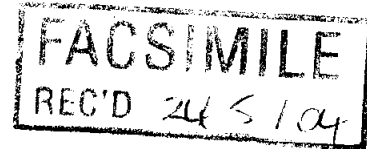


FILE No.
ENTITY Day 23801
DMAN



24 May 2004

Michael Cosgrave  
 General Manager  
 Telecommunications  
 Australian Competition and Consumer Commission  
 GPO Box 520J  
 MELBOURNE VIC 3000



By facsimile: (03) 9663 3699

Dear Michael

**Line sharing Service -- Telstra Access Undertaking**

Thank you for your letter dated 3 May 2004 inviting comment from Optus in relation to a series of questions about Telstra's spectrum sharing Undertaking. These questions are provided in bold font below, followed by Optus' responses.

At the outset, however, Optus notes that the Undertaking service applies only to a narrow subsection of the declared line sharing service (LSS). If the ACCC were to accept the Undertaking, this could have significant impact on the wholesale prices that Optus is able to secure through negotiations with Telstra for non-ADSL services and voice over ADSL offered via LSS. It could also limit the ACCC's ability to set arbitrated prices for non-ADSL services below the Undertaking price. Given the increasing importance of new technologies such as ADLS2+ and ADSL2/2+, among others, this could become of significant relevance over time.

As outlined in Optus' previous submission relating to Telstra's line sharing undertaking, Telstra's proposed access price is well in excess of its efficient costs of supply. For this reason, Optus recommends that the ACCC's determination should reject the undertaking but provide guidance as to the price that it would be likely to accept for the service. In addition, the determination should provide guidance to the industry on whether the ACCC believes it would be appropriate for access prices to differ amongst the various services (ADSL, xDSL, including non-voice and voice services) that use the high frequency spectrum of a copper pair.

Furthermore, in the event that the ACCC did accept an undertaking, the determination should clearly stipulate that the undertaking in no way overrides Telstra's responsibilities to provide access for the declared line sharing services not included in the undertaking, such as, for example, voice over xDSL.

***Does the Undertaking only apply in respect of the LSS when it is used to supply ADSL services in accordance with Deployment Class 6 (excluding 6c) of the Network Deployment rules?***

The declared line sharing service provides for access by an Access Seeker to the high frequency spectrum on an existing copper pair to deliver broadband services. The Access Provider is responsible for delivery of the narrowband / low frequency service including the copper pair to the customer's boundary point.

Telstra's Undertaking, on the other hand, is narrowly focused on the most popular high frequency service in the market today, that is, ADSL offered in accordance with the Network Deployment rules.

In Optus' view, a true spectrum sharing service should enable any high frequency service (DSL or otherwise) over an existing narrowband service following the guidelines set out by ACIF's Network Deployment Rules. These rules were developed, and are under continual review with improvements in technology, by ACIF's Network Reference Panel (Working Committee 18); an industry group which includes Telstra.

If DSL or otherwise is permitted over ULLS, Telstra's undertaking ideally should operate so as to incorporate automatically any update to the ACIF network rules. For example, if industry agreed to ULLS supporting ADSL over ISDN (Deployment Class 6c), ADSL 2/2+ over POTS, ADSL 2+ over ISDN, VDSL over POTS, then these should be available for Spectrum Sharing immediately under the same network rules.

***Would the Undertaking apply in respect of the LSS when it is used to supply ADSL services in a manner other than that in accordance with Deployment Class 6?<sup>1</sup>***

The Undertaking should not apply for ADSL services that are not supplied in accordance with Deployment Class 6. This is because the service description specifies that the Undertaking service is to be operated in accordance with the Network Deployment Rules.

The ACCC would appear to retain the ability to arbitrate terms and conditions in relation to the parts of the LSS that are not covered by Telstra's undertaking.

***Would the Undertaking apply in respect of the LSS when it is used to supply other xDSL services?***

The Undertaking only enables one DSL variant, namely ADSL. It does not include other symmetrical DSL services that require the entire spectrum of a ULL Service, such as HDSL, SHDSL and ESHDSL.

***Would the Undertaking have any relevance or application in respect to access for the purposes of supplying a form of service that falls within the parameters set out under the declared LSS but falls outside the parameters and description of the Telstra Service?***

---

<sup>1</sup> While it is understood that ADSL services can only be provided in accordance with the ACIF ULLS deployment rules, the issue is whether the undertaking would somehow apply to other possible ways of providing ADSL services.

No. The ACCC would retain the ability to arbitrate terms and conditions in relation to the parts of the LSS which are not covered by Telstra's undertaking.

***Do you consider that the Undertaking will satisfy Telstra's standard access obligations in respect of only the Telstra Service? and; Do you consider the Undertaking will satisfy Telstra's standard access obligations in respect of the declared LSS?***

Sections 152BS(1) and (2) of the Trade Practices Act require an undertaking to be made in respect of the satisfaction of all the relevant standard access obligations. The standard access obligations include the obligation to supply. Arguably, this means that an undertaking must cover the field of the declared service in order to satisfy the obligation to supply in the SAOs. An undertaking which only covers part of the declared service does not cover Telstra's SAO to supply the declared service and therefore arguably does not fulfil the requirements of section 152BS(1).

Furthermore, the Undertaking fails to provide sufficient detail on a variety of issues, including:

- *Operations and Maintenance.* The undertaking does not outline the division of responsibilities between the access seeker and access provider when services are at fault in order to determine whether Telstra can continue to meet its Emergency Services obligations.
- *Availability of the undertaking service.* The Undertaking leaves the issue of availability very open ended. Telstra should identify the specific conditions that would result in geographic or technical capability precluding a wholesale spectrum sharing service from being delivered.
- *Non-Payment of underlying PSTN service.* The undertaking does not specify the processes that will apply if the customer cancels or is late paying for the PSTN service. The Undertaking should outline the rights that Telstra would have in disconnecting the service, along with the relevant notification rights to the Access Seeker.

In addition, Optus has a number of further issues and concerns with the Undertaking. These are listed below:

- The splitters that are defined under the Telstra Splitter Specifications have not been endorsed by industry standards. Splitter requirements should be managed by the same technical ACIF committee that deals with spectrum compatibility on ULLS.
- Pair gain and RIMs may preclude a Spectrum Sharing Service from being made available. Telstra should have to remove pair gains in order to provide a spectrum sharing service.
- Cat D Number Portability requirements should extend to this Undertaking.
- While tie-cables are shown as part of the Undertaking, these comprise separate charges and are an expensive component in the delivery of ULL Services. The

Undertaking should require Telstra to deliver to the Boundary Points including to the SSS POI to ensure that there is no double charging for tie-cables under TEBA agreements.

***Do you consider that the Undertaking, if accepted by the Commission, will preclude arbitration of LSS disputes other than when the LSS is used to supply an ADSL service in accordance with Deployment Class 6 (excluding 6c) of the Network Deployment Rules? For example, if the LSS was used to supply ADSL services in a manner other than that in accordance with Deployment Class 6 or to supply other xDSL services, do you consider that the Commission would be able to arbitrate disputes and make a determination on access in relation to such supply?***

In our view, Part XIC envisages that undertakings may exclude some parts of a service or some terms of a service to be provided to an access seeker, subject to comments below regarding limitations on the standard access obligations. It would logically follow that the ACCC retains the ability to arbitrate terms and conditions or other parts of a service not covered by a declared service.

This 'logical' view is supported by the following legal analysis:

- section 152BS(5), which enables an access seeker to give separate undertakings in relation to the same service which cover different terms and conditions; and
- section 152BS(6A) which specifies that an undertaking may be without limitations or may be subject to such limitations as are specified in the undertaking. This would allow another undertaking to be submitted without the limitations included in another undertaking. Alternatively, service provision within the scope of the limitations could be arbitrated. The intention of including this sub-section is confirmed by the Explanatory Memorandum to the Telecommunications Competition Bill 2002 under which this sub-section was inserted, which states:

*"This [section 152BS(6A)] makes it clear that an undertaking may be given only in relation to, for example, a relevant service supplied in a specified area or by means of a particular facility."*

In terms of the practical question of whether Optus can seek arbitration on issues not covered in the undertakings, the only limitation on arbitrations is that an ACCC determination not be inconsistent with any undertakings in force (s 152CQ(5) of the TPA). If the subject of an arbitration is not covered in an undertaking, in our view the ACCC is not limited to a decision which is the same as the undertakings.

In our view, Part XIC supports the view that Optus is not technically precluded from seeking an arbitration in relation to those aspects of the LSS which are not covered by Telstra's undertaking. If the undertaking does not cover the field of the declared service, the ACCC would not be limited in making an arbitration determination by section 152CQ(5) because such a determination would not be (indeed, could not be) inconsistent

with the terms and conditions of the undertaking. The undertaking simply covers a different field of activity.

***Can the declared LSS be used to supply xDSL services other than ADSL, such as SHDSL, SDSL, HDSL or VDSL; if yes, please specify?<sup>2</sup>***

The declared line sharing service can be used to supply xDSL services other than ADSL, but as discussed above, the undertaking service is limited to ADSL.

***Telstra defines the "SSS Boundary" to include, where there is an MDF in the customer building, "a two wire point on the side of the frame nearest to the Telstra network". The Telecommunications Act 1999 (TA), however, provides for a boundary point on an MDF on "the side of the frame nearest to the end-user".<sup>3</sup> Is this definition of SSS Boundary more limited than the definition in the TA? Why would Telstra have described the SSS Boundary in this way?***

Optus notes that the definition provided by Telstra of the 'SSS Boundary' in the 'definitions' section of its service schedule differs from the definition provided in section 2.3 of the same document. This inconsistency could give rise to problems in the event that the Undertaking was accepted by the ACCC.

***Are you aware whether Telstra has a list of splitters it considers comply with the "Telstra Splitter Specifications" (both exchange-end splitters and customer premises end splitters)? If so, could you please provide these details? Also, can you confirm that any of these splitters can be used by access seekers acquiring the LSS?***

Optus is not aware of the specific types of splitters that comply with Telstra's splitter specifications.

Optus is concerned that the Undertaking provides Telstra the sole right to determine and modify Splitter requirements, both at the exchange and at the end-users' premises. While ACIF has formed the Customer Reference Panel (Working Committee 15) to capture splitter requirements, to date, Telstra has not accepted the invitation to join this panel.

Telstra recently modified the end-user filter/splitter technical requirements with no industry involvement. Fortunately, in this case splitter vendors were willing to modify their product. The same flexibility may not be available to exchange based splitters that are more specialised.

Acceptance of the Undertaking could thereby impose substantial risk on industry competition in this respect.

***In its definition of "TCAM", Telstra does not expressly include a "customer line module of a customer access module", even though this definition is included in the Declaration. Why would Telstra have excluded customer line modules of a customer access module from Telstra Service?***

<sup>2</sup> It is noted that VDSL is not currently included in the ACIF ULLS deployment rules.

<sup>3</sup> *Telecommunications Act 1999* section 22(4)(i).

Optus sees no reason as to why the Undertaking should not extend to RIMs to maintain existing services to end-users following any Telstra Network Modernisation, as allowed by the ACIF/ACA C559 Network Deployment Rules.

***Under the Network Modernisation provisions in the Undertaking, Telstra has not provided access seekers with a notice period in which it would advise of any such changes. Is such a notice period necessary?***

In the event of network modernisation, Telstra should be required to provide a notice period to any access seekers that would be affected by the modernisation. This is in keeping with the SAO's that would require Telstra to provide access to Spectrum Sharing under the same terms and conditions that it provides the service to itself.

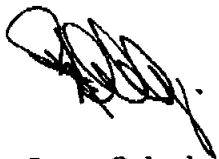
An undertaking that fails to specify such details should not be accepted, given the detrimental impact that Telstra could impose on competition through providing inadequate, or no, notice to access seekers regarding changes to the network.

***Does it appear the Undertaking intends to preclude the use of the ADSL spectrum for voice services (such as VoIP)?***

The service description for the Undertaking service specifies that *"the Telstra Wholesale Spectrum Sharing Service is a service for the provision of access to the non-voice ADSL frequency spectrum..."*. In this respect, the Undertaking does not cover use of ADSL spectrum for voice services.

If you have any questions in relation to this letter, please do not hesitate to contact me on (02) 9342 7036.

Yours sincerely



Jason Ockerby  
Manager, Economic Regulation