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Australian Competition and Consumer Commission
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Attention Grahame O'Leary
Director, ACCC

Dear Mr O'Leary

Domestic Transmission Capacity Service

Your Reference

Our Reference IP 091302

Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**") in response to the ACCC's consultation paper concerning the above.¹ The domestic transmission capacity service ("**DTCS**") is an important access service providing a key element of the voice and data services that Macquarie provides to its corporate and government customer base.

The DTCS is typically acquired by Macquarie to link various end-user locations (such as branch offices and retail outlets) to other customer locations (such as head office) and to the Macquarie network. Macquarie's experience is that while competitive wholesale transmission services are typically available on CBD and long-distance capital - regional routes, Telstra is frequently the only effective wholesale provider in outer metropolitan areas.

Macquarie is concerned that the ACCC's competitive criteria which is used to exempt from regulation certain DTCS when supplied in specified routes is set too low. In particular, it is Macquarie's experience that the potential for competitive alternative supply has not provided the effective competitive pressure on Telstra that the ACCC might have once hoped. In light of the transition to the NBN there is little or no commercial or policy imperative to duplicate Telstra's transmission network. As such, it is appropriate that the regulatory scope of the supply of the DTCS should be expanded rather than reduced.

Macquarie also notes that the DTCS is not included in the list of "Reportable Wholesale Products" in Telstra's structural separation undertaking ("**SSU**"). Accordingly, there is

¹ ACCC, An ACCC Discussion Paper reviewing the declaration for the Domestic Transmission Capacity Service, July 2013 ("**Discussion Paper**")

currently no readily available mechanism whereby the ACCC or access seekers can determine whether Telstra is meeting its equivalence obligations under either the SSU or Part XIC of the *Competition and Consumer Act 2010*. As part of this process, Telstra should be required to provide transparency as to the treatment of its own retail arm and its wholesale customers in relation to the DTCS and comparable products provided to retail.

Against this background, the key outcomes that Macquarie expects from the ACCC's inquiry include:

- the continued declaration of the DTCS;
- a more targeted and precise scope of the regulation of the DTCS given concerns with effective competition; and
- the declaration of the DTCS for a period of five years.

Macquarie's concerns with the effectiveness of competition in the supply of the DTCS translates into concerns with its pricing. Macquarie intends to make representations to the ACCC on DTCS pricing in the course of the ACCC's anticipated inquiry into making a final access determination in respect of the DTCS.

In this submission, Macquarie has responded to each of the consultation questions as set out in the Discussion Paper. For ease of reference, each consultation question is reproduced in a text box and is followed by Macquarie's response.

Consultation Questions

1. Are there any issues over access to different types of DTCS services in the deregulated areas? If there are any issues, please identify what those issues are, including where possible, details of those issues.

The fundamental issue that Macquarie and other access seekers face in obtaining access to different types of DTCS's in the de-regulated areas is that competition is not as effective as it might appear. This is more so in the case of the capital-regional and inter-exchange routes than in the inter-capital routes. In particular, the competition criteria for the capital-regional and inter-exchange routes often proves to be set too low. That is, the existence of fibre providers at or near a regional town or a Telstra exchange does not necessarily translate into a willingness to supply access seekers with competitive services.

Macquarie notes that Telstra Wholesale is increasingly encouraging wholesale customers such as Macquarie to move from traditional x163 services to its managed leased line ("MLL") and Ethernet Access services. Macquarie believes that these new services are covered by the current DTCS service description, but is concerned that there is potential for uncertainty to be created as to the extent to which services which are provided as substitutes for traditional DTCS are covered by the service description. Macquarie considers that Telstra should be required to provide details to the ACCC of the services which it currently provides which fall within the DTCS service description.

In addition, the ACCC should review the current service description to ensure that all services which are provided on either a retail or wholesale basis and which are capable of being substitutes for the traditional DTCS, are adequately covered by the service description. This is important not only to ensure that wholesale customers have access to

the relevant services on a wholesale basis, but also to ensure that comparisons between wholesale and retail services are done on a like for like basis. Macquarie believes that, over the last several years, Telstra's retail customers have been provided with Ethernet based transmission equivalent services, at dramatically lower prices than the wholesale price of the traditional x163 DTCS.

2. The ACCC has previously identified that the relevant downstream markets for the DTCS include national long distance, international call, data and IP-related markets, mobile voice and mobile data. Are these the relevant downstream markets for which the DTCS continues to constitute an input?

Macquarie is of the view that the downstream markets which the ACCC has previously identified for the DTCS are still appropriate for this inquiry. This is because these markets have remained relatively stable.

3. Are there any additional markets in which the DTCS is an input?

Macquarie is of the view that key recent developments in the market such as the growth in VoIP services and growth in mobile data services are already captured in the ACCC's view of downstream markets as expressed in the 2009 Declaration Decision.² Other market developments such as the roll-out of the NBN have not reached sufficient size or had sufficient impact to warrant identification of additional downstream markets.

4. Are there any substitutes for the DTCS in any of the current geographic markets that have developed since the 2009 Declaration Decision?

Macquarie does not believe that there any effective substitutes for the DTCS that have developed in the current geographic markets since the 2009 Declaration Decision. That is, Macquarie agrees with the ACCC's view that "... access seekers purchase DTCS based on particular routes ..." ³ and that lower priced services on other routes are not substitutes for services on a route required by the access seeker.

5. How should the DTCS service description define the geographic boundaries of each capital city and regional centre listed in the service description? What competition criteria should be applied to determine these boundaries?

Macquarie notes that the DTCS FAD⁴ revised the route categories that are used in the DTCS service description. Macquarie believes that the ACCC's revised route categories should be adopted going forward as these revisions result from the ACCC's most recent and detailed review of geographic boundaries.

² ACCC, An ACCC Final Report on reviewing the declaration of the domestic transmission capacity service, May 2009, ("**2009 Declaration Decision**")

³ Discussion Paper, p. 15

⁴ ACCC, Final Access Determination No. 1 of 2012 (DTCS), 21 June 2012 ("**DTCS FAD**")

As noted in its response to question 1, Macquarie is concerned that the competition criteria for the capital-regional and inter-exchange routes is set too low. In the case of the capital-regional routes, Macquarie considers that two or more fibre operators in addition to Telstra does not necessarily translate into effective competition. Lack of effective competition becomes evident through a given access provider failing to respond to a request for quotation, pleading an inability to supply or pricing the service at or above Telstra's price. This may arise for a variety of reasons which include:

- the relatively high costs that the potential provider may need to incur in order to provision its network to meet the requirements of the access seeker;
- the relatively long time delay incurred by the potential provider in making a service available to an access seeker compared to Telstra's readily available service; and
- a relatively small capacity service sought by an access seeker which may not be financially attractive to the potential provider.

Macquarie suggests that a solution to this situation would be to consider the relative capacity of a given route, i.e., Telstra's capacity compared to that of the other fibre providers. For example, the competition criteria might be qualified with the proviso that Telstra's capacity is less than 65 *per cent*. In other words even if there were two or more providers in addition to Telstra for a given route, if Telstra's capacity on that route was 65 *per cent* or more the route would not be considered competitive.

The assessment of share of capacity would be undertaken by the ACCC by way of a record keeping rule. Such a record keeping rule would require wholesale service providers to provide the ACCC with relevant data on an annual basis.

Macquarie believes that competition is only effective where an alternative to Telstra's infrastructure actually exists and is readily available as opposed to infrastructure which is potentially available. As such, to be counted as one of the "two or more providers in addition to Telstra" an operator must have network infrastructure which is actually connected to Telstra's network infrastructure at the regional end.

6. During commercial negotiations, how do parties typically interpret the geographic boundaries of each capital city and regional centre listed in the DTCS service description?

In Macquarie's experience commercial negotiations rarely get to the level of detail where geographic boundaries of capital cities and regional centres are debated. In practice, an access seeker requests a service for a given route and the access provider decides how the geographic boundaries are to be interpreted. The access provider then offers the DTCS on a "take it or leave it" basis.

7. Should the revised terminology used in the DTCS FAD to identify the geographic route categories be adopted into the DTCS service description? That is, should references to capital-regional route in the service description be replaced with regional route and references to inter-exchange transmission be replaced with metropolitan route?

As per its response to question 5, Macquarie considers that it would be reasonable for the ACCC to adopt the revised terminology used in the DTCS FAD to identify the geographic route categories in the DTCS service description.

8. Is it appropriate to reclassify the Sydney-Campbelltown route in the DTCS service description as a deregulated metropolitan route?

Consistent with its response to question 5, Macquarie considers that it would be appropriate to reclassify the Sydney-Campbelltown route in the DTCS service description as a deregulated metropolitan route. This is because such a reclassification results from the ACCC's most recent and detailed review of geographic boundaries. Macquarie notes, however, that following this reclassification the Sydney-Campbelltown route remains deregulated, i.e., charges for this service are not determined by the ACCC. However, in the context of its response to question 22, Macquarie believes that competition is not necessarily effective on metropolitan routes to and from Campbelltown and that this should be reviewed by the ACCC.

9. Should the DTCS service description be updated to include a definition for protected DTCS services? If so, is it appropriate to adopt the definition for protection provided in the DTCS FAD?

Macquarie is of the view that the DTCS service description should be updated to include a definition for protected DTCS's. This is because this reflects the current market practice where protected DTCS's are supplied, i.e., a service with geographic path diversity. Macquarie considers it appropriate to adopt the definition for protection in the DTCS service description as provided in the DTCS FAD.

10. Is it appropriate to continue to define the declared DTCS (in the DTCS service description) as 'symmetric' and 'uncontended'?

Macquarie notes that asymmetric transmission services are evolving particularly in the context of the emergence of the NBN. As such, it would seem appropriate for the definition of the DTCS to reflect that transmission services may or may not be symmetric, i.e., that the service supports the same data rate in either direction.

With regard to the continuation of the DTCS being provided on an uncontended basis, Macquarie believes that it would be appropriate to relax this requirement. Access seekers generally prefer that the DTCS is provided on an uncontended basis as this provides them with the flexibility to manage capacity among end-users. However, to the extent that an access provider may offer a contended service which is designed to be an equivalent

transmission service this service should not fall outside the DTCS service description. This suggests that it might be sufficient for the DTCS to be described as a service capable of operating as a permanent dedicated point-to-point service.

11. Can service availability for the DTCS be described using another measure?

The measurement of service availability is well understood in the telecommunications industry to be the percentage of uptime in a month. For example, 99.9 *per cent* or “three nines” availability means that the service is available for all but 43.8 minutes over a month. Macquarie considers that this approach to measure service availability is appropriate for the DTCS.

12. Should the current definitions for ‘a point of interconnect’, ‘an access seeker network location’ and ‘a customer transmission point’ in the DTCS service description be clarified or re-drafted to promote clarity? If so, how should those terms be defined?

The current definitions for ‘a point of interconnect’, ‘an access seeker network location’ and ‘a customer transmission point’ in the DTCS service description appear adequate to Macquarie. That is, access to the DTCS and its use does not appear to be constrained by the definition of these terms or the way in which they are interpreted.

13. Should references to the term ‘exempt’ in the DTCS service description be replaced? What other term should be used?

Macquarie notes that the term “exempt” occurs in the DTCS service description in the carve-out of particular inter-capital routes from the scope of the regulated service. The relevant part of the DTCS service description is as follows:

“Inter-capital routes

- (c) *a transmission point in an exempt capital city and a transmission point in another exempt capital city. Exempt capital cities include: Adelaide, Brisbane, Canberra, Melbourne, Perth or Sydney”*

Macquarie believes that the use of the term “exempt” in this context is not necessary. The term exempt is usually used to describe something which is “free of obligation”. In the context of the DTCS service description, it is transmission between certain inter-capital routes that are free of obligation and not the cities *per se*. As such, it is not necessary for the cities to be described as exempt only that they be specified.

Macquarie suggests that the relevant part of the DTCS service description may be reworded as follows:

“Inter-capital routes

- (c) *a transmission point in ~~a specified~~ ~~an exempt~~ capital city and a transmission point in another ~~specified~~ ~~exempt~~ capital city. ~~Specified~~ ~~Exempt~~ capital cities ~~are~~: include: Adelaide, Brisbane, Canberra, Melbourne, Perth ~~or~~ ~~and~~ Sydney”*

14. What will be the likely impact of the NBN on the market structure for the DTCS over the next few years?

Macquarie considers that the likely impact of the NBN on the market structure for the DTCS over the next few years will be a concentration of transmission services between NBN Co's POIs. This is because NBN Co is essentially building an access network from 93 *per cent* of Australian premises to one of 121 POIs. As such, transmission services will be required to provide connectivity between these 121 POIs in order to ensure any-to-any connectivity. To the extent that such POIs are located at places which are already considered competitive, the regulated DTCS will eventually cease to exist when the NBN roll-out is complete and Telstra's copper network is decommissioned.

The design of NBN Co's network with its 121 POIs and the decommissioning of Telstra's copper network means that access providers have little or no incentive to invest in transmission capacity in any other places. As such, access seekers will be increasingly dependent on Telstra's existing transmission capacity until such time as the NBN rollout is complete.

15. Will DTCS traffic be concentrated on any particular routes, such as routes between NBN POIs and capital cities?

Refer to Macquarie's response to the previous question.

16. Are the current high data rate NBN Access Service services (such as the 100/40Mbps service) a comparable substitute for low data rate DTCS services, such as the 2Mbps DTCS?

Macquarie does not consider that the NBN access service is a comparable substitute for the DTCS. This is because the NBN access service is essentially a link between an end-user location and one of NBN Co's 121 POIs. On the other hand, the DTCS is essentially a link between POIs. In the case of DTCS tail-end services, the NBN access service is still not a comparable substitute because the DTCS tail-end service is acquired as an integrated service. That is, while the DTCS tail-end service essentially links an end-user location to a POI, it is integrated with a further link to another POI.

17. What is the level of competition on transmission routes serving the 121 NBN POIs? Is DTCS traffic concentrated on particular routes to NBN POIs? Are there any routes which are currently declared which could be deregulated? Are there any deregulated routes which should be re-declared?

Macquarie does not have visibility of traffic volumes at NBN Co's POIs and is therefore unable to address this question.

18. What is an appropriate competition criteria for assessing DTCS competition at, or near, NBN POIs?

Refer to Macquarie's response to question 5.

19. Are there any regional DTCS routes which are competitive and could be removed from the scope of the DTCS declaration?

As per its response to question 14, Macquarie is strongly of the view that given the roll-out of the NBN there is no basis for considering that any regional DTCS routes would become more competitive and could be removed from the scope of the DTCS declaration. On the contrary, with transmission services being concentrated on connectivity between NBN Co's POIs it is more likely that some routes are or will become less competitive and should therefore be added to the scope of the DTCS declaration.

Macquarie's philosophy with regard to acquiring network infrastructure is to favour non-Telstra suppliers where an alternative exists. To the extent that Macquarie actually acquires DTCS from Telstra on any of the 23 capital-regional routes which are considered competitive provides a high-level indication that competition on such routes is not effective. That is, on such routes Macquarie has sourced DTCS from Telstra because there is no effective alternative supply.

[CiC]

Macquarie notes that competition on capital-regional routes may be masked to the extent that a non-Telstra provider may not be able to provide access seekers with a complete end-to-end service. Taking the Sydney - Grafton route as a hypothetical example, an access seeker may require a link between Sydney and an end-user location within the Grafton ESA but 20 km from the Telstra exchange. Telstra can readily provide the end-to-end service. However, an alternative provider with a Sydney - Grafton link in place is unlikely to have the regional tail-end from Telstra's Grafton exchange to the end-user location. The alternative provider can offer an access seeker an end-to-end service only by combining its own Sydney - Grafton link with Telstra's tail-end. With the alternative provider not having total control of the end-to-end service and a requirement for it to negotiate terms of access to Telstra's tail-end, there is an incentive for access seekers to favour Telstra in this situation.



20. Is it appropriate to continue to use the capital-regional criteria for assessing competition on regional DTCS routes? If so, is it appropriate for the capital-regional criteria to:

- *require a minimum of three fibre providers to be present?*
- *continue to use RPOs as the geographic location from which competitive fibre networks must be located in order to contest a regional DTCS route? If not, where should competition be assessed from?*
- *maintain the contestable distance to 1km? If not, what should be the contestable distance?*

As per its responses to questions 1 and 5, Macquarie is of the view that the competition criteria is set too low and should be revised. With respect to the criterion that there be a minimum of three fibre providers (i.e., Telstra plus two), Macquarie is of the view that this should be subject to the proviso that Telstra's share of capacity is less than 65 *per cent*.

Moreover, Macquarie believes that competition is only effective where an alternative to Telstra's infrastructure actually exists and is readily available as opposed to infrastructure which is potentially available. As such, Macquarie does not believe that potential competition which lies behind the concept of contestable distance and the use of the RPO as the reference point for assessing contestable distance is appropriate. RPO sites are largely irrelevant to the location of legacy telecommunication infrastructure given changes to the way post office services are being delivered in the regions from supermarkets and newsagencies. Any geographic linkage to where a Telstra local exchange is and a town's post office service is provided may longer exist. Instead, Macquarie is of the view that an alternative provider to Telstra must have network infrastructure which is actually connected to Telstra's network infrastructure at the regional end for it to apply effective competitive pressure. Otherwise competitive pressure is merely illusory.

21. If the capital-regional criteria should not be used to assess competition on declared regional routes, what should the competition criteria be?

As per its response to the previous question Macquarie believes that the "capital-region criteria" needs tightening for it to result in the identification of routes in which competition is effective. In particular, Macquarie is of the view that a capital-regional route can be considered competitive if:

- there are two fibre providers in addition to Telstra capable of providing a service;
- Telstra's share of capacity on a given route is less than 65 *per cent*; and
- the alternative fibre providers must have network infrastructure which is actually connected to Telstra's network infrastructure at the regional end.

22. Are there any metropolitan DTCS routes which are competitive and could be removed from the scope of the DTCS declaration?

As per its response to questions 14 and 19, Macquarie is strongly of the view that given the roll-out of the NBN there is no basis for considering that any metropolitan DTCS routes

would become more competitive and could be removed from the scope of the DTCS declaration. On the contrary, with transmission services being concentrated on connectivity between NBN Co's POIs it is more likely that some routes are or will become less competitive and should therefore be added to, rather than removed from, the scope of the DTCS declaration.

Macquarie's philosophy with regard to acquiring network infrastructure is to favour non-Telstra suppliers where an alternative exists. To the extent that Macquarie actually acquires DTCS from Telstra on any of the metropolitan routes which are considered competitive provides a high-level indication that competition on such routes is not effective. That is, on such routes Macquarie has sourced DTCS from Telstra because there is no effective alternative supply.

[CiC]

Macquarie also notes that there are more than 20 Sydney and Melbourne metropolitan ESAs at which non-Telstra wholesale suppliers do not offer a DTCS. As such, Telstra is the only effective supplier.

23. Is it appropriate to continue to use the inter-exchange criteria for assessing competition on metropolitan DTCS routes? If so, is it appropriate for the metropolitan criteria to require:

- *a minimum of three fibre providers to be present*
- *that competitors be located at a Telstra exchange and/or*
- *that ESAs be connected in a contiguous cluster and adjoin a CBD ESA?*

As per its responses to questions 1, 5 and 20, Macquarie is of the view that the competition criteria is set to low and should be revised. With respect to the criterion that there be a minimum of three fibre providers (i.e., Telstra plus two), Macquarie is of the view that this should be subject to the proviso that Telstra's share of capacity is less than 65 *per cent*. Macquarie is satisfied with the requirements concerning location at a Telstra exchange and contiguity.

24. Should the ACCC maintain regulation of tail-end services in the 17 CBD ESAs?

Macquarie is of the view that the ACCC should maintain regulation of tail-end services in the 17 CBD ESAs. This is essentially because of the ubiquity of Telstra's customer access network and that this network is a bottleneck for providing services to end-users.

25. What substitutes are available for the tail-end DTCS?

Macquarie does not believe that there are any effective substitutes available for the tail-end DTCS.

26. What competition criteria should the ACCC use when assessing levels of competition in tail-end markets?

Macquarie does not believe that there is effective competition in tail-end markets given the absence of effective substitutes and Telstra's dominance of the fixed customer access network. In this context, it is not appropriate to adopt competition criteria for assessing levels of competition in tail-end markets essentially because there is no basis for believing that there is competition in some parts of the overall tail-end market but not in other parts.

27. Are high bandwidth NBN Access Services (such as the 100/40Mbps services) a comparable substitute for low bandwidth (such as 2Mbps) tail-end DTCS services?

No. Refer to Macquarie's response to question 16.

28. Are there barriers to entry for access to facilities relating to the DTCS? If so, what are they?

[CIC]

29. Have the alternative technologies to fibre-optic cable become more or less viable in the provision of DTCS since the 2009 Declaration Decision? Are they likely to increase or decrease in importance in the future?

Macquarie does not believe that there are any viable alternative technologies to fibre-optic cable in the provision of the DTCS.

30. What are the substitutes for the DTCS?

Macquarie does not believe that there are any effective substitutes for the DTCS.

31. Can network capacity be viewed as a potential barrier to entry on certain DTCS routes?

Yes. Macquarie considers that a rational investor would only invest in transmission capacity on a given route if there was the likelihood of unsatisfied future demand. For example, a rational investor would have little incentive to invest in a route which already has excess available capacity.

Macquarie considers that the more tangible barrier to entry to the market for the provision of transmission services is the industry's transition to the NBN. Transmission will essentially only be required between NBN Co's 121 POIs once the network roll-out is complete. This means that there is little incentive to invest in transmission capacity in any other places.

32. What should be the length of the regulatory period should the DTCS be re-declared?

Macquarie is of the view that an appropriate duration for the declaration of the DTCS is five years. Macquarie bases its view on consideration of the following:

- the need to provide operators and investors with a more certain operating environment;
- that it is unlikely that changes which are occurring in the telecommunications sector such as the roll-out of the NBN will materially affect Telstra's control of bottleneck services over the next five years; and
- the precedent that the ACCC has set in relation to the wholesale ADSL service where the duration of the declaration is five years.

Macquarie is also of the view that with a five year DTCS declaration, the duration of the corresponding FAD should be two years. This reflects the timeframes on which commercial agreements are typically made.

33. Should the DTCS service description continue to identify the geographic boundary of telecommunications networks using ESAs? If not, what alternative geographic unit should be used?

Yes. Macquarie believes that the DTCS service description should continue to identify the geographic boundary of telecommunications networks using ESAs. This is because the ESAs do in fact identify the boundaries of Telstra's local access network and the location of Telstra exchanges. Moreover, NBN Co has acquired access to Telstra's local access network for the purpose of rolling out its fibre network. As such, ESAs will still have relevance in the NBN environment.

34. Would the service description adequately capture the DTCS markets while the NBN is being rolled out?

Refer to Macquarie's response to the previous question.

Closing

Macquarie welcomes the opportunity to make this submission in response to the Discussion Paper. The key outcomes that Macquarie expects from the ACCC's inquiry include:

- the continued declaration of the DTCS;
- a more targeted and precise scope of the regulation of the DTCS given concerns with the effectiveness of competition; and
- the declaration of the DTCS for a period of five years.

Please do not hesitate to contact me should you have any queries in relation to this matter.

Yours sincerely



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