



**Nextgen submission on the
“Telecommunications Final Access
Determination inquiries — non-price terms
and conditions and supplementary prices,
Position Paper”**

July 2014

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1 INTRODUCTION

The Nextgen Group (Nextgen) welcomes the opportunity to make this submission on the ACCC's Position Paper "Telecommunications Final Access Determination inquiries — non-price terms and conditions and supplementary prices".

We understand that current consideration of non-price terms and conditions and supplementary prices is aligned with the consideration of Final Access Determinations (FADs) for a number of other, related services namely the domestic transmission capacity service (DTCS), various fixed line services (and wholesale ADSL) and the mobile terminating access service (MTAS). Furthermore, we also understand the ACCC is undertaking a combined consultation process on non-price terms and conditions and supplementary prices because a number of these are similar (or the same) across the each of the declared services referred to above and there may be some benefits in maintaining consistency in certain terms across the FADs.

Nextgen supports the ACCC's current consideration of non-price terms and conditions and supplementary prices, and recognises that any FAD in this area has the potential to provide a 'fallback' set of terms and conditions for both access seekers and access providers in situations relating to the provision of a declared service where a commercial agreement cannot be reached.

Nextgen also supports the ACCC's revisitation of current arrangements relating to the regulation of facilities access services, noting that a number of recent cases appear to give rise to questions about whether or not the intent of existing measures in this area continue to be realised.

Finally, it is noted that as Nextgen is primarily involved in the provision of transmission services the comments made within this submission accordingly reflect this perspective.

2 RESPONSE TO QUESTIONS

In this section we set out our responses to the questions raised in the Position Paper.

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

In the case of non-price terms and conditions, Nextgen believes that the best approach to regulating these is via public inquiry, with consultation undertaken to inform the subsequent development of an access determination that appropriately balances the interests of both access seekers and access providers for instances (where access to a declared service is sought) in which commercial agreement is not otherwise reached. In essence, this is the approach currently employed by the ACCC in supporting promoting the LTIE.

To this end, Nextgen supports the aspiration to have a set of non-price terms and conditions which are common — to the extent practicable — for each of the declared services for which FAD's will shortly be determined, namely the DTCS, MTAS and various Fixed Line services.

Nextgen also supports a continuation of the ACCC's recent approach to the setting of non-price terms and conditions, whereby attention is focused on those aspects of access where commercial agreement is less likely to result.

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.

Nextgen is of the view that the FAD should be made as “a set of terms and conditions which deal only with a limited number of issues”.

This view is primarily based on expediency considerations, in that the narrower the set of non-price terms and conditions, the quicker the accompanying development and consultation processes between the ACCC and industry can be progressed. We believe this approach — inter alia — has the most likelihood of supporting the LTIE, as a relatively quick outcome in this area will provide a degree of certainty which can be a backdrop for future negotiations in relation to each of the associated declared services, as opposed to a scenario of prolonged development and little to no certainty.

We note that in practice any non-price terms and conditions included within a future FAD could notionally be available as either a ‘package’ or ‘individually’, at the choosing of an access seeker, in conjunction with other commercially agreed terms. On this matter, Nextgen submits that the ACCC should provide clarity about the expected practical operation of any non-price terms and conditions included in a future FAD. Nextgen's view is that any non-price terms and conditions included within a future FAD should only be available as a whole (i.e. a package) as opposed to being available individually.

Nextgen's recent experiences suggest that non-price terms and conditions are typically a non-contentious matter in commercial negotiations, and this is also a factor in the views expressed above.

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

Nextgen notes that the 2011, 2012 and 2013 FADs included non-price terms and conditions grouped within a number of categories, including:

- Billing & notification;
- Creditworthiness & security;
- General dispute resolution;
- Confidentiality;
- Communication with end users;
- Suspension and termination;
- Changes to operating manuals; and
- Network upgrade & modernisation.

Nextgen believes that the categories above are an appropriate starting point for the consideration of non-price terms and conditions which are to be included in the forthcoming FAD. That said we also appreciate that the specific wording of the provisions included within each of the categories above is the primary matter of importance. Given Nextgen does not have visibility across each of the declared services, and the commonalities to these, it is our preference to respond to the proposed wording of future terms and conditions rather than put forward suggestions unilaterally. To this end, we believe it is reasonable to draw upon the non-price terms and conditions that were within the FAD from June 2012 as an initial basis (or part-basis) for further consultation.¹

The general reason for having non-price terms and conditions covered by a FAD relate to having base fallback (or default) positions should there be a failure to reach agreement in commercial negotiations, which could in turn reflect a position of advantage — or market power — held by one party. As commercial negotiations involve numerous considerations, many of which are tangential to actual service provision, the regulatory framework correspondingly needs to have regard to these. Simply put, terms and conditions associated with each of the categories noted above are common to most commercial agreements in the telco sector and for this reason default terms have been established. The table below outlines general reasons for the inclusion of non-price terms and conditions by category.

Table 1 General reasons for including non-price terms and conditions, by category

Category	General reason for including specific terms and conditions
Billing & notification	- Billing, ultimately, underpins the provision of services and can be a common area of disputation.
Creditworthiness & security	- The provision of services may require capital works, underpinning the need for creditworthiness and security provisions (possibly in the form of unconditional bank guarantees, proportional to the investment or value of services in question).
General dispute resolution	- Disputes can arise for a variety of reasons, and may derive from a billing or non-billing (i.e. technical) matter. In some circumstances independent adjudication may be required.
Confidentiality	- There are common protocols associated with commercial transactions, and the confidentiality of these.
Communication with end users	- There are common protocols associated with end-user communications.
Suspension and termination	- Either party to a contract can initiate service suspension or termination, which can have commercial implications for the counter-party. Suspension or termination can also arise due to 'Force Majeure', with concordant implications.
Changes to operating manuals	- Changes to operating manuals may, in some circumstances impact service provision.
Network upgrade & modernisation	- Network upgrade and modernisation activities impact service provision, but also involve capital works which can in turn create

¹ See: <http://www.accc.gov.au/system/files/DTCS%20Final%20Access%20Determination%20-%20June%202012.pdf>

	price pressure. On account of this, notification periods are an important consideration.
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One area of contracting not addressed in the earlier determinations on non-price terms and conditions is that of 'liability and risk allocation'. Nextgen submits that the ACCC should explore the inclusion of terms and conditions in this area, as this would be consistent with current commercial practice.

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

Nextgen is not aware of any need to consider any of the non-price terms and conditions as a matter of urgency. As noted earlier, Nextgen is primarily involved in the provision of transmission services so we may have a narrower visibility about matters of potential urgency in comparison to other industry participants.

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

As noted above, Nextgen's support of common terms is primarily based on reasons of expediency (in order to support certainty) as opposed to practical convenience on account of supplying services in each of the associated areas of declaration (i.e. DTCS, MTAS and Fixed Line services). As such, Nextgen does not have a strong view on which terms and conditions should be common beyond supporting this aspiration to the extent it is practicable.

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

In terms of the transmission services with which Nextgen is most familiar, we are not aware of any specific non-price issues which warrant the consideration of a unique approach (vis-à-vis the other declared services).

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

Nextgen is of the view that a light-handed review could be undertaken annually — with any variations only considered where there has been a material change in circumstances and/or the emergence of unintended consequences — with a full review occurring every four to five years in tandem with revision of the FADs for the associated 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)?

While Nextgen is generally supportive of active engagement between the ACCC and the industry, on this occasion we are not sure there needs to be an industry forum on the future non-price terms and conditions applicable to the various declared services in question. This position is based on our view that non-price terms and conditions are not an overly contentious part of the broader regulatory framework. We anticipate that industry interest will be greater in relation to the core price determination processes for each of the declared services associated with the non-price terms and conditions Position Paper.

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.

Nextgen believes that the ACCC's previous approach to setting connection and disconnection charges for the declared services in question remains appropriate, and could be applied again in the current setting. We understand that this would entail:

- For future connection and disconnection charges, the use of third party contractor rates, sourced from Telstra and based on competitive tendering, as a benchmark; and
- For back-of house activities and other indirect costs, the use of employee wage data and raw cost data with a minor markup (as appropriate) respectively. The basis for this mark-up should be both transparent and reasonable.

Nextgen also supports the ACCC's proposed way forward in respect of connection charges for the DTCS.

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.

As above – Nextgen is supportive of the ACCC's proposed way forward.

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?

No comment, as this matter is not that relevant to Nextgen.

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

Nextgen supports the proposed approach, and also the attention directed towards any over-recovery of MDF housing costs.

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

No comment.

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?

Nextgen is of the view that the DTCS FAD should address the issue of special linkage charges in relation to non-price terms and conditions. The focus of this consideration should be on:

- promoting transparency around any use of special linkage charges, including the circumstances in which they may apply and the basis for cost estimation/determination;
- the time requirements associated with the provision of cost estimates/invoices, noting the desirability of having this information before any orders for network extensions are actually placed;
- the process for apportioning special linkage costs between multiple end users where relevant; and
- the arrangements which are to apply (especially in terms of financial liabilities) where an order is cancelled before capital works commence.

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).

Nextgen notes that the ACCC has, for some time, been contemplating the regulation of certain facilities access services under Part XIC of the *Competition and Consumer Act 2010* in order to promote the LTIE in relation to the supply of certain declared services.

In its submissions to the ACCC as part of the recent Declaration Inquiry into the DTCS, Nextgen submitted that “there appears to be scope for a general streamlining of all measures relating to facilities access”.² Nextgen continues to have this view.

In considering the relationship between facilities access services and the supply of telecommunication services more broadly, Nextgen notes that while a number of facilities access services are common ‘inputs’ to the provision of various telecommunication services not all of these services meet the criteria within the *Competition and Consumer Act 2010* (and the factors associated with these) for declaration in the form of an access determination. Building upon the current focus on three specific declared services, it is appropriate for the ACCC to examine the nexus between the provision of these services and facilities which are ancillary to this.

In the case of the DTCS, Nextgen submits that the type of facility where access is primarily required is Ducts, with Telstra Exchanges and external interconnect cables also having relevance in some settings. The description we attach to these separate types of facilities, and their relationship to the provision of the DTCS, is as follows:

- Ducts: ducts, pits and pipes which support the installation and operation of network equipment, including interconnection with the equipment of other operators. Ducts are the facility type of primary importance to the DTCS because they enable interconnections to be established at a significant number of locations. In some instances the usage of ducts can be aligned with the usage of Telstra Exchanges and/or external interconnect cables. As a result of interconnection which is provided by the infrastructure classified as ‘ducts’, transmission services (i.e. the DTCS) can be provided.
- Telstra exchanges (or TEBA): Telstra exchanges are frequently a key point of interface between backhaul networks, the network equipment of multiple operators and local access networks. As an ‘access service’ ‘TEBA’ encompasses the floor space, equipment racks and/or rack space via which interconnection can occur. By extension, these types of facilities can all be relevant to the provision of transmission services (i.e. the DTCS).
- External interconnect cables (EIC): EIC’s are the cables which run from a point in an exchange building to a point outside that building, which will often be a duct. By virtue of connecting ducts and exchange buildings, EIC’s support interconnection and as such are relevant to the provision of transmission services (i.e. the DTCS).

In addition to being regulated under Part XIC of the *Competition and Consumer Act*, access to facilities is regulated under various provisions of the *Telecommunications Act*. Nextgen submits that the pathways available under the *Telecommunications Act* in particular have certain disadvantages (and indeed, the Schedule 3 pathway would essentially be outside the scope of any potential declaration inquiry). Under Schedule 1, for example, prices and terms need to be agreed by the parties in question (usually on a case-by-case basis), and if agreement cannot be reached arbitration is required as there are no default, fallback terms. As noted in the ACCC’s Position Paper, arbitrated determinations only apply to the parties to the arbitration meaning there is a potential need for this process to be undertaken on a recurrent basis, albeit by separate access seekers. A recurring need to negotiate access, and the potential need for arbitration, can both increase the costs faced by access seekers due to time delays and/or uncertainty.

We also note that a number of recent decisions in access-related disputes appear to have created some questions about the overall practicality of current arrangements pertaining to facilities access in the telecommunications sector. In the recent *Telstra v Vocus* case³ for example, the court found that access seekers have no avenue for recourse to the ACCC about the terms of facility access arrangements if they have entered into a commercial agreement with the access provider. In contrast to the circumstances (and decision) of the *Vocus* case, in both the ‘101 Collins st’ case⁴ and the

² See page 4: <https://www.accc.gov.au/system/files/DTCS%20-%20Declaration%20Inquiry%20-%20Nextgen%20Submission%20to%20DTCS%20Draft%20Report%20-%202017%20February%202014.PDF>

³ *Telstra Corporation Limited v Vocus Fibre Pty Ltd* [2014] FCAFC 77

⁴ *Pipe Networks Pty Ltd v Commonwealth Superannuation Corporation* [2013] FCA 444

Megaport v Pipe⁵ TIO dispute the rights of access seekers to seek access via use of the Schedule 3 provisions of the Telco Act were upheld, precluding the need for the parties concerned to seek commercial agreements via the Schedule 1 provisions (against a backdrop of arbitration by the ACCC). Implicitly these decisions may influence the future choices of access seekers when they are contemplating means for accessing one or more facilities — and indeed steer them towards the use of Schedule 3 — despite Schedule 1 and Schedule 3 having different constructs and different purposes. Nextgen submits that this current ‘state of play’ may not accurately reflect the intention associated with each of the schedules in question at the time of their establishment, and this lends weight to the possibility of declaring certain facilities access services as being ancillary to currently declared services.

Were the ACCC to regulate access to the various facilities access services identified above on the basis that they were ancillary to the supply of the DTCS, this would help promote the LTIE via the promotion of competition (including a focus on the use of equivalent terms) and encouraging the efficient use of infrastructure. Regulation could also result in increased certainty and lower costs for access seekers, and in the very near future assist with managing the transition to the NBN, as a number of POIs will be located within Telstra exchanges.

To the extent that any declaration was extended to the other declared services, it seems reasonable to expect that similar benefits could arise for the access seekers in question (and their end users), noting that Nextgen itself is not involved in the provision of MTAS or downstream fixed line services (and as such has less visibility about the type of, and extent to which, facilities which underpin the supply of these).

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 detailed service description of the each facilities access service sufficient to precisely identify the service
 - an explanation of how declaring these facilities access services would be likely to promote the LTIE.

Nextgen is not aware — at the current point in time — of 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.

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 detailed description of each supplementary charge
 - an explanation of how and why the supplementary charge is incurred in relation to the use of a declared service
 - how regulating this charge in the FADs would be likely to promote the LTIE
 - the materiality of the charge in relation to the supply of services to end-users using the relevant declared service.

Nextgen is not aware — at the current point in time — of any other supplementary charges relating to the acquisition of declared services that should be regulated through the FADs for those specific services.

⁵ <http://www.megaport.com/resources/blog/TIO-decision-148-Brunswick.pdf>

3 CONTACT DETAILS

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