

TELSTRA CORPORATION LIMITED

Final Access Determination inquiry on supplementary pricing
Response to ACCC position paper

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Executive Summary

Telstra welcomes the opportunity to provide feedback to the Commission's Position Paper on "Telecommunications Final Access Determination Inquiries —non-price terms and conditions supplementary prices" (**Position Paper**). This is Telstra's submission on supplementary pricing.

Consumers and the telecommunications industry are experiencing a period of significant change and a number of challenges brought about by the transition from the traditional copper network to the National Broadband Network (**NBN**). As such, a regulatory framework that provides certainty and stability in regulated price and non-price terms must be a key objective for the various Final Access Determination (**FAD**) inquiries. Instability and substantial changes to the key regulatory settings for legacy declared services will lead to greater uncertainty, disruption and potential investment risk at this critical point in the industry's longer term transformation.

It is important that the efforts of all industry participants remain focused on ensuring a smooth and effective transition to the NBN, including by investing in and developing the innovative new products, services and platforms needed to support the future requirements and expectations of our customers, both wholesale and retail.

Regulatory stability allows the industry to successfully transition to the NBN while operating under a well understood and longstanding set of key terms and conditions with respect to legacy declared services. It also minimises unnecessary regulatory intervention and supports the effective commercial negotiations that have occurred in the wholesale market over a long period for both regulated and non-regulated services.

Primary and supplementary pricing should be considered together

Telstra recommends that the Commission consider supplementary prices together with primary prices for the relevant declared services. This would ensure consistency between the primary and supplementary pricing approach, and reduce the risk of regulatory error in setting either the primary or supplementary prices.

Connection and disconnection charges

The approach used to determine the unconconditioned local loop service (**ULLS**) and line sharing service (**LSS**) connection and disconnection charges in the 2011 FAD inquiry is practical and should be retained. Telstra is amenable to the data used to derive connection charges being updated, but, as set out above, these prices should be determined at the same time as part of the same inquiry as for primary ULLS and LSS charges.

The current wholesale DSL (**WDSL**) FAD includes an appropriate set of key supplementary charges for the WDSL and there would be little benefit in expanding the scope of the supplementary charges. The Commission intends to seek information from access seekers and Telstra in relation to the work and costs involved in the delivery of connection and other supplementary services relating to WDSL and Telstra will respond to that request at the appropriate time. Telstra considers that the FAD process in which primary WDSL prices are set is the appropriate process in which to seek this information and determine WDSL supplementary prices.

The approach to determining the Domestic Transmission Capacity Service (**DTCS**) connection charges undertaken in the 2011 FAD process is practical, as commercial pricing arrangements vary and it is in the long term interests of end users (**LTIE**) for parties to have flexibility to negotiate appropriate connection charges and discounts. As is the case for other regulated services, the FAD process in which primary DTCS prices are set is the appropriate forum to consider DTCS connection charges.

Internal interconnect cable

Telstra notes that the Commission intends to determine a price for the Internal Interconnect Cable (**IIC**) as part of the ULLS and LSS FADs. Telstra considers that it is imperative that the

Commission consider IIC pricing as part of the inquiry into primary prices to ensure consistency and minimise the risk of over- or under-recovery of costs.

DTCS Special linkage charges

Telstra does not believe the Commission should address special linkage charges (**SLCs**) in the DTCS FAD. The nature of these charges cannot be predicted in advance and as such it is impractical to set ex ante FAD prices. Also, these charges (and related quoting processes) are able to be implemented (and where appropriate updated) effectively through the normal commercial processes and channels. Nevertheless, if the Commission is minded to address SLCs, the Commission should do this as part of the inquiry into primary DTCS prices to minimise the risk of regulatory error.

Facilities access

Telstra believes that any additional regulation of facilities access is unwarranted and would not be in the LTIE. This is because facilities access is already regulated through long established and well understood mechanisms.

Other supplementary prices

Telstra does not consider there is a need to include any other supplementary charge for declared services in the FADs.

1. Introduction

The Position Paper calls for submissions on non-price terms and conditions and supplementary pricing in the FADs for the fixed line services, mobile terminating access service (**MTAS**) and DTCS. These issues are obviously related but raise a number of distinct issues. For the sake of better clarity, Telstra is providing separate submissions on non-price terms and conditions and supplementary pricing.

This is Telstra's submission on the supplementary pricing.

2. Process issues

The Commission proposes to separate the consideration of 'supplementary prices' from the consideration of 'primary prices' in the FAD inquiries.

Telstra considers such an approach could lead to regulatory error and inhibit the assessment of the relevant supplementary terms in their proper, service-specific context.

Further, Telstra believes that a FAD process in which primary prices and supplementary prices are considered together for each service would be preferable, as it will allow the Commission to consider the pricing for each of the declared services in a holistic manner

For example, Telstra notes that in its Position Paper the Commission states that in making its final determination of the IIC charge in November 2012, it made a number of adjustments to Telstra's IIC cost model to ensure consistency with the Fixed Line Services Model (**FLSM**). Given that the Commission is proposing to utilise the FLSM to set the primary prices for the fixed line services and WDSL, it would make sense to also use the FLSM to set the price for the IIC at the same time. In particular, if the Commission were to set the IIC price separately from and ahead of the primary prices for the ULLS and LSS (which the IIC is ancillary to) then it would be difficult for the Commission, access seekers or Telstra to have any assurance that costs were not being under- or over-recovered. The same argument applies to any other services that are deemed to be ancillary to the declared services and where the costs relating to those ancillary services are contained within the FLSM (and perhaps already partially allocated to the declared services).

Telstra also considers that the Commission's proposed approach of separating primary and supplementary pricing processes will not allow it to consider the pricing for each of the declared services in a holistic manner. Whether determination of the relevant prices involves domestic benchmarking, a building block model approach, or some other method, Telstra suggests that the Commission consider all pricing elements of a service in a complete way.

For example, in the event that the Commission proceeds to determine new FAD prices for the DTCS based on its domestic benchmarking methodology, it is likely that the Commission will again collect commercial pricing data from access providers as an input into that process (including data about monthly charges, connection and disconnection charges, and potentially other ancillary charges). Under commercial pricing arrangements, parties can structure their commercial charges for the DTCS in different ways, e.g. having a different balance between once-off connection charges and ongoing charges. As such, Telstra believes that connection and disconnection charges for the DTCS (and any other relevant ancillary charges) can only be assessed at the same time as the monthly charges. Similar issues arise in relation to the other declared services.

In summary therefore, Telstra believes it would be more appropriate to consider any relevant issues relating to supplementary charges as part of, and at the same time as, the primary pricing FAD inquiries for each of the fixed line services (including WDSL), DTCS and the MTAS.

3. Connection, disconnection and other supplementary charges

3.1 ULLS and LSS connection and disconnection charges

As part of the 2011 FAD inquiry for fixed services, the Commission set connection and disconnection charges based on the estimated costs of connection and disconnection work determined in 2007 and 2008 as part of the Commission's pricing principles and indicative prices, and then indexed these charges using the RBA's CPI forecasts. The connection and disconnection charges in the pricing principles and indicative prices were generally based on third party contractor rates (which were considered an appropriate benchmark for jumpering, travel, vehicle and materials costs). In respect of back-of-house activities, the Commission used relevant employee pay rates and the results of a time and motion study. For indirect costs, it applied a mark-up to total estimate costs for other cost categories.

In its Position Paper, the Commission proposes to update the underlying data used to set connection and disconnection charges by obtaining third party contractor rates from Telstra, and to consider whether the method used to estimate back of house and indirect costs remains appropriate.

Telstra considers that the approach to determining connection and disconnection charges undertaken as part of the 2011 FAD process is pragmatic. Telstra continues to tender out connection and disconnection work to third party contractors on a competitive basis and as such, this provides a good proxy for the efficient costs incurred in carrying out this work. However, Telstra agrees with the Commission that the data used to derive connection and disconnections charges should be updated.

In respect of back-of-house activities and indirect costs, Telstra considers that the previous approach of a time and motion study for back-of-house activities plus an appropriate mark-up for indirect costs is reasonable. It is expected that pay rates and processes may have changed since the previous study and that re-assessment is appropriate. Unlike connection and disconnection work (which can be tendered out), back-of-house activities are only ever carried out by Telstra personnel, making a time and motion study a pragmatic approach to determining costs.

However, for the reasons set out in section 2 above, the individual price terms FAD processes for fixed services would be the appropriate processes in which this should occur.

3.2 WDSL connection and supplementary charges

In the 2013 WDSL FAD, the Commission set regulated charges for three categories of connections, as well as for early termination. The Commission set these charges at their existing levels.

In its Position Paper, the Commission seeks submissions on the scope of the connection and supplementary charges for WDSL that should be included in the FAD. Telstra believes that the current WDSL FAD includes an appropriate set of key supplementary charges and that there would be little benefit in expanding the scope of the WDSL supplementary charges. The majority of revenue from supplementary charges for WDSL relates to connection, with other charges accounting for relatively little revenue. In light of this, it seems clear that there would be little to be gained from determining prices for the other supplementary charges.

Telstra notes that the Commission intends to seek information from access seekers and Telstra in relation to the work and costs involved in the delivery of connection and other supplementary services relating to WDSL and Telstra will respond to that request at the appropriate time.

3.3 DTCS connection charges

In the 2011 DTCS FAD, for the purposes of undertaking its regression analysis of competitive pricing, the Commission found that there was no significant relationship between connection charges and annual recurring charges. A base connection charge was therefore determined - outside the regression model used to determine monthly charges based on industry averages of connection charges for metropolitan and regional services. Separate charges were set for the connection of SDH services and for the connection of Ethernet services. The regulated charges were set for a single connection and did not account for longer term discounts.

At the time, Telstra agreed that this was a pragmatic approach, as commercial pricing arrangements vary and it is in the LTIE for parties to have flexibility to negotiate appropriate connection connections and discounts – Telstra continues to hold this view.

For the reasons set out in section 2 above, Telstra believes the appropriate place to consider connection and disconnection charges for DTCS is in the FAD pricing process.

4. Internal interconnect cable

Telstra recognises that it is the Commission's intention is to set a regulated IIC charge in the ULLS and LSS FADs. In this context, it is imperative that the Commission consider IIC pricing as part of the primary pricing FAD inquiry. In its November 2012 Final Determination, the Commission noted that it would be desirable to use the FLSM to determine the price of the IIC service.¹ However, at the time, the Commission noted that a considerable amount of additional modelling would need to be undertaken in order to separately price the IIC. Further, the Commission considered that the FLSM was not sufficiently disaggregated to derive a price for the IIC. As a result, the Commission made adjustments to Telstra's IIC Cost Model to make it consistent with the FLSM.

Telstra considers that the current fixed services FAD inquiry presents an ideal opportunity to make appropriate adjustments to the FLSM to ensure that it can be used to derive an IIC charge. Such an approach makes sense, because it will ensure consistency in pricing approach and provide assurance to Telstra and industry that IIC costs are not being under- or over-recovered. This will address the risk of regulatory error in setting prices in separate processes.

5. Special linkage charges

SLCs are charges levied by Telstra to offset costs incurred in extending transmission infrastructure beyond its existing network boundary to enable an access seeker to deliver a service. Telstra does not have a nationally ubiquitous network that can provide any service anywhere, therefore SLCs are necessary to enable it to recoup the costs of extending its infrastructure to enable access seekers to deliver services. SLCs ensure that competition is promoted at the same time as recognising the legitimate business interests of carriers or carriage service providers.

Paragraph 152BC(3)(d) of the *Competition and Consumer Act 2011 (CCA)* states that when making a FAD, the FAD may require a carrier or carriage service provider to extend or enhance the capability of a facility by means of which the declared services are supplied. This mirrors a provision which was in the *Trade Practices Act* in relation to access determinations, in respect of which the Commission, in its Access Pricing Principles, stated that:

“... if an access seeker enhances the facility to provide the required services, the access provider should not attempt to recover for themselves any costs related to this enhancement. Equally, if the access provider must enhance the facility to provide the

¹ <http://registers.accc.gov.au/content/item.phtml?itemId=1094274&nodeId=9c97189a99c31dd4a3f9b80d77c6309c&fn=Chime%20Telstra%20-%20internal%20interconnect%20cable%20-%20statement%20of%20reasons%20-%20November%202012.pdf>, p15.

*service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.*²

[Emphasis added].

Telstra's SLCs are cost-based charges directly proportionate to the cost of extending the network to accommodate the needs of the particular customer. As recognised by the Commission, it is legitimate for Telstra to recoup a proportion of the cost of extending its network to accommodate the needs of its customers.

Telstra does not believe the Commission should address SLCs in the DTCS FAD. As previously acknowledged by the Commission, the nature of these charges may vary considerably and cannot be predicted in advance such that it is impractical to set FAD prices.³ **[C-i-C]** Also, these charges are able to be implemented (and where appropriate updated) effectively through the normal commercial processes and channels.

Notwithstanding this, if the Commission decides it should address SLCs, for the reasons set out in section 2, the FAD pricing process is the most appropriate vehicle to consider these charges.

6. Facilities access services

In its Position Paper, the Commission asks whether it should regulate facilities access, either through the FADs for the currently declared services or by separately declaring facilities access services.

Telstra believes that any regulation of facilities access through Part XIC of the CCA is unwarranted and would not be in the LTIE, and has previously made submissions to this effect.⁴ Facilities access – including Telstra Equipment Building Access (**TEBA**), ducts access and external interconnect cables (**EIC**) – is already regulated through long established and well understood mechanisms, specifically Parts 3 and 5 of Schedule 1 to the *Telecommunications Act 1997* (Cth) (**Telco Act**).

If the Commission decides to regulate facilities access services through the FADs for currently declared services, it would need to establish a direct nexus between the facilities access service and access to the relevant declared service: that is, the facilities access service would need to “relate to access” of the declared service (s 152BC, CCA). Telstra is of the view that to establish this nexus the facilities access service should relate solely to access to the declared service in question and should not also relate to access to non-declared services. In this regard, it is Telstra's view that the only facilities access services for which the Commission could reasonably consider whether there is a direct nexus to declared services (ULLS and LSS) are the EIC and TEBA (TEBA offers access to floor space and other facilities such as security, electricity, cable trays and IICs in Telstra exchange buildings). In this regard, Telstra notes that the Commission has already formed the view that the IIC relates to access to the ULLS and the LSS.⁵ However, even if a direct nexus can be established, Telstra considers that there is no need to set regulated charges for these services under Part XIC, as access seekers are already able to take disputes in relation to charges for these services to the Commission under Part 5 of Schedule 1 to the Telco Act in the event that these charges cannot be negotiated commercially between the parties. In this regard, most parties have reached agreement on non-IIC TEBA in the past few years and there have been no disputes on EIC.

² Commission, 1997, *Access Pricing Principles*, p. 11.

³ Commission, Final Access Determination for the Domestic Transmission Capacity Service – Explanatory Statement, June 2012, p.40

⁴ See Telstra, Fixed Services Review: Response to the Commission's Discussion Paper on the Declaration Inquiry, 6 September 2013 at pp 43-45; Telstra's submission to the Commission's Discussion Paper on the Facilities Access Code, dated 24 August 2012.

⁵ Commission, Fixed Services Review: Inquiry into varying the WLR, LCS, ULLS and LSS final access determinations, Final Report, June 2014.

For other services, where a sufficiently direct nexus cannot be established to a currently declared service, the only appropriate path for Part XIC regulation would be declaration but, for the reasons set out in section 6.2, this is unnecessary and would give rise to competing regulatory regimes which would not be in the LTIE nor would have been the parliament's intention.

6.1 Regulation via FADs for declared services

6.1.1 When is it appropriate for the Commission to regulate facilities access through FADs for another declared service?

The object of Part XIC of the CCA is to promote the LTIE *of carriage services or services provided by means of carriage services*.¹¹ Telstra believes that the proper scope of Part XIC should therefore be targeted carefully to focus on the regulation of the supply of carriage services to address bottleneck issues with respect to particular infrastructure. Facilities access is not itself a carriage service (i.e. a service involving the carriage of communications). In some circumstances, if it can be established that access to a facility is a direct and necessary input into the supply of a regulated carriage service (e.g. ULLS) then such a facility could come within the scope of Part XIC.¹² Section 152BC of the CCA itself provides that the Commission may make an access determination "relating to" access to a declared service showing the need for a direct nexus between the declared service in question and any terms and conditions in the FAD on facilities access.

This makes sense given the underlying carriage service that is declared represents the means of addressing the relevant enduring bottleneck problem and related services must have a relevant and direct nexus to such carriage services. In the event that the access to a facility does not directly or relevantly relate to the supply of a declared carriage service, then the appropriate regulatory regime that relates to the sharing of facilities has been separately established under Schedule 1 to the Telco Act.

In this regard, Telstra considers that it would be inappropriate for the Commission to seek to make terms and conditions about a facilities access service in a FAD relating to a particular declared service where the facilities access service was not exclusively used for that purpose (i.e. it was used for both declared and non-declared services) because this would be inconsistent with the objectives of Part XIC and, practically, could give rise to inconsistency in respect of the price terms that would apply to accessing the facilities access service when used in relation to the declared service as compared to when used in relation to non-declared services.

6.1.2 Ducts

Facilities access services such as duct access should not be regulated via the FADs for the currently declared services, because access seekers acquire the duct access service to supply a range of non-declared services to retail or wholesale customers. If the Commission were to regulate duct access under Part XIC of the CCA (which Telstra considers inappropriate for the reasons set out in section 6.1) it would be more logical to do so through declaring the service. This view is shared by others in the industry:

*"Where a facilities access service is used solely in the acquisition and use of a declared service, then it would be effective to regulate the facility through the FAD of the service. For example, iiNet's use of the IIC could be regulated via the FADs for LSS and ULLS to achieve the same result as declaration of the IIC. However, iiNet is not certain that all access seekers only use IICs in relation to these services. **Where a facilities access service is also used, whether partially or entirely, for the supply of services that are not declared, then it would be more effective for the facilities access service to be declared in its own right.** For example, access seekers acquire the duct access service to supply a range of non-declared services to retail or wholesale customers."⁶ [Emphasis added]*

⁶ Herbert Geer, Fixed Services Review Discussion Paper on Declaration Inquiry, Submission by Herbert Geer Lawyers on behalf of iiNet Limited, 23 August 2013, p 14. See also Megaport's Submission to ACCC Fixed Services Review 2013 – Public version, 6 September 2013, pp 5-6.

If the Commission decides to hold a declaration inquiry into duct access, Telstra will respond to that inquiry at the appropriate time, including in respect of matters such as the service description. However, for the reasons set out in section 6.2 below, Telstra does not consider that declaration of any facilities access services is appropriate and in any event disputes in relation to duct can – in the event commercial negotiations are not successful – be dealt with effectively through long established processes under Schedule 1 of the Telco Act.

6.1.3 TEBA

With respect to TEBA, access seekers acquire space within Telstra's exchange buildings for purposes other than interconnection with declared services. For the reasons set out above, Telstra is of the view that where a facilities access service (such as TEBA) is also used, whether partially or entirely, for the supply of services that are not declared, it is inappropriate to make terms and conditions about the facilities access service in a FAD relating to a particular declared service to which it partly relates. In any case, to the extent that access seekers and access providers are unable to agree on the terms and conditions relating to access to TEBA, they can raise a dispute under Part 3 of Schedule 1 to the Telco Act.

If the Commission does decide to regulate TEBA under Part XIC (although as stated above, Telstra does not believe that this is warranted), then for the purposes of describing the regulated services Telstra considers it would be appropriate to draw upon relevant wording in Telstra's wholesale supply contracts. Telstra would be pleased to make further submissions on this point if and when necessary.

6.1.4 EIC

The EIC relates to access to the ULLS and LSS. There are a limited number of EIC pairs in operation **[C-i-C]**. To date, EIC charges have not been the subject of any disputes between Telstra and access seekers. In any case, to the extent that access seekers and access providers are unable to agree on the terms and conditions relating to access to the EIC, they can raise a dispute under Part 3 of Schedule 1 to the Telco Act. Accordingly, there is no need to regulate EIC pricing in a Part XIC FAD. In fact, to do so would result in different regulatory regimes (Part XIC and Schedule 1 to the Telco Act) applying to the same service, which creates uncertainty and unnecessary compliance costs, which is contrary to the LTIE.

6.2 Declaration of facilities access

As noted above, the proper scope of Part XIC should be targeted carefully to focus on the regulation of the supply of carriage services to address bottleneck issues with respect to particular infrastructure, and facilities access is not itself a carriage service. In some circumstances, if it can be established that access to a facility is a direct and necessary input into the supply of a regulated carriage service (e.g. ULLS) then such a facility could come within the scope of Part XIC FADs for those regulated carriage services.¹² This makes sense given the underlying carriage service that is declared represents the means of addressing the relevant enduring bottleneck problem and the related facilities access service has a relevant nexus to the carriage service.

In the event that the access to a facility does not directly or exclusively relate to the supply of a declared carriage service, then the appropriate regulatory regime that relates to the sharing of facilities has been separately established under the following mechanisms such that there is no need, nor would it be appropriate, to separately declare access under Part XIC.

- Parts 3 and 5 of Schedule 1 to the Telco Act sets out the regime for access to supplementary facilities, which includes exchange buildings whether owned by Telstra or another carrier (Part 3), as well as a regime for access to telecommunications transmission towers and underground facilities, which includes ducts access (Part 5).
- In 1999, the Commission established the Facilities Access Code (the **Code**) to govern how access to certain telecommunications facilities owned by

telecommunications carriers (including mobile towers and underground ducts) is provided to other carriers seeking to install their equipment on or in those facilities.

- Telstra's Structural Separation Undertaking (**SSU**) imposes further equivalence requirements upon Telstra with respect to exchange capping and the management of queues to access exchanges.

There is, therefore, no need, nor would it be appropriate, to separately declare access under Part XIC. In Telstra's view, it could not have been Parliament's intent to have different access regimes (in particular, Parts 3 and 5 of the Telco Act regime and the regime in Part XIC of the CCA) applying to access to the same facilities. The separate operation and distinct application of parallel regulatory regimes has been endorsed by the 2011 changes to the Telco Act and the CCA: despite making considerable changes to both Acts, Parliament did not seek to combine the two regimes.

If competing regulatory regimes were to apply to facilities, this would give rise to inefficiencies and confusion as carriers attempted to comply with two different, and potentially inconsistent, regimes and compliance costs would inevitably increase, which is contrary to the LTIE. Declaration of access to facilities would, therefore, neither promote competition nor encourage efficient investment in new infrastructure compared to the existing regulatory framework for access to facilities. The uncertainty of parallel regimes would also likely discourage investments and competitive conduct by current and potential service providers who wish to access each other's facilities at a time when regulatory stability is especially important given the planned transition to the NBN and a new industry structure.

7. Other supplementary prices

Telstra does not consider there is a need to include any other supplementary charges for declared services in the FADs. The current FADs already encompass the most common supplementary charges and those that have, in the past, been viewed as constituting potential barriers to competition. The Commission should consider the benefit (if any) that would accrue from including further supplementary charges in the FADs. Telstra reiterates its view that at this time, stability is critical to the LTIE and there is no need to expand the coverage of the prices included in the FADs. To the extent that the Commission disagrees with this position, Telstra considers that any other charges should be considered as part of the FAD pricing inquiries.