

IP 041301
5 April 2013

Jessica Wicks
Communications Group
Australian Competition and Consumer Commission

By email

accessdeterminations@acc.gov.au

Public Inquiry to Make a Final Access Determination for the Wholesale ADSL Service

Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**") in relation to its draft report concerning the above.¹ The Draft Report sets out the ACCC's draft final access determination for the wholesale ADSL service ("**Draft FAD**"). Given that this service was declared more than 13 months ago, Macquarie welcomes the likelihood that regulated terms on which this service may be accessed are now imminent.

Macquarie welcomes the ACCC's draft views on many of the key matters which have been addressed in the course of the ACCC's inquiry, in particular:

- that price terms for the wholesale ADSL service should be cost-based rather than based on a retail-minus approach;
- that an updated version of the ACCC's fixed line services model ("**FLSM**") is used to price the wholesale ADSL service;
- that Telstra's claim for a surcharge in the pricing of the wholesale ADSL service to account for the cost of network congestion has been rejected; and
- that Telstra's argument for geographic exemptions to the application of the final access determination for the wholesale ADSL service ("**ADSL FAD**") has also been rejected.

Macquarie is, however, concerned that the ACCC's proposed price terms for the wholesale ADSL service may not be appropriate. As such, the ACCC should revisit certain aspects of its pricing approach. Macquarie is also concerned about the commencement date of the ADSL FAD.

In this submission, Macquarie comments on a wide range of matters arising from the Draft Report. This reflects the importance that Macquarie attaches to the appropriate regulation of the wholesale ADSL service and the implications that arise for other declared fixed-line services, particularly as the NBN is rolled-out and Telstra's fixed copper network is gradually decommissioned. Macquarie's comments in this submission are intended to expedite the appropriate regulation of the wholesale ADSL service rather than to add any further delay in what has already been an overly time-consuming process.

¹ ACCC, Public inquiry to make a final access determination for the wholesale ADSL service, Draft Report, March 2013 ("**Draft Report**")

Macquarie notes the short timeframe that the ACCC has allowed for interested parties to make submissions in response to the Draft Report, i.e., a little over three weeks. The time allowed for preparing submissions is particularly short given the complex nature of the subject matter, the wide range of matters which are addressed in the 200+ page Draft Report and the Easter holiday period falling within the allowed period. As a consequence, Macquarie's comments on the Draft Report are necessarily constrained to this extent.

Apart from this introduction, this submission addresses a range of matters as set out under the following headings:

- methodology for setting price terms;
- adoption of the fixed-line services model;
- network congestion surcharge;
- geographic exemptions;
- application of the fixed-line services model;
- AGVC pricing;
- proposed amendment to the BBM RKR;
- carrier-specific exemptions;
- bundling with PSTN services;
- term of the ADSL FAD;
- fixed principles provisions; and
- non-price terms.

Methodology for Setting Price Terms

Macquarie welcomes the ACCC's draft decision to adopt a cost-based methodology for setting price terms for the wholesale ADSL service. This means that the ACCC has rejected Telstra's view that the appropriate pricing methodology should be retail-minus.

The ACCC's draft decision to adopt a cost-based methodology for setting price terms for the wholesale ADSL service is welcomed by Macquarie for reasons which include:

- consistency with generally accepted industry best practice;
- consistency with the pricing methodology that the ACCC has adopted for other declared fixed-line services;
- promoting the efficient supply of access services through ensuring that the access provider's costs are recovered;
- avoiding the inadequacies of the retail-minus pricing approach; and
- providing more regulatory certainty compared to that provided by the retail-minus pricing approach.

Adoption of the Fixed-Line Services Model

Macquarie welcomes the ACCC's draft decision to adopt a building block model ("**BBM**") as the cost-based methodology to be used for setting price terms for the wholesale ADSL

service. Specifically, the ACCC has developed a BBM which is known as the fixed-line services model (“**FLSM**”). The FLSM has previously been used by the ACCC to set prices for other declared fixed-line services. The ACCC has made appropriate variations to the FLSM to enable it to calculate prices for the wholesale ADSL service.

The ACCC’s draft decision to use the FLSM to set price terms for the wholesale ADSL service is welcomed by Macquarie for reasons which include:

- consistency with the pricing model previously used by the ACCC to set prices for other declared fixed-line services;
- locking-in the initial value of the regulatory asset base (“**RAB**”), thereby avoiding the task, and detrimental consequences of, periodically revaluing the RAB;
- leveraging the ACCC’s investment in the development of the FLSM; and
- leveraging industry’s collective general support for the FLSM.

Network Congestion Surcharge

Macquarie strongly supports the ACCC’s draft decision to resist including price terms in the ADSL FAD which account for the effect of network congestion which had been proposed by Telstra. Macquarie supports the ACCC’s draft decision for reasons including:

- congestion in telecommunications networks is nothing new and has no specific relevance to the wholesale ADSL service;
- price terms for other declared services do not account for the cost of network congestion;
- congestion pricing is precluded from the ACCC’s BBM which has been developed in consultation with industry; and
- Telstra has made no effort to manage network congestion through its retail pricing structures which casts considerable doubt on the seriousness of Telstra’s claims of network congestion.

While Macquarie strongly supports the ACCC’s draft decision on this matter, Macquarie is concerned that the ACCC has left open the possibility that it might consider congestion pricing in future final access determination inquiries. This would occur if Telstra were to implement retail pricing structures which actively managed congestion. For the reasons noted above, Macquarie is strongly of the view that price terms for network congestion are inappropriate and have no place in final access determinations made by the ACCC.

Macquarie also wishes to reiterate its view that the ACCC should not have entertained Telstra’s claims for including price terms in the ADSL FAD to account for network congestion.² Telstra’s claims were unsolicited and were designed to “game” the regulatory process. Allowing Telstra to dictate how the ACCC should conduct its inquiry has played directly into Telstra’s hands by delaying the inquiry by an estimated four to six months and placing an unnecessary burden on non-Telstra industry participants by forcing them to review, analyse and refute Telstra’s claims.

² Macquarie, Letter to ACCC (reference IP101201), 18 October 2012

Geographic Exemptions

Macquarie strongly supports the ACCC's draft decision to not limit the application of the ADSL FAD to certain geographic areas as proposed by Telstra. Telstra argues that the ADSL FAD should not apply in exchange service areas where Telstra's three largest competitors are present.

Macquarie supports the ACCC's draft decision for reasons including:

- Telstra's already dominant position in supplying wholesale ADSL services and the likelihood that this will not change; and
- the strong disincentives that exist for alternative suppliers to invest in copper infrastructure, e.g., market transition to NBN and insufficient scale.

Application of the Fixed-Line Services Model

Macquarie's initial review of the ACCC's application of the FLSM gives rise to some concerns. These are discussed below.

Capex Forecast - Data Equipment Asset Class

Despite a request from the ACCC, Telstra did not provide a forecast of its planned capital expenditure forecast in respect of the data equipment asset class. While Macquarie supports the ACCC's decision to make its own forecast given Telstra's failure to provide a forecast, Macquarie is concerned that the ACCC's forecast may be too generous.

The Draft Report indicates that the ACCC has applied an undisclosed growth rate to Telstra's actual capital expenditure of 2011-12 which results in a real decline. Given that Telstra's copper network is being decommissioned, Macquarie submits that Telstra has very little incentive to make any investment in this network. As such, Macquarie would suggest that a decline in nominal capital expenditure in respect of the data equipment asset class would be a more likely scenario. Accordingly, Macquarie urges the ACCC to revisit its forecast.

Opex Forecast - Data Equipment Asset Class

Again, despite a request from the ACCC, Telstra did not provide a forecast of its planned operating expenditure forecast in respect of the data equipment asset class. While Macquarie supports the ACCC's decision to make its own forecast given Telstra's failure to provide a forecast, Macquarie is concerned that the ACCC's forecast again may be too generous.

The Draft Report indicates that the ACCC has in part based its forecast on a five year average of actual operating expenditure from 2007-08 to 2011-12. Given that Telstra's copper network is being decommissioned, Macquarie submits that Telstra has every incentive to limit its operating expenditure on this network and in particular maintenance expenditure. Accordingly, Macquarie would consider that future operating expenditure would be lower than past operating expenditure for this asset category.

In addition, the ACCC has applied an 80 *per cent* mark-up for indirect operating expenditure. The extent of this mark-up appears to be particularly generous. As such, Macquarie urges the ACCC to revisit its forecast of operating expenditure in respect of the data equipment



asset class.

Demand Forecast

Macquarie is again concerned that despite an ACCC request, Telstra has been unable to provide a demand forecast for ADSL services. The ACCC has decided to assume that demand for ADSL services will decline by five *per cent per annum* over the two year forecast period. Macquarie notes that the Draft Report indicates that there was a small decline in ADSL SIOs for the half year ending 31 December 2012.³ In the light of this, Macquarie queries whether the ACCC's forecast decline in demand is too pessimistic.

AGVC Pricing

Macquarie supports the ACCC's draft decision to maintain the use of the port and AGVC pricing structures. However, the ACCC's approach to the estimate of the AGVC charge is of concern to Macquarie. The ACCC has essentially adopted a "quick fix" approach by basing its proposed AGVC charge on the relative proportion of the port and AGVC charges as set out in the IAD. The ACCC's rationale for adopting this approach is the absence of detailed information and its acceptance of Telstra's view that it may not be feasible to obtain the required cost information.⁴

Macquarie is concerned by the ACCC's draft decision for reasons including:

- its acceptance of Telstra's view that it may not be feasible to obtain the required cost information;
- the absence of any commitment from the ACCC to pursue a cost-based AGVC charge through, for example, formally seeking the necessary cost information from Telstra; and
- the reliance on the IAD pricing relativities which necessarily brings-forward a range of fundamental concerns arising from the interim access determination's ("IAD") use of the retail-minus cost methodology.

Proposed Amendment to the BBM RKR

Macquarie supports the ACCC's draft decision to amend the BBM RKR in order to capture relevant information concerning the wholesale ADSL service. Macquarie notes that it raised this matter in its submission to the ACCC in relation to its consultation with industry on the BBM RKR last year.⁵ Macquarie believes that a BBM RKR is particularly important given that Telstra has evidently ignored the ACCC's requests for forecast data in respect of capital and operating expenditure for the data equipment asset class and in respect of demand for the wholesale ADSL service. Macquarie looks forward to participating in the ACCC's consultation with industry on this matter in due course.

³ Draft Report, page 46

⁴ Draft Report, page 60

⁵ Macquarie, Letter to ACCC, (reference RG051203), 8 May 2012



Carrier-Specific Exemptions

Macquarie supports the ACCC's draft decision to exempt all non-Telstra access providers from the standard access obligations. This is consistent with Telstra's dominant market position in the supply of the wholesale ADSL service.

Bundling with PSTN Services

Macquarie is disappointed by the ACCC's draft decision to not require that a PSTN service be provided over the line on which a wholesale ADSL service is provisioned. Macquarie remains of the view that an unbundled service offering would provide access seekers with the flexibility to meet the diverse needs and preferences of end-users. Macquarie does, however, note that the ACCC is of the view that it may be appropriate for it to reconsider this issue.⁶

Term of the FAD

The ACCC's draft decision on the term of the FAD is that it will commence on publication and will expire on 30 June 2014. Macquarie is disappointed by the ACCC's proposed ADSL FAD commencement date. Macquarie's position, like that of the non-Telstra respondents, is that the FAD should be backdated to commence from the date that the wholesale ADSL service was declared, i.e., 14 February 2012. The ACCC's justification for its draft position is that it "does not consider there to be any factors present which indicate that such backdating should occur".⁷

It would appear to Macquarie that the ACCC has chosen to ignore the following in forming its draft position on this matter:

- Telstra has blatantly gamed the regulatory process through its unsolicited submissions to the ACCC concerning congestion pricing which has delayed the ACCC's inquiry by an estimated four to six months;
- access seekers are better off under the Draft FAD's pricing of the wholesale ADSL service compared to that under the IAD and as such, access seekers are denied the benefit of lower prices if the ADSL FAD is not backdated; and
- Telstra is the only respondent to the ACCC's inquiry that did not advocate backdating the ADSL FAD.

Given the above, Macquarie urges the ACCC to reconsider its draft view on the commencement date of the FAD. If the ACCC chooses not to reconsider its position the non-Telstra section of the industry will interpret this as a clear victory for Telstra and an emphatic endorsement by the ACCC of Telstra's gaming activity.

Macquarie supports the ACCC's draft decision that the ADSL FAD will expire on 30 June 2014. This aligns the expiry of the ADSL FAD with the expiry of the other current fixed-line service FADs and thereby promotes the efficient conduct of future ACCC inquiries concerning final access determinations for fixed-line services.

⁶ Draft Report, page 112

⁷ Draft Report, page 153

Fixed Principles Provisions

Macquarie notes that the ACCC has included in its draft FAD a set of fixed principles provisions in accordance with section 152BCD of the *Competition and Consumer Act 2010*. This is despite the ACCC not consulting with industry on this matter in the course of its inquiry.

Having reviewed the ACCC's proposed fixed principles provisions for inclusion in the ADSL FAD, Macquarie is satisfied that they are reasonable and promote a more certain regulatory environment. In forming this view, Macquarie notes that such principles are intended to provide the basis on which future final access determinations for the wholesale ADSL service will be based.

Non-Price Terms

Macquarie supports the ACCC's draft decision to make various amendments to the standard non-price terms and conditions for the supply of the wholesale ADSL service. In combination, these amendments remove anomalies, provide clarification and modernise the non-price terms and conditions. As such, Macquarie supports the ACCC's proposed amendments.

Closing

Macquarie welcomes the opportunity to make this submission in response to the Draft Report. Macquarie supports the ACCC's draft decisions on the key matters which are under review in this inquiry. However, Macquarie urges the ACCC to review some aspects of its draft decision concerning price terms for the wholesale ADSL service and the commencement date of the ADSL FAD. Should you have any queries arising from this submission, please do not hesitate to contact me.

Yours sincerely



Chris Zull
Senior Manager - Industry & Policy

T 03 9206 6848
E czull@macquarietelecom.com