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Australian Competition and Consumer Commission

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Telecommunications Final Access Determination inquiries – non-price terms and conditions and supplementary prices

Your Reference

Our Reference IP 071402

Macquarie Telecom Pty Limited (“**Macquarie**”) appreciates the opportunity to make this submission to the Australian Competition and Consumer Commission (“**ACCC**”) in response to its position paper concerning the above.¹ The Position Paper seeks comments from industry stakeholders on matters concerning non-price terms and conditions and supplementary prices in respect of the domestic transmission capacity service (“**DTCS**”), the mobile terminating access service (“**MTAS**”) the seven fixed-line services.² The outcomes from the matters addressed in the Position Paper will be used by the ACCC in its inquiries concerning the making of final access determinations (“**FADs**”) in respect of these services.

In Macquarie’s experience as an access seeker, the most significant term of access for a given service is its price. Given that Macquarie is a party to many established access agreements, the non-price terms and conditions of access are of less concern to Macquarie compared to price. While Macquarie understands and appreciates the importance of the ACCC’s consultation with industry on this matter it urges the ACCC to prioritise its work on determining price terms for the declared services.

The importance of the ACCC’s task of determining price terms cannot be overstated particularly given that the ACCC’s new prices for the MTAS and the seven fixed-line services have already been delayed. That is, new prices for the MTAS and fixed-line services should have applied from 1 July 2014. The ACCC has already rolled-over the previous prices for these services until such time as new prices are determined. This unsatisfactory situation is further exacerbated given that prices are generally trending downward which means that access seekers and ultimately end-users are denied the benefit of lower access prices. This also means that Telstra has every incentive to prolong the ACCC’s consideration of new prices by whatever means it can.

As noted in the Position Paper, Telstra has recently introduced the Telstra Wholesale Agreement (“**TWA**”) to replace over time the existing Customer Relationship Agreements

¹ ACCC, Telecommunications Final Access Determination inquiries – non-price terms and conditions and supplementary prices, Position Paper, May 2014 (“**Position Paper**”)

² The seven fixed line services are the LSS, LCS, WLR, ULLS, FTAS, FTOS and the wholesale ADSL service.



("CRA"). Macquarie is strongly of the view that improved non-price terms and conditions that arise from the ACCC's consultation should be adopted by Telstra in its TWA.

Consultation Questions

In this section, Macquarie has responded to each of the consultation questions as set out in the Position Paper. For ease of reference, the ACCC's questions are reproduced in shaded text boxes which is then followed by Macquarie's response.

1. What approach to regulating non-price terms and conditions of access do you consider would best promote the LTIE?

Macquarie notes that the ACCC must have regard to seven criteria specified in subsection 152BCA(1) of the *Competition and Consumer Act 2010* ("CCA"), when making a FAD. One of these is the promotion of the LTIE. Macquarie understands that the ACCC interprets this criterion on the basis of three factors, i.e., the promotion of competition, achieving any-to-any connectivity and efficient use of infrastructure.

As outlined in the Position Paper, the ACCC intends to approach its task of regulating non-price terms and conditions of access from the perspective of ensuring that there would be an effective fall-back set of terms and conditions available to the parties, i.e., access seekers and access providers. Macquarie considers this approach to be rational and effective on the basis that regulatory intervention should create the conditions and outcomes that would be expected in markets which are competitive. That is, fall-back terms and conditions as determined by an independent regulator would be *ceteris paribus* expected to balance the interests of both access seekers and access providers. As such, fall-back terms and conditions should be readily acceptable to the parties where commercial agreement cannot be reached.

Of the three factors on which the ACCC assesses the LTIE, Macquarie considers that the promotion of competition is particularly relevant. This is because fall-back terms and conditions are conducive to promoting competition given the significant imbalance in competitive market power between access seekers like Macquarie and access providers, i.e., Telstra. That is, fall-back terms and conditions as determined by the ACCC would be expected to be more evenly balanced between the interests of access seekers and Telstra compared to the terms and conditions that Telstra would voluntarily offer access seekers in a commercial negotiation.

2. Do you consider the FADs should be made as:

- *a comprehensive set of terms and conditions which can act as a fall back or complete substitute for commercial agreement; or*
- *a set of terms and conditions which deal only with a limited number of issues, which can be used when parties are unable to agree on a complete set of terms and conditions for access to a declared service or services; or*
- *an alternative option (please describe).*

Please provide reasons for your answers. In doing so, please describe any relevant experiences you have had in negotiating commercial agreements and how those experiences explain your preferred approach to addressing non-price terms and conditions in the FADs.

Macquarie notes that the ACCC is making FADs for a range of declared services in an environment where there is a significant imbalance in competitive market power between access seekers like Macquarie and access providers, i.e., Telstra. The declaration of the DTCS, MTAS and the seven fixed-line services acknowledges that there is an anticipation that Telstra would not provide such services to access seekers on reasonable terms. Regulatory intervention to determine the terms and conditions on which these services are supplied is required and justified on this basis.

Macquarie notes that the Position Paper presents two broad options for the construction of fall-back terms and conditions. These are essentially “a comprehensive set” and a “controversial set” of terms and conditions. Macquarie’s preferred approach is that the FADs address the “controversial set” of fall-back conditions that address matters on which the parties are unlikely to agree. This preference is based on the following grounds:

- regulatory intervention should be used where it is most effective, i.e., in situations where access seekers and access providers are genuinely unlikely or unable to reach agreement;
- with established and workable access seeker / access provider commercial relationships there is little need for comprehensive terms to be set by the ACCC; and
- even while there is a significant imbalance in market power between access seekers and Telstra, Macquarie accepts that there must be some scope for the parties to negotiate commercial terms.

*3. What terms and conditions do you consider should be covered in the FAD?
Please provide reasons and examples.*

Macquarie notes that the ACCC has addressed non-price terms and conditions in respect of previous FADs. Such terms and conditions are concerned with the following matters:

- billing and notification;
- creditworthiness and security;
- general dispute resolution;
- confidentiality;
- communication with end-users;
- suspension and termination; and
- changes to operating manuals.

Macquarie considers that these matters remain appropriate for the setting of non-price terms and conditions in respect of the FADs which the ACCC is currently making.

In addition to the above, Macquarie is of the view that non-price terms and conditions in the FADs should be made regarding the pass-through of relevant regulatory decisions. The need for such provisions arises from the primacy of access agreements over regulatory decisions as noted in the Position Paper. From the time when amendments were being contemplated to the access regime as set out in Part XIC of the CCA, Macquarie has consistently argued that regulatory decisions should in fact prevail over commercial access agreements. *Inter alia* Macquarie’s position reflects the outcome of an imbalance in

competitive market power by which access seekers may be forced to accept unfavourable terms and conditions of access.

Macquarie considers that such a pass-through provision would ensure that regulatory decisions concerning, for example, the setting of a price for a service are reflected immediately in commercial arrangements. This would overcome the present and unsatisfactory situation in which while the ACCC may determine the price for a given service at a given date in a FAD, it will have no effect until such time as the commercial agreement (or its price term) is renegotiated. In an environment where prices are generally falling this is particularly disadvantageous to access seekers.

Macquarie recognises that if such a pass-through provision was introduced to the FADs, it would not have effect unless the relevant commercial agreement itself is renegotiated. In other words, Macquarie's concerns with the "access hierarchy" can only be satisfactorily addressed through amendment to the CCA. However, for the time being, the inclusion of a pass-through provision in the FADs would assist access seekers in their negotiations with access providers to have regulatory decisions reflected immediately in commercial arrangements.

4. Are there any terms and conditions that the ACCC should consider as a matter of urgency? Please provide reasons.

As noted above, Macquarie considers that the ACCC should prioritise its work on determining price terms for the declared services. Non-price terms and conditions are less important and the ACCC need not be distracted from addressing price terms as price terms are the most important aspect of the FADs and need to be considered by the ACCC as matters of urgency.

5. What terms and conditions do you consider should be 'common' (that is, identical) across all the declared services? Please provide examples and reasons.

Macquarie considers that a *de facto* set of common non-price terms and conditions has effectively resulted from the FADs which the ACCC has previously made. As noted in Macquarie's response to question 3, these common non-price terms and conditions are concerned with the following matters:

- billing and notification;
- creditworthiness and security;
- general dispute resolution;
- confidentiality;
- communication with end-users;
- suspension and termination; and
- changes to operating manuals.

Macquarie considers this to be an appropriate set of common matters for which non-price terms and conditions may be applied for all of the declared services.

6. Are there non-price issues for which a different approach should be adopted for individual regulated services? Please provide examples and reasons.

Whether or not there are any non-price issues for which a different approach should be adopted for individual regulated services is in Macquarie's view not important at this time. Macquarie reiterates its view that the ACCC should prioritise its work on determining price terms for the declared services as a matter of urgency.

7. How frequently should the ACCC review the non-price terms and conditions included in the FADs?

Macquarie considers that the ACCC's review of non-price terms and conditions as included in the FADs should be reviewed as and when FADs are made for newly declared and re-declared services. That is, Macquarie does not consider that the non-price terms and conditions should be subject to any form of special review. As noted earlier in this submission, Macquarie is of the view that the ACCC should prioritise its work on determining price terms for the declared services.

8. Please provide your views on what steps the ACCC can take to facilitate active engagement and assistance from industry in the course of its consultation on non-price terms and conditions. For example, would there be benefit from holding an industry forum to discuss specific issues in relation to non-price terms and conditions (as proposed in chapter 2 of this paper)?

Macquarie notes that the ACCC has in relation to other matters convened an industry forum to discuss specific issues with industry stakeholders. Macquarie considers that such fora have generally been regarded as effective. However, in relation to the setting of non-price terms and conditions, Macquarie does not consider that an industry forum is warranted. This is because the issues are relatively non-controversial and the ACCC should not be distracted from its very important task of determining price terms for the declared services.

9. Please comment on whether the ACCC's previous approach to setting connection and disconnection charges for the fixed line services, Wholesale ADSL and the DTCS remains appropriate. If not, please propose an alternative approach and explain why it would be more appropriate and how it would be implemented.

Connection and disconnection charges arise in relation to various fixed-line services. The Position Paper considers such charges in relation to the following categories of service:

- ULLS and LSS;
- Wholesale ADSL; and
- DTCS.

Macquarie's comments in respect of these service categories are given below.

ULLS and LSS

Macquarie notes that connection and disconnection charges for the ULLS and LSS have generally been made on the basis of Telstra's third party contractor rates plus an estimate of Telstra's "back of house and indirect costs". The ACCC proposes to update third party contractor rates and to consider the appropriateness of the method for estimating Telstra's back of house and indirect costs.

Macquarie considers that in principle third party contractor rates provide an appropriate basis for setting regulated connection and disconnection charges for the ULLS and LSS as such rates would be expected to be based on commercial negotiation in a competitive environment. However, Macquarie is concerned about the appropriateness and materiality of Telstra's "back of house and indirect costs". Macquarie urges the ACCC to consider the relevance of such costs and the basis on which they are estimated. Such costs should be cost-based and Telstra should be required to demonstrate that this requirement is fulfilled. The intensity of the ACCC's scrutiny of Telstra's cost estimates should be increased if they are material, for example, if the back of house and indirect costs are more than 20 per cent of the third party contractor rates.

Wholesale ADSL

Macquarie notes that the connection and supplementary charges for the wholesale ADSL service are currently set at rates determined solely by Telstra. Macquarie submits that in the absence of any scrutiny by the ACCC, these charges will be set at levels materially above their underlying costs. Macquarie urges the ACCC to demand that Telstra justify these costs and require Telstra to demonstrate that they are cost-based and reasonable.

DTCS

Macquarie notes that the connection charges for the DTCS are based on industry average costs. It is presumed that the ACCC will follow the same method for setting revised connection charges for the DTCS FAD. On the basis that such industry average costs include charges set by non-Telstra suppliers, Macquarie considers this method to be satisfactory. That is, such charges should be exposed to competition. However, Macquarie remains concerned that such charges may not be cost-based. As such, Telstra should be required to demonstrate to the ACCC's satisfaction that its charges are cost-based and reasonable.

WLR

The Position Paper makes no comment on the setting of connection and disconnection charges in respect of the WLR service. Macquarie submits that such charges for these services should be cost-based and that Telstra should be required to demonstrate to the ACCC's satisfaction that its charges are cost-based and reasonable. Macquarie notes with concern the results of Telstra's TEM Report for Quarter 2 2014/3 in respect of WLR connection. This shows a variance of -200.63% which is in favour of Telstra's retail business units compared to Telstra's wholesale customers. *Prima facie* this suggests that Telstra's charges are considerably above costs to the detriment of access seekers and end-users.



10. *If you agree with maintaining the ACCC's previous approach to setting connection and disconnection charges, please provide any comments on the ACCC's proposal to update the contractor rates and other costs used in calculating these charges.*

Macquarie's response to the previous question has commented on the ACCC's approach to setting connection and disconnection charges in respect of the different groups of declared services. Macquarie emphasises that such costs should be cost-based and where such charges are proposed by Telstra, Telstra must be required to demonstrate to the ACCC's satisfaction that they are cost-based and reasonable.

11. *Please comment on the non-price terms and conditions associated with connection and disconnection charges, such as whether disconnections should still be made pursuant to the Telstra churn process or whether the terms around Telstra Managed Network Migrations policy are still appropriate?*

Macquarie understands that disconnections pursuant to the Telstra churn process and Telstra's Managed Network Migrations policy relate to the disconnection of DSL services. Macquarie sources these services from Telstra via a third party wholesale supplier and as such, Macquarie does not have direct exposure to such process and policy of Telstra. However, Macquarie is concerned that any process or policy that is solely determined by Telstra would *prima facie* be skewed in favour of Telstra's interests. Accordingly, Macquarie doubts that disconnections should still be made pursuant to the processes and policies of Telstra.

12. *Is the ACCC's proposed approach in pricing these services still appropriate? Please provide reasons.*

Macquarie understands that this question relates to the internal interconnection cable ("IIC") service and that the ACCC proposes to adopt the same methodology for the pricing of this service that it made in its arbitral determination in November 2012. Macquarie's view is that Telstra's charge for the supply of the IIC should be zero. Macquarie considers that the costs of supplying the IIC are negligible and would in any case be readily absorbed by Telstra given that its EBITDA margin on its fixed services is more than 60 *per cent*.³ The fact that Telstra imposes a charge for the supply of the IIC and that it has fought access seekers over its charge is a very clear indication of Telstra's market power and its willingness for it to be exercised.

³ Telstra, Full Year Results Announcement 2013



13. *Is there an alternative approach to pricing these services that would be more appropriate? Please provide reasons.*

As per its response to the previous question, Macquarie is of the view that Telstra's charge for the supply of the IIC should be zero.

14. *Should the DTCS FAD address the issue of special linkage charges in relation to non-price terms and conditions? If so, what specific issues should be addressed?*

Macquarie is strongly of the view that the DTCS FAD should address the issue of special linkage charges ("**SLCs**") in relation to non-price terms and conditions. SLCs essentially arise where access seekers pay Telstra to extend its network so that the access seeker can serve an end-user. The network extension becomes Telstra's asset and may be used by Telstra to serve its own customers. Telstra derives considerable long-term benefits from these situations particularly where its network is extended into corporate / industrial parks. That is, a network extension which is fully funded by a single access seeker provides Telstra with access to end-users that are (i) passed by the network extension and (ii) are also located near to the termination point of the network extension. Moreover, Telstra essentially has the opportunity to set SLCs on a "take it or leave it" basis.

Of their nature, SLCs are specific to the particular circumstances in which an access seeker requires additional network infrastructure. As such, Macquarie accepts that it is not practical to set a "standard" SLC which would be applied in all situations that may arise.

Macquarie does, however, believe that certain principles may be set in the form of non-price terms and conditions that would protect the interests of access seekers against the incentives of Telstra to set SLCs in excess of underlying costs. Such principles may, for example, include:

- a requirement that SLCs are subject to an equivalence requirement, i.e., a requirement Telstra's retail business is subject to the same SLCs that would apply to Telstra's wholesale customers when satisfying end-user demands;
- a commitment from Telstra that the SLCs that it alone determines will be cost-based and reasonable;
- that Telstra will provide an itemised breakdown of proposed SLCs to access seekers so as to improve transparency; and
- that Telstra consents to the ACCC undertaking an *ad hoc* review of some specific examples of Telstra's SLCs to confirm that such charges are cost-based and are reasonable.



15. Which facilities access services are ancillary to currently declared services and should be regulated through the FADs for those services? Please provide:

- a. a detailed description of each facilities access service that is ancillary to a declared service
- b. an explanation of the nexus between the declared service and each facilities access service that make these facilities access services ancillary to declared services
- c. how regulating these facilities access services in the FADs would be likely to promote the long term interests of end-users (LTIE).

Macquarie welcomes the ACCC's review of the regulation of facilities access services as part of its current consultation with industry on non-price terms and conditions for the FADs. However, it is very concerning to Macquarie that the ACCC again poses essentially the same questions to stakeholders on this matter as it did 12 month's ago.⁴ Macquarie contends that the ACCC has sufficient information on this matter to formally commence an inquiry into declaring certain facilities access services. Accordingly, Macquarie urges the ACCC to commence such an inquiry immediately.

The need for facilities access services to be regulated by the ACCC is further emphasised by the recent decision of the Full Federal Court regarding the jurisdiction of the ACCC to arbitrate a dispute under the *Telecommunications Act 1997*. The origin of this case lies in an increase in Telstra's charges for its facilities access services which was disputed by iiNet. Macquarie contends that if facilities access services were declared by the ACCC and therefore prices for such services would be set by the ACCC, there would be (i) no dispute about Telstra's charges *per se* and (ii) no question about the ACCC's jurisdiction which would necessitate action before the Full Federal Court.

Macquarie reiterates its previously expressed views that the facilities access services that the ACCC should declare are:

- the Telstra Exchange Building Access service;
- the duct access service;
- the external interconnect cable access service; and
- the internal interconnect cable access service.

The following table describes how each of these facilities access services is linked with declared services.

⁴ ACCC, Fixed Services Review, Discussion Paper on the Declaration Inquiry, July 2013, questions 19 - 22



Table 1: Facilities Access Services Related to Declared Services

| Service | Relationship to Declared Services |
|--|---|
| Telstra exchange building access service | TEBA provides secure floor space within Telstra’s exchange buildings which enables access seekers to house and operate their own exchange equipment (primarily DSLAMs). In turn, the access seekers’ DSLAMs are combined with the access provider’s ULLS and LSS which enables access seekers to provide voice and broadband services to end-users. |
| Duct access service | Duct access enables access seekers install their own fibre optic cables for transmission between points of interconnection. For example, transmission between two Telstra exchanges which would be used by access seekers in conjunction with the access provider’s WLR services and FTAS and FOAS to provide telephony services to end users. |
| External interconnect cable access service | The external interconnect cable access service is typically used to connect an access seeker’s DSLAM located outside a Telstra exchange building to Telstra’s MDF located inside the exchange building. This service enables access seekers to use the access provider’s ULLS and LSS to provide voice and broadband services to end-users. |
| Internal interconnect cable access service | The internal interconnect cable access service is typically used to connect an access seeker’s DSLAM located inside a Telstra exchange building to Telstra’s MDF also located inside the exchange building. This service enables access seekers to use the access provider’s ULLS and LSS to provide voice and broadband services to end-users. |

Macquarie’s comments in respect of the ACCC’s considerations for assessing the promotion of the LTIE are discussed below. As noted earlier in this submission, the ACCC considers three factors in making this assessment.

Implications for Competition

Telstra is the dominant owner of telecommunications facilities which are sought by access seekers to enable them to provide services to end-users. Macquarie notes that there have been many disputes in which access seekers have sought reasonable terms of access to Telstra’s facilities. Macquarie believes that Telstra is effectively able to set terms (including price) of access to its facilities on a “take it or leave it” basis. The decision of the Full Federal Court as discussed above shows clearly that Telstra has an unfettered capability to set prices for facilities access services.

The declaration of certain facilities access services would result in the ACCC setting terms (including price) of access to such facilities through a final access determination. This would result in regulated cost-based pricing for facilities access services which is conducive to effective competition. Moreover, the decision of the Full Federal Court shows that declaration of facilities access services is necessary to protect the interests of access seekers against the excessive market power of Telstra.

Any-to-any Connectivity

Any-to-any connectivity is a concept by which customers of one network can make (and receive) calls to (and from) any other network. This concept has no particular relevance in the case of facilities access services because such services are not used to connect end-users of different networks. Rather, facilities access services enable an operator to provide services to end-users using the network of another operator. That is, there is only one network involved with facilities access services and there is no connection between networks. As such, it is appropriate for the ACCC to apply little or no weighting to this factor.

Efficient use of and Investment in Infrastructure

Macquarie believes that the declaration of the four facilities access services as noted earlier is consistent with promoting the efficient use of and investment in infrastructure. This is because declaration will result in cost-based pricing of these input services which in turn will provide appropriate build versus buy pricing signals to access seekers and access providers alike. That is, with appropriate pricing signals, access seekers would avoid making inefficient investment in duplicating infrastructure and access providers would be encouraged to provide services at their lowest cost.

16. Are there any other facilities access services (that are not acquired as ancillary to a declared service) that should be the subject of a declaration inquiry into facilities access services? Please provide:

a. a detailed service description of the each facilities access service sufficient to precisely identify the service

b. an explanation of how declaring these facilities access services would be likely to promote the LTIE.

Access seekers have already made numerous representations to the ACCC in previous consultations on the specific facilities access services that should be subject to a declaration inquiry. Macquarie considers that these representations are sufficient to enable the ACCC to commence such an inquiry. That is, Macquarie is strongly of the view that the ACCC need not be distracted from the task of commencing an inquiry by considering at this time what, if any, other types of facilities access services might be on a “wish list” of declared facilities access services. Macquarie reiterates its view that the ACCC should commence an inquiry concerning this matter immediately. Moreover, Macquarie reiterates its view that the decision of the Full Federal Court as discussed above shows that there is a need for the ACCC to protect access seekers against the excessive market power of Telstra.

17. Are there any other supplementary charges relating to acquiring declared services that should be regulated through the FADs for those services? Please provide:

a. a detailed description of each supplementary charge

b. an explanation of how and why the supplementary charge is incurred in relation to the use of a declared service

c. how regulating this charge in the FADs would be likely to promote the LTIE

d. the materiality of the charge

Whether or not there are any other supplementary charges relating to acquiring declared services which should be regulated through the FADs for those services is in Macquarie’s view not important at this time. Macquarie reiterates its view that the ACCC should prioritise its work on determining price terms for the declared services.

Closing

Macquarie appreciates the opportunity to make this submission in response to the matters raised in the Position Paper. The key points in this submission are as follows:

- while Macquarie understands and appreciates the importance of the ACCC's consultation with industry on non-price terms and conditions it urges the ACCC to prioritise its work on determining the price terms for the declared services noting in particular that new prices for the MTAS and the fixed services are already overdue;
- the FADs should address the "controversial set" of fall-back terms and conditions that address matters on which the parties are unlikely to agree;
- non-price terms and conditions should be made in the FADs regarding the pass-through of relevant regulatory decisions to current commercial arrangements;
- connection and disconnection charges should be cost-based and where such charges are proposed by Telstra, Telstra must be required to demonstrate to the ACCC's satisfaction that they are cost-based and reasonable;
- principles should be set in the FADs that address the setting of cost-based and reasonable SLCs; and
- Macquarie urges the ACCC to commence an inquiry into the declaration of four specific facilities access services immediately particularly following the recent decision of the Full Federal Court.

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

Yours sincerely



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