hutchison acknowledges the fact that the usage charge of 21 cpm exceeds the direct costs of providing the MTAS. However, it does not necessarily follow that the price terms contained in the PMTS Dual Rate Undertaking, on the whole, are unreasonable.

Hutchison repeats its submission above in relation to the rationale for the 21 cpm rate. Hutchison urges the Commission to reconsider its assessment of reasonableness in view

[27] Draft Decision, page 69.

[28] Draft Decision, page 70.

[29] Draft Decision, page 71.

of the likelihood that the inclusion of the 21 cpm usage charge will compel access seekers to accept a reciprocal 12 cpm rate – a rate which reflects the direct costs of providing the service.

The economically efficient operation of a carriage service/telecommunications network or facility

For the reasons given in relation to the 'economically efficient use of investment in infrastructure' LTIE criterion, the economically efficient operation of a service, network or facility is encouraged by the combination of prices specified by the PMTS Dual Rate Undertaking. The higher usage charge of 21 cpm is justified to the extent that it creates a strong incentive for access seekers to agree to the lower, reciprocal target rate of 12 cpm.

Conditional aspects of the PMTS Dual Rate Undertaking

With the exception of the differential pricing proposed by the PMTS Dual Undertaking (discussed above), the Commission is satisfied that the conditional aspects of the PMTS Dual Rate Undertaking, ie, those relating to reciprocity, transit traffic and Hutchison's discretion to cease charging 12 cpm, are reasonable.[30]

2.3 Non-PMTS Undertaking

The Non-PMTS Undertaking proposes a rate of 18 cpm for the MTAS supplied by Hutchison in respect of Non-PMTS calls, ie fixed-line calls or calls originating from overseas networks. The Commission has decided that the price terms contained in this undertaking are also unreasonable in accordance with the s152AH(1) criteria.

The LTIE

The Commission does not believe that the price terms contained in the Non-PMTS Undertakings would benefit the LTIE for the following reasons:

- The proposed price of 18 cpm would weaken competition in the FTM market because, 'the MTAS would be supplied at a rate higher than even a conservative estimate of the underlying cost of providing the service and well above… the level that the Commission expects would emerge (through both arbitral determinations and commercial negotiations) if the Non-PMTS Undertakings were rejected'.[31]
- At worst, the Commission believes that the level of competition in the retail mobile services market would be no worse than it would be if the Non-PMTS Undertakings were rejected.[32]
- By failing to establish a price closer to the TSLRIC+ of supplying of the MTAS, the Non-PMTS Undertakings will likely have the effect of discouraging efficient investment in, and efficient use of, the infrastructure by which telecommunications services are provided – to some extent.[33]

[30] Draft Decision, page 31.

[31] Draft Decision, page 79.

[32] Ibid.

[33] Draft Decision, page 80.

Hutchison strongly disagrees with the Commission's assessment of the LTIE in relation to the Non-PMTS Undertaking.

The Commission's conclusion is based on the assumption that a reduction in the price of the MTAS supplied in respect of FTM calls to 12 cpm will promote competition in the relevant markets. This conclusion fails to acknowledge that such improvements will only occur if FTM operators are forced to pass-through reductions in MTAS prices to end-users in the form of lower retail prices.

The Commission itself has acknowledged that the FTM market is not effectively competitive.[34] Existing market structures provide vertically-integrated fixed and mobile network operators with considerable scope and incentive to use their control over access to the MTAS to engage in anti-competitive price-squeeze behaviour.[35] The Draft Decision fails to acknowledge that, given the lack of competition in the FTM market, lower MTAS charges are unlikely to produce lower FTM prices without further regulation of those prices.

The Non-PMTS Undertaking was submitted by Hutchison to ensure an appropriate reduction in MTAS prices, taking into account the likelihood that pass-through will not necessarily occur:

> In its previous submissions to the Commission, Hutchison advocated the need for a pass-through mechanism to ensure a reduction in fixed-to-mobile retail prices. However, pass-through mechanisms, including the FTM safeguard proposed by Vodafone in its MTAS undertaking, have been strongly rejected by fixed-line operators such as Optus and Telstra.[36] In the light of this opposition, Hutchison considers that a reduction in MTAS charges to 18 cpm for Non-PMTS Calls is a practical means of testing whether or not an appropriate degree of pass-through will occur in the absence of a specific pass-through mechanism.[37]

Hutchison is not satisfied that the Commission's Draft Decision deals with the fact that:

- given the lack of competition in the FTM market, a pass-through mechanism is required to ensure a reduction in FTM retail prices; and
- without pass-through, significant reductions in access prices may adversely affect price competition in the retail mobile services market.

Hutchison therefore questions the validity of the Commission's decision to reject the Non-PMTS Undertaking on the grounds that its price terms are not in the LTIE. Hutchison submits that the 18 cpm rate proposed by the Non-PMTS Undertaking strikes an appropriate balance until such times as adequate pass-through occurs. Hutchison submits that this approach, which essentially requires a delayed movement toward the target price of 12 cpm, is in principle consistent with the adjustment path proposed by the MTAS Final

[34] ACCC, Draft MTAS Final Decision, March 2004, p 93.

[35] Hutchison, *Submission by Hutchison in response to the draft MTAS Final Decision*, April 2004, p 3.

[36] See Optus, *Optus Submission to the ACCC on Vodafone's revised mobile terminating access service undertaking lodged 23 March 2005*, August 2005, p6.

[37] See Hutchison submission, page 11. The Commission acknowledges that "pass-through may take time to emerge in full": ACCC, MTAS Final Decision, p 125.

Decision. The price terms in both the Non-PMTS Undertaking and the MTAS Final Decision are designed to limit the perceived negative effects that an immediate move toward the target price of 12 cpm may have for the LTIE.

Legitimate business interests

The Commission notes that, as 18 cpm is more than necessary to meet Hutchison's legitimate business interests, such interests would be met by acceptance of the Non-PMTS Undertaking.

Hutchison accepts that its legitimate business interests would not be compromised by the price terms contained in the Non-PMTS Undertaking and refers to its rationale for such terms as set out above.

Further, Hutchison notes that its business interests, as a new entrant and an efficient forward-looking operator, are wholly consistent with the statutory factors which make up the LTIE test, namely promoting competition and the economically efficient use of, and investment in, infrastructure. The Non-PMTS Undertaking would therefore promote Hutchison's legitimate business interests not at the expense, but rather in furtherance of, the LTIE.

Interests of persons who have the right to use the declared service

The Commission has decided that the interests of persons who have a right to use the MTAS would be better promoted if the Non-PMTS Undertakings were to be rejected on the grounds that the price terms contained in the Non-PMTS Undertaking are more likely to:

- improve the ability of mobile operators to compete *at the expense of* fixed operators in their respective markets; and
- encourage inefficient FTM substitution and inhibit the ability of fixed operators to compete in supply of voice services to end users.

The Commission provides no market analysis in support of this conclusion. Further, the Commission fails to address the fundamental fact that the FTM market is *substantially less competitive* than the retail mobile services market.[38]

Hutchison's rationale in submitting separate undertakings in respect of PMTS and Non-PMTS traffic flows from this market analysis. A general reduction in MTAS charges to 12 cpm would be a windfall for the incumbent fixed-line provider, Telstra Corporation Ltd, thereby hindering competition in the retail mobile services market and the FTM market. However, a reduced MTAS charge of 12 cpm in respect of PMTS traffic only would foster competition in the mobile services market, allowing new entrants such as Hutchison to become increasingly competitive, while addressing pass-through concerns in the FTM market. A price of 12 cpm would also enable efficient mobile operators to place competitive pressure on integrated carriers to increase efficiency. However, to reduce MTAS charges to this extent without ensuring a commensurate reduction in FTM retail prices would be detrimental to competition.[39]

[38] Hutchison submission, page 17.

[39] Hutchison, *Submission by Hutchison to the Mobile Services Review*, June 2003, p3.

In March 2006, Telstra submitted an undertaking for the public switched telephone network (***PSTN***) originating and terminating access (***OTA***) services and the local carriage service (***LCS***). The undertaking proposes substantially increased prices for Telstra's supply of PSTN OTA services and the LCS.

Telstra submits that these substantial increases must be imposed due to an anticipated decline in the use of PSTN services and to recover increasing unit costs. Hutchison submits that Telstra's undertaking, and the express rationale for this undertaking, indicates that Telstra is highly unlikely to reduce its FTM retail prices in response to an immediate reduction in the cost of the MTAS to 12 cpm.

Hutchison maintains that the Non-PMTS Undertaking strikes an appropriate balance between the interests of fixed-line/integrated operators and mobile only operators. It proposes a reduction in the price of the MTAS for FTM calls which does not create an undue windfall in favour of fixed-line operators, but ensures a closer association of price and underlying cost. Hutchison repeats its previous submission that a price of 18 cpm for its supply of the MTAS in respect of Non-PMTS Calls:

- constitutes a significant reduction in MTAS charges;
- is preferable to the Commission's adjustment path; and
- is appropriate given the time period for which the Non-PMTS Undertaking will operate.

The Commission has also concluded that the limited operating period of the Non-PMTS Undertaking fails to provide market certainty for any significant period of time, contrary to the interests of persons who have a right to use the declared service.[40] Given that the date for expiry of the Non-PMTS Undertaking is fast approaching, Hutchison notes its intention to lodge a new Non-PMTS undertaking in order to provide certainty for the period after 30 June 2006.

Regardless, Hutchison submits that certainty is not the only factor that determines whether the Non-PMTS Undertaking is in the interests of persons who have a right to use the MTAS. The extent to which the Undertaking improves competition in the relevant markets is a factor which must be accorded significantly more weight in the present circumstances.

Hutchison submits that the limited time period proposed by the Non-PMTS Undertaking appropriately balances the need to provide certainty for access seekers with the need to ensure that pricing levels can be adjusted by reference to both the declining price of the MTAS and the effectiveness of the revised retail price control scheme.[41]

Direct costs of supplying the MTAS

In the Draft Decision, the Commission notes that "18 cpm is above what the Commission believes is the direct costs of supplying the MTAS", and that "18 cpm is above what

[40] Draft Decision, page 83.

[41] See *Telstra Carrier Charges – Price Control Arrangements, Notifications and Disallowance Determination No. 1 of 2002.* Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts, *Senate Hansard*, 22 June 2005, p 50.

Hutchison itself concedes is appropriate", having regard to the direct costs of providing the MTAS.[42] On this basis, the Commission has decided that the pricing proposed by the Non-PMTS Undertaking is unreasonable.

Hutchison does not contend that 18 cpm represents the direct costs of providing the MTAS. However, it does contend that the rate of 18 cpm is fair and reasonable in view of the different competition issues arising in the retail mobile services and FTM markets, as outlined above.

Pursuant to s152AH(1) of the Act, the Commission is required to have regard to the direct costs of providing the service. This requirement does not preclude the Commission from accepting an Undertaking that proposes a price which exceeds direct costs if that Undertaking is, in all the circumstances, reasonable under s152BV(2)(d) of the Act. As noted above, the adjustment path proposed by the MTAS Final Decision sets prices for the MTAS that exceed direct costs on the basis that the Commission regarded such prices as reasonable in all the circumstances. Hutchison submits that the Commission should adopt a similar approach when assessing the 18 cpm rate proposed by the Non-PMTS Undertaking.

Hutchison urges the Commission to reconsider its approach to the 'direct costs' criterion and to accept its submission that a price of 18 cpm is appropriate for the MTAS supplied in respect of Non-PMTS calls:

> Reductions in MTAS charges alone would result in an unjustified windfall for fixed-line operators, leading to greater market distortions and no tangible consumer benefit. Given the likely effect of a universal reduction in the price of the MTAS on competition, Hutchison believes that the Undertakings, which propose rates of 12 cpm and 18 cpm in the retail mobile services market and the FTM market respectively, will ultimately assist in promoting competition in each of the relevant markets.[43]

Economically efficient operation of a carriage service, telecommunications network or facility

The Commission refers to its reasoning under the 'efficient use of, and investment in, infrastructure' LTIE criterion in finding that the economically efficient operation of a carriage service, telecommunications network or facility would be more likely to be promoted in the absence of the Non-PMTS Undertaking.

Hutchison has submitted that, given the short time period for which the Non-PMTS Undertaking would operate, the Non-PMTS Undertaking would most likely have a neutral effect on the economically efficient use of and investment in infrastructure, and would certainly not discourage the economically efficient use of and investment in infrastructure.

Accordingly, Hutchison contends that the Commission should reassess its decision in relation to the criterion in view of the short-term nature of the price terms proposed by Non-PMTS Undertaking.

[42] Draft Decision, page 84.

[43] Hutchison submission, page 18.

2.4 The Undertakings in combination

Having assessed the reasonableness of each individual Undertaking (ie, PMTS Single Rate, PMTS Dual Rate and Non-PMTS Undertakings), the Draft Decision purports to consider the price terms of the following combinations of Undertakings proposed by Hutchison:

- PMTS Single Rate Undertaking and Non-PMTS Undertaking; and
- PMTS Dual Rate Undertaking and Non-PMTS Undertaking.

Combined PMTS Dual Rate Undertaking and Non-PMTS Undertaking

The Commission was not satisfied that the price terms and conditions of either the PMTS Dual Rate Undertaking, and the Non-PMTS Undertakings were reasonable. On this basis, it found the combination of the two undertakings to be unreasonable.

The Commission merely repeats its reasons for rejecting each individual undertaking to support its conclusion that together, the Undertakings are unreasonable. In doing so, the Commission assumes that its assessments of the Undertakings individually amounts to an assessment of the Undertakings in combination. This is contrary to Hutchison's submission that the Commission should assess the *joint effect* of the Undertakings; a process which is fundamental to the reasonableness of the pricing structures proposed by the PMTS Dual Rate and Non-PMTS Undertakings.

The fact that each Undertaking, in isolation, may have been regarded as unreasonable does not necessarily preclude the Commission from finding that their combined effect is reasonable. Hutchison is not satisfied that the Commission has properly assessed the price terms of the combined PMTS Dual Rate and Non-PMTS Undertakings and therefore repeats its previous submissions in relation to the overall consistency of the Undertakings with the reasonableness criteria under s152AH(1):

> In assessing the reasonableness of the price related terms and conditions, particularly the 21 cpm proposed by the PMTS Dual Rate Undertaking, Hutchison submits that the Commission should have regard to:
>
> - the interplay between all of the price related terms and conditions contained in the Undertakings; and
> - the different markets in which those terms and conditions apply.
>
> For example, 18 cpm represents a reasonable reduction in MTAS charges in the fixed-to-mobile market given the absence of an effective pass through mechanism and the delayed emergence of competition in that market. Meanwhile 12 cpm is an appropriate price for the MTAS in the mobile-to-mobile context, being at the higher end of the range of best estimates of the cost of supplying the MTAS. While Hutchison does not intend to suggest that the rate of 21 cpm is in any way reflective of the underlying cost of providing the MTAS, this optional rate is appropriate when coupled with the offer of the lower, reciprocal rate of 12 cpm.
>
> The rate of 21 cpm contained in the PMTS Dual Rate Undertaking should not be viewed in isolation. A review of all of the price related terms and conditions *in context* reveals a broader consistency with the principles expressed by the Commission in its MTAS Final Decision and the LTIE. Hutchison submits that, when considered together, the PMTS Dual Rate Undertaking and the Non-PMTS Undertaking provide a rate structure that addresses the different issues arising in the relevant markets, promotes competition in those markets

and ensures a closer association of the price of the MTAS with its underlying cost in such a way as to promote the LTIE.[44]

Combined PMTS Single Rate/Non-PMTS Undertakings

In the Draft Decision, the Commission states that, "As a consequence of finding that the price terms and conditions of the PMTS Single Rate Undertakings are reasonable and the Non-PMTS Undertakings were unreasonable, the Commission cannot find that combined the price terms and conditions of these Undertakings are reasonable".[45]

Again, the Commission has failed to assess the overall effect of both Undertakings and has relied on its individual assessment of the Non-PMTS Undertaking to support its finding that, combined, the Undertakings are unreasonable.

For the reasons expressed above in relation to the combined PMTS Dual Rate and Non-PMTS Undertakings, the Commission should reassess the joint effect of the PMTS Single Rate and Non-PMTS Undertakings.

That said, if one of the Undertakings satisfies the statutory criteria contained in s152BV of the Act, the Commission is obliged to accept that undertaking. While Hutchison recommends acceptance of a PMTS Undertaking and the Non-PMTS Undertaking, Hutchison also submits that the Commission should not be deterred from accepting one of the PMTS Undertakings if the Non-PMTS Undertaking fails to meet the statutory criteria, and *vice versa*. As the Commission notes in its Draft Decision, there is no evidence to suggest that reduced MTAS charges for PMTS Calls would be detrimental to competition in the absence of a commensurate reduction in MTAS charges for Non-PMTS Calls.[46]

Non-Price Terms

There are two aspects of the non-price terms and conditions proposed by the PMTS Single Rate, PMTS Dual Rate and Non-PMTS Undertakings that the Commission deems unreasonable in accordance with s152AH(1):

- clause 4.1, which deals with the interrelationship between the undertakings and commercial agreements on foot with respect to the MTAS; and
- clause 5, which provides that the non-price terms and conditions of existing agreements may govern the terms and conditions of access to the MTAS.

2.5 Effect of clause 4.1 of the Undertakings

The Commission has noted that it has not previously been asked to consider the interaction between existing agreements and ordinary access undertakings. This issue arises in the context of clause 4.1 of the Undertakings, which provides that the Undertakings, if accepted, will override any commercial agreement for the supply of the service as defined in the Undertakings.

[44] Hutchison submission, page 6.

[45] Draft Decision, page 91.

[46] Draft Decision, page 58.

The Commission has expressed some doubt as to the validity of clause 4.1 of the Undertakings. The Commission maintains that, pursuant to s152AY of the Act, the terms of any commercial agreement take precedence over the terms and conditions of access undertakings.

In response, Hutchison refers to its most recent submission to the Commission regarding its 'failure to agree' with access seekers.[47] In it, Hutchison noted that s152AY of the Act provides that undertakings govern the terms and conditions of access 'failing agreement' between the parties. Given that access disputes are either on foot or imminent between Hutchison and every potential access seeker, clause 4.1 of the undertakings merely mirrors the statutory position and is therefore reasonable.

Regardless of Hutchison's submissions on this point, the Commission has decided that, "prima facie, the legal validity of clause 4.1 is uncertain. As such, it may lead to confusion and argument between the parties as to its effect".[48]

In the interests of certainty, Hutchison summarises its reasoning below:

- Provided that an access undertaking complies with the formal requirements specified in s152BS and satisfies the criteria set out in s152BV of the Act, including the reasonableness criterion, the Commission has the power to accept an undertaking that purports to override existing agreements.
- Hutchison does not contend that access undertakings can override existing agreements in all circumstances. However, s152AY(2)(b) envisages that access undertakings will override existing contractual arrangements 'failing agreement' between carriers and access seekers.
- Hutchison and access seekers have failed to reach agreement about the price of the MTAS. This Commission is cognisant of this given the 12 access disputes that have been notified by Hutchison and other parties in relation to the price of the MTAS.
- In these circumstances, the Undertakings, if accepted, will automatically govern the terms and conditions of supply of the MTAS in accordance with s152AY(2)(b) of the Act. Clause 4.1 merely clarifies the operation of the relevant statutory provisions in these particular circumstances.

Hutchison sets out each point in further detail below.

The Commission has the power to accept the Undertakings

As long as the Undertakings comply with the formal requirements specified in s152BS and satisfy the criteria set out in s152BV of the Act, including the criteria pertaining to reasonableness, the Commission is entitled to accept the Undertakings.

Hutchison submits that clause 4.1 of the Undertakings is reasonable and consistent with s152AY of the Act, which provides that:

[47] See Hutchison's letter to the Commission dated 30 March 2006 regarding the Hutchison MTAS Undertakings.

[48] Draft Decision, p96.

(1) This section applies if a carrier or carriage service provider is required to comply with any or all of the standard access obligations.

(2) The carrier or carriage service provider must comply with the obligations:

(a) on such terms and conditions as are agreed between the following parties:

(i) the carrier or carriage service provider, as the case requires;

(ii) the access seeker; or

(b) failing agreement:

(i) if an access undertaking given by the carrier or carriage service provider is in operation and specifies terms and conditions about a particular matter—on such terms and conditions relating to that matter as are set out in the undertaking.

Access undertakings do not override existing contracts in all circumstances, only where there has been a "failure to agree" in accordance with s152AY(2)(b)

As the Commission is aware, Hutchison has failed to reach agreement with access seekers regarding the price of the MTAS. To date, 12 access disputes have been notified by Hutchison and other parties regarding the price at which the MTAS is to be supplied.

Given this universal failure to agree, s152AY(2)(b) clearly provides that the Undertakings, if accepted, will govern the terms and conditions of access. Hutchison does not contend that access undertakings will always override existing agreements. However, where there has been a failure to agree, s152AY(2)(b) provides that this is the case.

In its submission, Telstra contends that "[o]bviously where the parties have an ongoing commercial agreement they have not failed to reach agreement".[49] However, the Commission itself has acknowledged that the existence of a contract does not necessarily preclude the parties from being unable to agree.[50] Indeed, this scenario is expressly acknowledged by the Commission in its guide to the resolution of access disputes.

To assist the Commission, Hutchison sets out the specific circumstances that constitute the parties' 'failure to agree' within the meaning of s152AG of the Act.

Vodafone Network Pty Limited (*Vodafone*)

Vodafone and Hutchison currently supply the MTAS to each other in accordance with two Access Agreements (the ***Hutchison/Vodafone Access Agreements***). The Hutchison/Vodafone Access Agreements were most recently amended by a variation executed on 15 July 2004. Together, these agreements form the current interconnection agreement between Vodafone and Hutchison.

The current agreement specified a price of 21 cpm for the supply by Hutchison to Vodafone until 31 December 2004. The parties have failed to agree on the appropriate price to be charged for their supply of the MTAS to each other from 1 January 2005 onwards.

[49] Telstra Corporation Limited, *Submission in response to the ACCC's Discussion Paper, Hutchison Undertaking in relation to the Domestic Digital Mobile Terminating Access Service*, December 2005, p15.

[50] ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised), p 8-9.

On 23 December 2004, H3GA notified the Commission of an access dispute in relation to the price payable by it for the MTAS supplied by Vodafone from 1 January 2005. HTAL lodged its notification in respect of the same dispute on 24 February 2005. The price payable by Hutchison to Vodafone for the MTAS is currently governed by the Commission's interim determinations in these disputes dated 14 July 2005.

On 20 December 2005, Hutchison notified further access disputes regarding the price payable by Vodafone for the MTAS supplied by Hutchison from 1 January 2005. These access disputes were withdrawn by Hutchison on 20 March 2006 following the making of interim payment arrangements, which apply until the earlier of:

- acceptance by the Commission of an undertaking submitted by either Hutchison or Vodafone,
- withdrawal of the access disputes;
- the expiry of the Final Determinations; or
- 31 December 2006

These arrangements do not constitute an agreement as to the price payable by Vodafone for the MTAS supplied by Hutchison. Rather, they are an interim measure designed to ensure reciprocal payment on terms consistent with the interim determinations made by the Commission in the existing access disputes.

Optus Networks Pty Ltd, Optus Mobile Pty Ltd and Optus Vision Pty Ltd (together *Optus*)

Optus and Hutchison supply the MTAS to each other in accordance with two Access Agreements (the ***Hutchison/Optus Access Agreements***). The Hutchison/Optus Access Agreements were most recently amended on 7 July 2004.

Schedule 5 of the Hutchison/Optus Access Agreements provides that the parties are to supply the MTAS to each other at price of 21 cpm until the 'Review Date' of 31 December 2004. The term 'Review Date' is not defined in the agreements and no indication is given as to the rights and obligations of the parties after the Review Date.

Following the failure of the parties to agree upon a price to apply from 1 January 2005, Hutchison lodged disputes on 23 February 2005 regarding the price to be paid by it for MTAS supplied by Optus. The price payable by Hutchison is currently governed by the Commission's interim determinations dated 5 August 2005.

Hutchison refers to its letter to the Commission dated 8 February 2006 regarding its rejection of Optus' most recent offer in relation to the supply of the MTAS. Despite these negotiations, the parties continue to disagree regarding the appropriate price for the MTAS from 1 January 2005.

Telstra

Telstra and Hutchison provide the MTAS to each other under a General Access Agreement dated 24 November 1999 (***GAA***), as varied from time to time.

The GAA does not specify pricing for the MTAS for the 2005/2006 period. Telstra is currently charging Hutchison 21 cpm for the MTAS, the most recently negotiated contract price.

The parties have failed to reach agreement regarding the price of the MTAS from 1 January 2005. To this end, we refer the Commission to the access disputes notified by Telstra on 19 December 2005 in relation to the price payable by Telstra for the MTAS supplied by Hutchison, and the access disputes notified by Hutchison on 8 February 2006 in relation to the price payable by Hutchison for the MTAS supplied by Telstra.

AAPT Limited (*AAPT*)

HTAL currently supplies the MTAS to AAPT pursuant to an Access Agreement dated 3 June 2002 (the ***Hutchison/AAPT Agreement***). The Hutchison/AAPT agreement provides that Hutchison will charge AAPT 18 cpm for MTAS supplied in respect of fixed line (ie Non-PMTS) calls terminating on Hutchison's network until 31 December 2005. The parties have failed to reach agreement with respect to the price to be charged by Hutchison from 1 January 2006.

On 4 April 2006, AAPT lodged an access dispute in relation to the price to be charged by Hutchison for the MTAS from 1 January 2006 to 31 December 2007.

PowerTel Pty Ltd (*PowerTel*)

Hutchison expects to execute a written agreement with PowerTel regarding Hutchison's supply of the MTAS to PowerTel in the coming week (the ***Hutchison/PowerTel Agreement***). However, despite continued negotiations, the parties are yet to reach agreement with respect to the price to be charged by Hutchison for the MTAS pursuant to the Hutchison/PowerTel Agreement.

It is clear from this protracted history of negotiation and dispute that Hutchison and the parties to which it supplies and from whom it acquires the MTAS have failed to agree about the price to be charged for the MTAS.

Clause 4.1 of the Undertakings merely clarifies the statutory position

Clause 4.1 is contained in the Undertakings to make clear that, given Hutchison and other parties' failure to agree on the price of the MTAS, its Undertakings will automatically govern supply of the MTAS to those access seekers in accordance with s152AY(2)(b) of the Act in the event that the Undertakings are accepted.

In addition, to the extent that access seekers' existing contractual non-price terms and conditions of supply are effectively incorporated into the Undertakings by virtue of clause 5.2, acceptance of the Undertakings will not result in access seekers being deprived of their non-price contractual rights.

Accordingly, clause 4.1 of the Undertaking is reasonable and entirely consistent with the statutory provisions that relate to the operation of access undertakings and existing commercial agreements. It is Hutchison's view that acceptance of the Undertakings will ensure efficient resolution of the multiple disputes on foot between Hutchison and access seekers about the price of the MTAS, an outcome that is consistent with the underlying purpose of the access undertaking regime.

2.6 Clause 5 of the Undertakings: two sources of non-price terms

Clause 5 of the Undertakings provides two alternative sources of non-price related terms and conditions on which Hutchison will supply the MTAS:

- the non-price terms and conditions contained in Attachment B to the Undertakings; or
- the access seeker's existing agreement with Hutchison for the supply of the MTAS, SMS, MMS or any other service (the ***existing agreement option***).

As to the reasonableness of the non-price terms contained in Attachment B, the Commission noted that, "…had it been certain that Attachment B would form the terms and conditions of the Undertakings…, it is likely that the non-price terms and conditions would have been considered reasonable".[51] Hutchison agrees that the non-price terms and conditions contained in Attachment B of the Undertakings are reasonable.

In contrast, the Commission found the existing agreement option contained in clause 5.2 of the Undertakings to be unreasonable for the following reasons:

- Given that the Commission has not reviewed the individual agreements which may operate pursuant to clause 5.2, it cannot be satisfied that their terms and conditions are reasonable.
- Even if it had reviewed these agreements, the Commission would still not be able to undertake the necessary assessment, nor be satisfied that the terms and conditions were reasonable, given that:
    - clause 5.2 refers to agreements for the supply of MTAS or any other service (such as SMS or MMS) which are in force on the date on which the Undertakings commence, but does not specify an order of precedence for those agreements. Therefore, neither the Commission nor the access seeker has any way of knowing which existing agreement should be assessed; and
    - there is a possibility (albeit remote) that Hutchison could enter into an agreement between the time that the Commission makes its decision and communicates that decision to Hutchison. Such an agreement would be deemed an existing agreement pursuant to clause 5, but would not have been assessed by the Commission for reasonableness.
- While clause 5.3 could bring the existing agreements into line with the Attachment B provisions to the extent of any inconsistency, the Commission still has not reviewed the terms and conditions of existing agreements that are not inconsistent with Attachment B, ie the existing terms and conditions that would 'survive' acceptance of the undertakings.
- There is no certainty as to the operation of the inconsistency provision contained in clause 5.3: "It may be the subject of considerable debate by the parties to the

[51] Draft Decision, page 102.

agreements as to whether the ‘inconsistency’ clause is triggered, and with what effect".

Hutchison addresses each in turn.

The Commission has not reviewed existing terms and conditions

The Commission has decided that it cannot be satisfied that the terms and conditions of the existing agreements are reasonable without first reviewing these terms and conditions. This is contrary to Hutchison's submission that the non-price terms and conditions of existing agreements must be reasonable, having been subject to a process of commercial negotiation between Hutchison and access seekers.

In order to address these concerns, the Commission has issued a request pursuant to s152BT of the Act that Hutchison submit the non-price terms and conditions of the following commercial agreements for the supply of the MTAS to the Commission, being 'existing agreements' in accordance with clause 5.2:

Vodafone	
Access Agreement between H3GA and Vodafone	2002
Access Agreement Variation 2004/2 between H3GA and Vodafone	2004
Access Agreement between HTAL and Vodafone	21 July 2004
Access Agreement Variation 2004/2 between HTAL and Vodafone	2004
Optus	
Services Agreement between Optus and H3GA	6 March 2003
Amending Agreement between Optus and H3GA	7 July 2004
Services Agreement between Optus and HTAL	16 July 1999
Variation to Services Agreement between Optus and HTAL	6 August 1999
Telstra	
Telstra Access Agreement – General Terms and Conditions between Telstra and HTAL	24 November 1999
Customer Relationship Agreement between Telstra and H3GA	30 April 2003
AAPT	
Access Agreement between HTAL and AAPT	3 June 2002
Variation Agreements No. 1 to No. 5 between HTAL AAPT	16 July 2002, 31 December 2004, 7 April 2005 and 20 October 2005
Access Agreement between H3GA and AAPT	6 July 2004
PowerTel	
Access Agreement between HTAL and PowerTel	To be executed

The non-price terms and conditions contained in the agreements listed above do not depart significantly from those set out in Attachment B to the Undertakings.

On this basis, Hutchison submits that the non-price terms and conditions contained in the existing agreements are reasonable.

Order of precedence – agreements for SMS, MMS or any other service

The Commission states that:

> ..the 'existing agreement option' refers to agreements for the supply of MTAS or any other service (such as SMS or MMS) which are in force on the date on which the Undertakings commence, but does not specify an order of precedence for those agreements. Therefore, neither the Commission nor the access seeker has any way of knowing which existing agreement should be assessed.[52]

Hutchison submits that the Commission should reassess its view given that Hutchison's supply of the different services referred to in clause 5.2 to each access seeker is governed by the same set of non-price terms and conditions. It is Hutchison's commercial practice to enter into a single access agreement with each access seeker for supply of the relevant services. The services that are provided in accordance with the general terms and conditions of the agreement, including SMS and MMS, and their respective price terms, are annexed to the agreement in the form of a separate schedule.

Therefore, the Commission's concern that, "when negotiating these agreements, the relevant access seekers may have had no knowledge or appreciation that these agreements could or would form part of an MTAS access arrangement" is unfounded. No order of precedence is required as one agreement governs Hutchison's supply of the relevant services to each access seeker.

Entry into new agreements that have not been reviewed by the Commission

The Commission is concerned about the possibility that Hutchison could enter into an agreement between the time that the Commission makes its decision and communicates that decision to Hutchison. Such an agreement would be deemed an existing agreement pursuant to clause 5.2, but would not have been assessed by the Commission for reasonableness.

Hutchison submits that this concern is also unfounded. Hutchison will not be entering into any agreements regarding supply of the MTAS, other than with PowerTel, from now until the date the Commission makes its final decision, assuming that such a decision is made in accordance with the time limits specified under the Act. Hutchison expects to finalise the terms and conditions of its agreement with PowerTel next week and will forward this agreement to the Commission for its review.

No certainty as to clause 5.3

The Commission's view is that there is no certainty with regards to the operation of the inconsistency provision contained in clause 5.3, and that "it may be the subject of considerable debate by the parties to the agreements as to whether the 'inconsistency' clause is triggered, and with what effect".[53] Hutchison submits that this finding is based on an erroneous interpretation of clause 5.3 of the Undertakings.

[52] Draft Decision, p 97.

[53] Draft Decision, page 97.

Clause 5.3 provides that:

> For the avoidance of doubt, if an Existing Agreement governs the supply of the [relevant Hutchison service] by reason of clause 5.2, the terms of this Undertaking will prevail to the extent of any inconsistency.

The Commission has interpreted clause 5.3 to mean the following:

> In the present case, the net effect of the 'existing agreement option' is that all 'consistent' terms and conditions are to be read into the Undertaking, while inconsistent clauses are replaced by the relevant clauses set out in Attachment B.[54]

Hutchison understands that the Commission has interpreted the reference to 'the terms of this Undertaking' in clause 5.3 to include all the terms and conditions contained in Attachment B. This would clearly have the effect summarised by the Commission above, ie Attachment B and the existing agreements may operate concurrently. However, such an interpretation is contrary to Hutchison's purpose in including two separate sources of non-price terms for access seekers.

Hutchison's intention in submitting two sources of non-price terms was to allow continuity and certainty for access seekers with existing agreements.

In Hutchison's view, there is no requirement that an existing agreement be consistent with Attachment B, as Attachment B does not form part of the Undertakings in circumstances where an access seeker is party to an existing agreement. Clause 5.2 makes clear that Attachment B *does not* apply to such access seekers. Therefore, Attachment B should not to be regarded as part of the Undertakings for the purposes of determining whether an inconsistency exists under clause 5.3. All that clause 5.3 requires is consistency with the balance of the terms and conditions specified in the Undertaking and in Attachment A of the Undertaking.

In the interests of certainty, Hutchison would support the making of the following minor variation pursuant to s152BY of the Act if it would satisfy the Commission as to the certainty of the inconsistency clause:

> For the avoidance of doubt, if an Existing Agreement governs the supply of the [relevant Hutchison service] by reason of clause 5.2, the terms of this Undertaking<u>, excluding Attachment B,</u> will prevail to the extent of any inconsistency.

Hutchison will supply the MTAS to access seekers on the non-price terms and conditions contained in existing agreements regardless of any inconsistency with Attachment B to the Undertakings. Accordingly, Hutchison submits that the Commission's concerns regarding uncertainty arising from clause 5.3 are unfounded. It will not be unduly difficult for the parties to determine whether the 'inconsistency' clause is triggered, and with what effect.

[54] Ibid.

3. Consistency with the SAOs: s152BV(2)(c)

The Commission considers that, while price terms and conditions are more relevant to the assessment of reasonableness, non-price terms and conditions are especially relevant to assessment of the Undertakings' consistency with the SAOs.[55]

The Commission accepts Hutchison's submission that the following SAOs apply to its supply of the MTAS:

- the supply of the declared service (s152AR(3)(a));
- the technical and operational quality of the declared services to be supplied (s152AR(3)(b));
- fault detection, handling, rectification and timing of the service to be supplied (s152AR(3)(c));
- the interconnection of facilities required to supply carriage services (s152AR(5)); and
- the provision of billing information (s152AR (6) and (7)).

In relation to the first SAO, the Commission is satisfied that the Undertakings are consistent with Hutchison's obligation to supply the MTAS.

As to the remaining SAOs the Commission noted that, if Attachment B was the sole source of non-price terms and conditions, it is likely that the Commission would be satisfied with the consistency of the Undertakings with the SAOs. However, because the Commission cannot be satisfied that the Attachment B will be incorporated into the undertakings due to the existing agreement option, the Commission has cannot be satisfied that the Undertakings are consistent with the SAOs.

Accordingly, the Commission has made a request pursuant to s152BT of the Act that Hutchison submit each of the existing agreements referred to in clause 5.3 of the Undertakings to the Commission for the purposes of assessing their consistency with the SAOs. Hutchison contends that each agreement demonstrates consistency with each of the SAOs listed above.

Hutchison confirms that the non-price terms and conditions contained in the existing agreements are similar to the terms and conditions contained in Attachment B. There are no significant differences between the two sets of non-price terms insofar as they seek to comply with the applicable SAOs. To the extent that the non-price terms contained in the existing agreements currently facilitate Hutchison's supply of the MTAS to access seekers and vice versa, it is difficult to see how such terms could be inconsistent with the relevant SAOs.

[55] Draft Decision, p 106.

Conclusion

Hutchison submits that the ***price terms*** proposed by its Undertakings are reasonable in accordance with the criteria set out in s152AH(1) of the Act. In particular:

- the 21 cpm rate proposed by the PMTS Dual Rate Undertaking is reasonable when assessed in the context of the lower, reciprocal rate of 12 cpm; and
- the 18 cpm rate proposed by the Non-PMTS Undertaking is reasonable given the competition issues arising in the FTM and retail mobile services markets.

Accordingly, in making its final decision, the Commission should be satisfied that the Undertakings comply with the reasonableness requirement set out in s152BV(2)(d) of the Act.

Hutchison submits that the ***non-price terms*** proposed by its Undertakings are reasonable. Specifically:

- clause 4.1 of the Undertakings is reasonable as it merely reflects the statutory position. Undertakings will govern the terms and conditions of access under s152AY(2) in circumstances where an access provider and access seeker have 'failed to agree';
- clause 5 is reasonable to the extent that it allows the non-price terms and conditions of existing agreements to govern Hutchison's supply of the MTAS to access seekers. In addition, the non-price terms and conditions contained in the existing agreements themselves are reasonable; and
- clause 5.3 will not result in disputes between the parties as the inconsistency clause does not require the existing agreements to be consistent with the terms and conditions in Attachment B, only the terms and conditions contained in the Undertakings and Attachment A to the Undertakings.

Finally, Hutchison maintains its view that the LTIE would be best served by acceptance of the ***PMTS Dual Rate Undertaking*** combined with the ***Non-PMTS Undertaking***. However, Hutchison submits that if the Commission is satisfied that any one of the Undertakings independently satisfies the statutory criteria, it must accept that Undertaking – regardless of whether or not the remaining Undertakings proposed by Hutchison are deemed to comply with the statutory criteria.