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Dear Nicole

Please find attached Telstra's submission in response to the Commission's Second Position Paper issued as part of the Fixed Services Review.

Yours sincerely,

A handwritten signature in black ink, which appears to read "per Jan - 3" followed by a long, horizontal flourish.

Tony Warren
Executive Director Regulatory Affairs
Public Policy and Communications



TELSTRA CORPORATION LIMITED

Submission to the Australian Competition and Consumer
Commission

Response to the Commission's Fixed Service Review

"A Second Position Paper April 2007"

July 2007

General comments

Telstra welcomes the change in the Commission's stated intentions as to the way it intends to regulate fixed services. However, a change of stated intention of itself achieves nothing. Actual, timely, deregulatory decisions are the only way in which the Commission will cease the harm caused by regulation in competitive areas.

The Commission's recent track record in this regard has been woeful. The whole of the fixed services review has been conducted by the Commission in the absence of a fact base. This has been acknowledged by the Commission in its acceptance of the need for an infrastructure audit on which it is currently consulting.

Nevertheless, despite the absence of a fact base to inform its decisions, the Commission:

- Has re-declared ULL, LCS, and OTA;
- Most remarkably, has actually declared a whole new service, wholesale line rental; and
- Has commenced an inquiry into the declaration of a new service, sub-loop unbundling.

The Commission states that it is proposing that it will *commence* a review of the set of fixed declared services by mid-2008 with a final decision to be provided by the end of the 2nd Quarter of 2009 – essentially in two years time from now. To get this into perspective the Commission is saying:

- Today it is appropriate to look at markets on a geographic basis and not on a national basis;
- Today it is appropriate to conduct an infrastructure audit to enable a fact base within which to make informed decisions about where the existence of competition means that regulation should be relaxed;
- Today, that ex ante regulation where it is not necessary can do more harm to competitive dynamics than it can do it any good;
- Today, that decisions in the telecommunications market need to be taken quickly in the light of substantial technological change.

But it intends to make a decision in two years time.

In addition, the Commission offers no mitigation to the damage to the long term interests of end users that its inaction causes. And it proceeds to impose *additional ex ante* regulation in the mean time.

The Commission's stated intentions and its actions (or inactions) are irreconcilable. Rhetoric is not enough. The Commission must take deregulatory action quickly to ensure the competitive future of the telecommunications industry.

Specific Comments

Alternative regulatory tools to ex ante regulation

Telstra applauds the Commission's recognition that it can assure the integrity of competition in the telecommunications industry by means other than the heavy hand of ex ante regulation. The Commission makes reference to price controls and Part XIB in this regard. Telstra makes the following observations:

- The price control regime is a policy instrument which Parliament has entrusted in the relevant Minister to exercise rather than the unelected officials in the Commission. As such the Minister may from time to time use that instrument in a manner which is not always consistent with the advice or preferences of the Commission. Where this is the case, the Commission needs to recognise that these Ministerial determinations have a real life impact on the competitive conditions of the market and must take those impacts into account in framing regulatory decisions.
- The Commission provides the recent declaration of WLR and the recently issued competition notice as an example for the appropriate simultaneous interaction of these two provisions. It is surprising for the Commission to do so when the current Federal Court proceedings found substantial issues with the Commission's use of its competition notice powers under Part XIB in that case. Instead this is an example of how the simultaneous interaction of these two provisions can go horribly wrong. The Commission was chasing illusory anti-competitive conduct through Part XIB. Simultaneously, and for other reasons, the Commission employed the blunt instrument of declaration in the absence of an infrastructure audit or any other form of substantive fact base within which to make the decision. It subsequently sought, for public affairs reasons, to link the two. In a deregulatory environment the judicious application of the Part XIB and Part IV processes is going to be essential to maintain the integrity of the competitive system. In addition to a fact base, the Commission will need to develop greater expertise at discerning between legitimate complaints of anti-competitive conduct and the next attempt at regulatory gaming.

Consistent approach in dynamic market circumstances

Telstra has concerns with the Commission's comments regarding its preference to maintain "a consistent regulatory approach" in circumstances where the underlying technology, delivery platforms and points of interconnection may change. A consistent regulatory approach should not mean consistent regulation. The Commission needs to be cautious that it does not merely transpose legacy regulation designed for legacy platforms onto new technologies without taking into account the changed dynamics that new technologies bring. The move in technology from traditional services over existing infrastructure, to new services over new infrastructure will in most circumstances mean that traditional regulation becomes redundant. Indeed, to enable new services to develop and to provide the correct investment incentives, a light touch approach to regulation is essential. Only in circumstances where it is proved, through a comprehensive fact base, rather than forward-looking conjecture, that bottleneck hotspots are extant should the

Commission consider appropriate and proportionate regulation of new services and platforms.

The Commission's example of taking a consistent approach is its latest missive at the behest of SingTel to misappropriate the assets of Telstra's shareholders. The Commission's approach to the sub-loop unbundling inquiry exemplifies Telstra's concerns. The document that the Commission has issued is an attack on the integrity and ownership of Telstra's network. Telstra's views on this proposal are set out in its submission in reply. In addition to the fact that the proposal itself is outside the bounds of Part XIC and is not capable of being in the interests of anyone, Telstra's submission highlights that the proposal would:

- Create significant network interference issues;
- Result in massively increased faults and associated costs; and
- Restrict the utility of the network and hamper any ability to upgrade it in the future to meet the technology needs of Australian consumers.

The Commission is not obliged to consult on every idea put before it. That the Commission would issue this document highlights that its ability or willingness to grasp the implications of new technologies and delivery platforms is deficient and that it is at risk of manipulation by those in the industry who seek not to promote the long term interests of Australian end users but seek to shape the regulatory regime to promote their own short term interests. Telstra encourages the Commission to provide opportunities for its staff to be educated about industry developments to address this situation.

What is an enduring bottleneck?

The Commission has rightly pointed to the fact that evidence of replicability may be indicative that there is not an enduring bottleneck problem. The Commission is right to suggest that it can look to overseas experience of the types of duplicative assets which bring sustainable competitive restraint to traditional fixed copper wire networks. The most obvious of these is the use of HFC networks which offer the full "triple play bundle" and which solve for the bottleneck problem. The decisions of the FCC in this regard are instructive.

It is therefore worrying for Telstra to read footnote 50 at page 22 of the Second Position Paper which states:

"The Commission accepts that the (albeit limited) emergence and availability of alternative inter-modal delivery platforms such as cable, fixed-wireless, mobile-wireless and satellite in certain geographic locations might obviate the enduring bottleneck characteristics of the CAN. However, it expects that if this does occur, it is likely to be highly localised."

Telstra is not certain how competitive overbuild to approximately 2.2 million households in the major metropolitan centres of Australia (in the case of the SingTel Optus HFC) can be classed as "highly localised".

Geographically delineating relevant fixed-line markets

Telstra welcomes the Commission's recognition that competition is emerging in different geographical regions in Australia and that a blanket approach to treating fixed line services on a national basis no longer tenable. The Commission has sensibly outlined a number of approaches to the issue of identifying the appropriate unit by which to delineate geographical markets. Telstra agrees that using the exchange as the unit will enable the Commission to achieve an appropriate factual base upon which to make decisions.

The Commission points to evidence of price discrimination or price correlation between different geographic regions as an indicator to aggregate exchange areas and includes, as an example, potential evidence that Telstra consistently offers different prices for homogeneous services across different local exchange areas. Telstra cautions that its pricing policies are substantially constrained by the regulatory environment within which it operates. Telstra notes the influence of the price control regime and the Commission's own policies in relation to setting prices on either a nationally averaged or de-averaged basis. Any review of Telstra's use of price discrimination of necessity must keep these exogenous factors at the forefront. In addition, the Commission should be looking at evidence of price discrimination not only by Telstra but of Telstra's competitors, who are now engaging in price discrimination based around the Commission's pricing signals for regulated services. SingTel Optus recent price increases for consumers in rural and regional areas, arising from the Commission's de-averaged ULL pricing principles, is a good example.